174 FERC ¶ 61,197
DEPARTMENT OF ENERGY
Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM18-9-002; Order No. 2222-A]

(Issued March 18, 2021)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order addressing arguments raised on rehearing, setting aside prior order in part, and clarifying prior order in part.

SUMMARY: In this order, the Federal Energy Regulatory Commission (Commission) addresses arguments raised on rehearing, sets aside in part, and clarifies in part its final rule amending its regulations to remove barriers to the participation of distributed energy resource aggregations in the capacity, energy, and ancillary service markets operated by Regional Transmission Organizations and Independent System Operators (RTOs/ISOs).

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

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174 FERC ¶ 61,197
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. RM18-9-002

ORDER NO. 2222-A

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

March 18, 2021

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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

[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); 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

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 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

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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). In this order, we modify § 35.28(g)(12)(i) of the Commission's regulations to revise "organized wholesale electric markets" to instead read "independent system operator or regional transmission organization markets."

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

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

[5] 18 CFR 35.28.

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

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] Under Order No. 2222, each RTO/ISO must include tariff provisions addressing distributed energy resource aggregations that: (1) allow distributed energy resource aggregations to participate directly in RTO/ISO markets and establish distributed energy resource aggregators as a type of market participant; (2) allow distributed energy resource aggregators to register distributed energy resource aggregations under one or more participation models that accommodate the physical and operational characteristics of the distributed energy resource aggregations; (3) establish a minimum size requirement for distributed energy resource aggregations that does not exceed 100 kW; (4) address locational requirements for distributed energy resource aggregations; (5) address distribution factors and bidding parameters for distributed energy resource aggregations; (6) address information and data requirements for distributed energy resource aggregations; (7) address metering and telemetry requirements for distributed energy resource aggregations; (8) address coordination between the RTO/ISO, the distributed energy resource aggregator, the distribution utility, and the relevant electric retail regulatory authorities (RERRAs); (9) address modifications to the list of resources in a distributed energy resource aggregation; and (10) address market participation agreements for distributed energy

[7] *Id.* P 6.

resource aggregators.[8] Additionally, an RTO/ISO must not accept bids from a distributed energy resource aggregator if its aggregation includes distributed energy resources that are customers of utilities that distributed 4 million megawatt-hours (MWh) or less in the previous fiscal year, unless the RERRA permits such customers to be bid into RTO/ISO markets by a distributed energy resource aggregator.

3. On October 16, 2020, Xcel Energy Services Inc. (Xcel) filed a request for clarification of the final rule. On October 19, 2020, Advanced Energy Economy and Advanced Energy Management Association (together, AEE/AEMA);[9] the Kansas Corporation Commission (Kansas Commission); and Sierra Club, Sustainable FERC Project, and Natural Resources Defense Council (Public Interest Organizations)[10] filed timely requests for rehearing and clarification of the final rule. On November 3, 2020, American Public Power Association and the National Rural Electric Cooperative Association (APPA/NRECA) filed an answer to AEE/AEMA's and Public Interest Organizations' requests for rehearing and clarification.[11]

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[8] *Id.* P 8.

[9] On November 12, 2020, AEE/AEMA filed an errata to its request for rehearing.

[10] On October 20, 2020, Public Interest Organizations filed an errata to its request for rehearing.

[11] 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 APPA/NRECA's answer.

4. Pursuant to *Allegheny Defense Project v. FERC*,[12] the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the FPA,[13] we modify the discussion in the final rule and set aside the final rule, in part, as discussed below.[14]

5. We either dismiss or disagree with most arguments raised on rehearing. However, we set aside the finding 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 and provide further clarification on the Commission's interconnection policies pertaining to Qualifying Facilities (QFs), restrictions to avoid double counting of services, information sharing in the distribution utility review process, and distribution utility review criterion, as further discussed below. We also modify § 35.28(g)(12)(i) of the Commission's regulations to make a non-substantive ministerial correction.[15]

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[12] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

[13] 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.").

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

[15] *See supra* note 2.

II. Discussion

A. Commission Jurisdiction

1. Exclusive Jurisdiction

6. In Order No. 2222, the Commission stated that it has exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets, including the wholesale market rules for participation of resources connected at or below distribution-level voltages.[16] The Commission reiterated its previous finding that establishing the criteria for participation in RTO/ISO markets, including with respect to resources located on the distribution system or behind the meter, is essential to the Commission's ability to fulfill its statutory responsibility to ensure that wholesale rates are just and reasonable.[17] The Commission further found that, like the Commission's

[16] Order No. 2222, 172 FERC ¶ 61,247 at P 57 (citing *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, at P 35 (2018) (citing *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016) (*EPSA*)), *order on reh'g and clarification*, Order No. 841-A, 84 FR 23902 (May 23, 2019), 167 FERC ¶ 61,154, at P 38 (2019), *aff'd sub nom. Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1187 (D.C. Cir. 2020) (*NARUC*) ("FERC has the exclusive authority to determine who may participate in the wholesale markets."); *Advanced Energy Econ.*, 161 FERC ¶ 61,245, at PP 59-60 (2017) (AEE Declaratory Order), *reh'g denied*, 163 FERC ¶ 61,030 (2018) (AEE Rehearing Order); *Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280-82 (D.C. Cir. 2007); *Transmission Access Pol'y Study Grp. v. FERC*, 225 F.3d 667, 696 (D.C. Cir. 2000)).

[17] Order No. 2222, 172 FERC ¶ 61,247 at P 57 (citing Order No. 841-A, 167 FERC ¶ 61,154 at PP 31, 38; AEE Rehearing Order, 163 FERC ¶ 61,030 at P 36). The Commission noted that the Supreme Court also has recognized that the Commission extensively regulates the structure and rules of wholesale auctions, in order to ensure that they produce just and reasonable results. *Id.* P 57 n.138 (citing *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288, 1293-94 (2016) (*Hughes*); *EPSA*, 136 S.Ct. at 769).

rules governing demand response and electric storage resource participation in RTO/ISO markets, Order No. 2222 "addresses—and addresses only—transactions occurring on the wholesale market."[18] The Commission thus found that the FPA and relevant precedent does not legally compel the Commission to adopt an opt-out with respect to participation in RTO/ISO markets by all resources interconnected on a distribution system or located behind a retail meter.[19] Rather, the Commission found that it has jurisdiction to decide which entities may participate in wholesale markets, which means that a RERRA cannot broadly prohibit the participation in RTO/ISO markets of all distributed energy resources or of all distributed energy resource aggregators, as doing so would intrude upon the Commission's statutory authority to ensure that wholesale electricity markets produce just and reasonable rates.[20] The Commission also noted that it was not obligated to provide an opt-out in Order No. 719, but rather did so as an exercise of its discretion.[21]

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[18] Order No. 2222, 172 FERC ¶ 61,247 at P 58 (quoting *EPSA*, 136 S.Ct. at 776) (citing *NARUC*, 964 F.3d at 1186, 1189 (finding that "Order No. 841 solely targets the manner in which an [electric storage resource] may participate in wholesale markets" and that Order Nos. 841 and 841-A "do nothing more than regulate matters concerning federal transactions"); Order No. 841-A, 167 FERC ¶ 61,154 at P 44).

[19] *Id.* P 58 (citing Order No. 841-A, 167 FERC ¶ 61,154 at P 32; AEE Declaratory Order, 161 FERC ¶ 61,245 at P 62 (citing *EPSA*, 136 S.Ct. at 776)).

[20] *Id.* (citing *NARUC*, 964 F.3d at 1187; *Hughes*, 136 S.Ct. at 1298; *Oneok*, *Inc. v. Learjet, Inc.*, 575 U.S. 373, 386 (2015)) (internal citations omitted).

[21] *Id.* P 59 (citing *Wholesale Competition in Regions with Organized Elec. Mkts.*, Order No. 719, 73 FR 64100 (Oct. 28, 2008), 125 FERC ¶ 61,071, at PP 154-55 (2008), *order on reh'g*, Order No. 719-A, 74 FR 37776 (Jul. 29, 2009), 128 FERC ¶ 61,059, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009); *EPSA*, 136 S. Ct. at 779 (describing the opt-out as a "notable solicitude toward the States," in recognition of "the linkage between wholesale and retail markets and the States' role in overseeing retail

a. Request for Clarification or Rehearing

7. The Kansas Commission requests clarification, or in the alternative rehearing, of the Commission's jurisdictional determinations in Order No. 2222.[22] The Kansas Commission asserts that the Commission created uncertainty about its view on its exclusive jurisdiction over rules and practices that directly affect Commission-jurisdictional rates, as well as federal court precedent on that issue, and should grant clarification to resolve that uncertainty. Alternatively, the Kansas Commission asks the Commission to grant rehearing to ensure that its jurisdictional determinations do not violate the prohibition against arbitrary and capricious decision making.

8. According to the Kansas Commission, the Commission previously found that "no federal court has stated that the Commission has exclusive jurisdiction over rules or practices that directly affect a jurisdictional rate."[23] The Kansas Commission contends, however, that in Order No. 2222, the Commission relied on *EPSA* and *Hughes* to support its assertion of exclusive jurisdiction over rules governing wholesale market

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sales"); *NARUC*, 964 F.3d at 1190 ("Local Utility Petitioners correctly acknowledge that *EPSA* did not condition its holdings on the existence of an opt-out.")).

[22] Kansas Commission Request for Rehearing at 1.

[23] *Id.* at 2-3 (quoting *Tri-State Generation & Transmission Ass'n, Inc.*, 170 FERC ¶ 61,224, at P 121 (March 2020 Tri-State Order), *order on reh'g*, 172 FERC ¶ 61,173 (August 2020 Tri-State Rehearing Order), *order on reh'g*, 173 FERC ¶ 61,097 (2020)).

participation.[24] The Kansas Commission states that, in the August 2020 Tri-State Rehearing Order,[25] the Commission declined an opportunity to address the impact of *NARUC* on the findings from the March 2020 Tri-State Order, which has created uncertainty regarding the Commission's view of its exclusive jurisdiction over rules and practices that directly affect Commission-jurisdictional rates, as well as its interpretation of *EPSA* and *Hughes* on that issue.[26] The Kansas Commission therefore asks the Commission to grant clarification to resolve that alleged inconsistency and to clearly articulate the Commission's views on the scope of its exclusive jurisdiction.

9. Alternatively, the Kansas Commission seeks rehearing on the basis that the Commission acted in an arbitrary and capricious manner, and failed to engage in reasoned decision making, when it held that *EPSA* and *Hughes* support a finding that the Commission has exclusive jurisdiction over rules and practices that directly affect Commission-jurisdictional rates.[27] The Kansas Commission argues that Order No. 2222 does not acknowledge the Commission's findings in the March 2020 Tri-State Order to the contrary or provide any explanation for the Commission's conflicting interpretations

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[24] *Id.* at 3-4 (citing Order No. 2222, 172 FERC ¶ 61,247 at PP 57 nn.137-138, 58 nn.139 & 141, 59 n.143).

[25] We note that the Kansas Commission states that the August 2020 Tri-State Rehearing Order was issued 11 days after Order No. 2222. However, Order No. 2222 was issued on September 17, 2020, 20 days after the issuance of the August 2020 Tri-State Rehearing Order.

[26] Kansas Commission Request for Rehearing at 4.

[27] *Id.* at 5.

of the Commission's exclusive authority over rules and practices that directly affect Commission-jurisdictional rates, and therefore, rehearing is warranted to address these material omissions and inconsistencies.[28]

b. Commission Determination

10. We disagree with the Kansas Commission that the Commission in Order No. 2222 created uncertainty about its view on its jurisdiction over rules and practices that directly affect Commission-jurisdictional rates.[29] We also disagree with the Kansas Commission's argument that the Commission acted arbitrarily and capriciously by failing to acknowledge the Tri-State proceeding in Order No. 2222.

11. In the March 2020 Tri-State Order, the Commission found that Tri-State's exit charges are not a rate or charge for a jurisdictional service itself but fall within the Commission's jurisdiction as a rule or practice directly affecting Tri-State's jurisdictional wholesale rates.[30] The Commission stated that "neither the Supreme Court nor the appellate courts have expressly found that the Commission has *exclusive* jurisdiction over rules or practices that directly affect jurisdictional rates."[31] The Commission therefore

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[28] *Id.* at 6.

[29] *See* 16 U.S.C. 824d(a), 824e(a) (providing the Commission with authority to ensure that rules or practices "affecting" Commission-jurisdictional rates are just and reasonable); *EPSA*, 136 S.Ct. at 774 (approving a construction of the FPA "limiting [the Commission's] 'affecting' jurisdiction to rules or practices that *directly* affect the [wholesale] rate") (emphasis in original) (internal quotation marks omitted).

[30] March 2020 Tri-State Order, 170 FERC ¶ 61,224 at PP 118-119.

[31] *Id.* P 117 (emphasis in original).

declined to find that it had exclusive jurisdiction over Tri-State's exit charges and, as a result, found that the Colorado Public Utility Commission's jurisdiction over complaints before it regarding Tri-State's exit charges were not currently preempted.[32]

12. However, on rehearing of that order and prior to the issuance of Order No. 2222, the Commission modified that discussion in the underlying order, set aside the finding that Tri-State's exit charge is not a rate or charge for a jurisdictional service, and instead found that Tri-State's assessment of an exit charge constitutes a Commission-jurisdictional rate.[33] The Commission stated that it therefore need not address Tri-State's and Wheat Belt's argument that the Commission has exclusive jurisdiction over Tri-State's assessment of exit charges as a practice directly affecting wholesale rates.[34] Therefore, contrary to the Kansas Commission's argument, the Commission did not make any findings in the Tri-State proceeding regarding its jurisdiction with respect to practices that directly affect Commission-jurisdictional rates that could be inconsistent with Order No. 2222. We continue to find, as the Commission did in Order No. 2222, the AEE Declaratory Order, and Order No. 841, that the Commission has exclusive jurisdiction over wholesale markets and the criteria for participation in those markets, including the wholesale market rules for participation of

[32] *Id.* P 121.

[33] August 2020 Tri-State Rehearing Order, 172 FERC ¶ 61,173 at PP 31-32.

[34] *Id.* P 34 n.75.

resources connected at or below distribution-level voltages.[35] This view is consistent with the D.C. Circuit's holding in *NARUC* that "Congress gives [the Commission] exclusive authority over the regulation of the sale of electric energy at wholesale in interstate commerce, *including both wholesale electricity rates and any rule or practice affecting such rates*" and that the Commission "has the exclusive authority to determine who may participate in the wholesale markets."[36]

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[35] *See* Order No. 2222, 172 FERC ¶ 61,247 at P 57 n.137 (citing, *e.g.*, Order No. 841, 162 FERC ¶ 61,127 at P 35 (citing *EPSA*, 136 S.Ct. 760)); Order No. 841-A, 167 FERC ¶ 61,154 at P 38; AEE Declaratory Order, 161 FERC ¶ 61,245 at PP 59-60.

[36] *NARUC*, 964 F.3d at 1181, 1187 (internal citations omitted) (emphasis added). In response to Commissioner Danly's suggestion that we are "obstructing the states from asserting their own authority over distributed energy resource aggregations," *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222-A, 174 FERC ¶ 61,198, at P 2 (Danly, Comm'r, dissenting), we reiterate that Order No. 2222 and this order on rehearing address the rules governing wholesale market participation, a matter under the Commission's exclusive jurisdiction. *See NARUC*, 964 F.3d at 1187-88. For similar reasons, we disagree with Commissioner Christie's suggestion that the Commission is undermining the FPA's jurisdictional framework. *See* Order No. 2222-A, 174 FERC ¶ 61,198 at P 5 (Christie, Comm'r, dissenting). Because 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. *NARUC*, 964 F.3d at 1181, 1187-88; *see id.* at 1188 (noting that Order No. 841 "does not usurp state power" because "States continue to operate and manage their facilities with the same authority they possessed prior to Order No. 841") (internal quotation marks and alterations omitted); *see also EPSA*, 136 S. Ct. at 776-77 (holding that Order No. 745 was a valid exercise of Commission jurisdiction because it regulated only wholesale market rules and did not aim at matters within state jurisdiction). To the contrary, rather than upending the FPA's jurisdictional framework, this order fulfills the Commission's statutory responsibility to ensure that the matters subject to its exclusive jurisdiction are just and reasonable and not unduly discriminatory or preferential. *See NARUC*, 964 F.3d at 1190.

2. Order No. 719 Demand Response Opt-Out

13. In Order No. 2222, the Commission stated that the final rule does not affect the ability of RERRAs to prohibit retail customers' demand response from being bid into RTO/ISO markets by aggregators pursuant to Order No. 719.[37] The Commission also stated that, because demand response falls under the definition of distributed energy resource, an aggregator of demand response could participate as a distributed energy resource aggregator, but that the final rule does not affect existing demand response rules.[38] 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.[39] 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.

a. Requests for Clarification or Rehearing

14. Public Interest Organizations argue that the Commission erred by including an opt-out for distributed energy resource aggregations that contain demand response resources.[40] Public Interest Organizations claim that the Commission's decision in Order

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

[38] *Id.* P 118.

[39] *Id.* P 145.

[40] Public Interest Organizations Request for Rehearing at 5.

No. 2222 to allow RERRAs to opt out with respect to demand response is functionally separate from the opt-out provided in Order No. 719.[41] They state that there may be demand response resources that, for reasons specific to their business models, choose to continue to be classified as demand response resources participating in wholesale markets pursuant to Order Nos. 719 and 719-A.[42] They argue, however, that demand response resources that participate in distributed energy resource aggregations under Order No. 2222 are a categorically different class of resource than those not participating as distributed energy resources.[43] They assert that the Commission therefore has the discretion to treat these two resource classes differently but explicitly chose to expand the Order No. 719 opt-out to apply to demand response resources acting as distributed energy resources.[44]

15. Public Interest Organizations argue that the opt-out is unlawful because legal developments have clarified that the Commission has the 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.[45] They contend that, in upholding Order No. 841, the United States Court of Appeals for the

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[41] *Id.* at 6.

[42] *Id.* at 6-7.

[43] *Id.* at 7.

[44] *Id.* at 7-8.

[45] *Id.* at 8 (citing *EPSA*, 136 S.Ct. at 771; *Hughes*, 136 S. Ct. at 1288).

District of Columbia Circuit (D.C. Circuit) did not conclude that withholding the opt-out was merely a reasonable choice within the Commission's discretion but rather "simply a restatement of the well-established principles of federal preemption."[46] Public Interest Organizations therefore argue that a state cannot determine which resources may participate in RTO/ISO markets because such state actions directly "aim at" wholesale transactions and are field preempted.

16. Public Interest Organizations contend that, even assuming that the Commission had discretion to allow states to prohibit resources from accessing the wholesale market, there is no legally relevant basis to distinguish between categorical state bans on the participation of demand response resources in distributed energy resource aggregations and bans on the participation of electric storage and all other distributed energy resources.[47] Public Interest Organizations assert that the Commission wrongly suggested that the fact that demand response falls under its jurisdiction over practices that directly affect Commission-jurisdictional rates, whereas distribution-connected generators are engaged in wholesale sales of energy and may qualify as public utilities under the FPA, is a relevant distinction with regard to the application of an opt-out.[48] They argue that the Commission did not fully explain why such a distinction should affect its decision to extend the opt-out to demand response contained within a distributed energy resource

[46] *Id.* (quoting *NARUC*, 964 F.3d at 1187).

[47] *Id.* at 9-10.

[48] *Id.* at 12 (citing Order No. 2222, 172 FERC ¶ 61,247 at P 60).

aggregation. Public Interest Organizations assert that other types of technologies also do not necessarily engage in wholesale sales yet are not subject to an opt-out under Order No. 2222, citing the example of a behind-the-meter generator whose function is to reduce the net demand of its host and may never deliver power to the grid, although it has the potential to do so.[49] Public Interest Organizations state that the Commission has concluded that such technologies, whether or not they actually deliver power to the grid, are not subject to the opt-out.[50] They argue that an opt-out impermissibly targets the wholesale markets and is inconsistent with the FPA, regardless of whether it targets an aggregator that engages in wholesale sales or an aggregator that directly affects wholesale rates and regardless of any legitimate state objectives that may motivate the state's action.[51]

17. Public Interest Organizations further allege that the demand response opt-out adopted in Order No. 2222 is *ultra vires* because it is an impermissible relinquishment of the Commission's duty under FPA section 206 to ensure just and reasonable rates.[52] They assert that the Commission identified the changes necessary to address certain market flaws but failed to ensure that these reforms shall be "thereafter observed and in

[49] *Id.* at 12-13.

[50] *Id.* at 13.

[51] *Id.* at 12-14 (citing *Hughes*, 136 S.Ct. at 1290-91).

[52] *Id.* at 14.

force."[53] Public Interest Organizations elaborate that allowing states to obstruct the expansion of demand response resources frustrates the Commission's responsibility to "establish[] the criteria for participation in RTO/ISO markets," which "is essential to the Commission's ability to fulfill its statutory responsibility to ensure that wholesale rates are just and reasonable."[54]

18. Public Interest Organizations maintain that the opt-out unduly discriminates against distributed energy resource aggregations containing demand response resources by treating them differently from aggregations that do not contain demand response even though they provide the same grid services.[55] Public Interest Organizations argue that, where different technologies appear operationally equivalent from the perspective of the system operator, there is no basis for differentiating eligibility to participate in the market. They claim that the Commission has previously found that the source of a load reduction, whether it comes from behind-the-meter generation or operational shutdown, is irrelevant to a resource's eligibility to participate as demand response.[56] They argue however that, under Order No. 2222, distributed energy resource aggregations that have the same ability to meet the qualification and performance requirements are treated

[53] *Id.* at 15 (quoting 16 U.S.C. 824e(a)).

[54] *Id.* at 16 (quoting Order No. 2222, 172 FERC ¶ 61,247 at P 57).

[55] *Id.* at 18.

[56] *Id.* at 19-20 (citing *Demand Response Supporters v. N.Y. Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,162, at P 32 (2013)).

differently depending on whether they contain demand response resources or not, which means the ability to compete turns not on the services provided or their cost, but instead on the equipment by which the service is produced. They state that, for example, energy storage resources can be deployed to shape load profiles, shift demand, or modulate demand within a distributed energy resource aggregation in the same manner as most demand response technologies, but air conditioning load control would not be allowed to provide the same service within a distributed energy resource aggregation.[57] They assert that there is no justification for such discriminatory treatment based solely on the type of equipment by which the service is delivered.[58]

19. Finally, Public Interest Organizations argue that the opt-out is a barrier to competition and the full potential benefits of Order No. 2222 cannot be realized as long as the opt-out remains in place.[59] They assert that adopting an opt-out applicable to distributed energy resource aggregations that incorporate demand response directly contradicts the Commission's goal to enable heterogeneous aggregations that allow different technologies to provide complementary capabilities at lowest cost, and to unleash competition that spurs innovation and the next generation of technologies and business models.[60] Specifically, they assert that distributed energy resource aggregations

[57] *Id.* at 20.

[58] *Id.* at 20-21.

[59] *Id.* at 21-24.

[60] *Id.* at 22.

will not be able to incorporate the complementary capabilities of existing and enhanced demand response technologies that would support the integration of large shares of variable renewable resources and create significant economic and reliability benefits.[61]

20. AEE/AEMA request that the Commission clarify that the opt-out and opt-in requirements of Order No. 719 will apply only to the non-injection portion of an individual distributed energy resource and not to the injection portion of an individual distributed energy resource.[62] According to AEE/AEMA, the Commission's discussion of how its prior rules regarding demand response resources interact with Order No. 2222 may inadvertently limit the participation of individual distributed energy resources that are configured to engage in both non-injection demand response and injection of energy onto the grid to make wholesale sales.[63] AEE/AEMA state that it is increasingly common for a single customer load site to include installed energy storage and/or distributed generation resources that have the technical capability to both facilitate demand reduction at the customer's location, and inject energy to provide a broader set of wholesale services, depending on the customer's or the grid's needs and market signals at any given time. They assert that, while such a distributed energy resource's reduction of consumption of electric energy from expected consumption fits the Commission's definition of "demand response," it also has the technical capability to inject energy onto

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[61] *Id.* at 23-24.

[62] AEE/AEMA Request for Rehearing at 4.

[63] *Id.* at 5.

the grid and engage in a broader set of wholesale market activities as part of a distributed energy resource aggregation.[64] AEE/AEMA contend that interpreting Order No. 2222 as requiring the application of the opt-out and opt-in requirements of Order No. 719 to the entire resource would inappropriately expand the scope of Order No. 719 and work against the overall objective of Order No. 2222 to enhance market competition and ensure just and reasonable rates.[65]

21. According to AEE/AEMA, their requested clarification is technology neutral and would ensure that technologies other than the demand response resources that were the sole focus of Order No. 719 are not inadvertently excluded from distributed energy resource aggregations.[66] AEE/AEMA state that, under their requested clarification, aggregations consisting solely of demand response or utilizing the non-injection portion of other distributed energy technologies would continue to be subject to Order No. 719 and could not use Order No. 2222 to circumvent the opt-out and opt-in requirements. They further state that the clarification is consistent with the Commission's stated view of its FPA authority because it would apply the Order No. 719 opt-out and opt-in requirements only to instances in which distributed energy resources engage in "practices

[64] *Id.* at 6 (citing 18 CFR 35.28(b)(4)).

[65] *Id.* at 6.

[66] *Id.* at 7.

affecting wholesale rates" and not to those in which they inject energy or otherwise engage in wholesale sales.[67]

b. Commission Determination

22. We 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. Pursuant to those orders, the Commission's regulations provide a RERRA the ability to prevent "an aggregator of retail customers that aggregates the demand response of the customers of utilities" within its borders from participating in RTO/ISO markets.[68] As discussed further below, we decline to extend this opt-out to demand response resources that participate in heterogeneous distributed energy resource aggregations—i.e., those that are made up of different types of resources including demand response as opposed to those made up solely of demand response. The opt-out will continue to apply to aggregations made up *solely* of resources that participate as demand response resources, consistent with our regulations.

[67] *Id.* at 8 (citing Order No. 2222, 172 FERC ¶ 61,247 at PP 40-42, 60).

[68] 18 CFR 35.28(g)(1)(iii); *see* Order No. 719, 125 FERC ¶ 61,071 at P 3 n.3 ("We will use the phrase 'aggregator of retail customers,' or ARC, to refer to an entity that aggregates demand response bids (which are mostly from retail loads)."). The Commission's regulations define demand response as "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." 18 CFR 35.28(b)(4).

23. In Order No. 719, the Commission defined an "aggregator of retail customers" as "an entity that aggregates demand response bids (which are mostly from retail loads)."[69] Since that time, the Commission's regulations have precluded aggregations of retail customers from participating in RTO/ISO markets where the RERRA prohibits such participation. Prior to this rulemaking, the Commission has never addressed how the opt-out adopted in Order No. 719 applies to demand response resources that participate in RTO/ISO markets through an aggregation that is not solely made up of demand response resources. Upon reconsideration, we decline to extend the opt-out adopted in Order No. 719 to demand response resources that participate in heterogeneous distributed energy resource aggregations. We find 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.[70] In addition, for the reasons that follow, we find that extending the Order No. 719 opt-out to demand response resources in heterogeneous

[69] Order No. 719, 125 FERC ¶ 61,071 at P 3 n.3.

[70] *Compare* 18 CFR 35.28(g)(1)(iii) (expressly limiting the application of the Order No. 719 opt-out to "an aggregator of retail customers that aggregates the demand response of the customers of utilities"), *with* 18 CFR 35.28(b)(10), (g)(12) (requiring RTOs/ISOs to establish market rules applicable to entities that aggregate one or more resources located on the distribution system, any subsystem thereof or behind a customer meter); *see also* Order No. 2222, 172 FERC ¶ 61,247 at P 114 (finding that distributed energy 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).

distributed energy resource aggregations would undermine the potential of Order No. 2222 to break down barriers to competition, interfering with our responsibility to ensure that wholesale rates are just and reasonable.[71] Accordingly, we clarify that the Order No. 719 opt-out does not apply to demand response resources that participate in a heterogeneous distributed energy resource aggregation.

24. One of the principal advantages of distributed energy resource aggregations is their ability to take advantage of the different resources' operational attributes and complementary capabilities.[72] As the Commission explained in Order No. 2222, "[p]ermitting distributed energy resource aggregations to participate in the RTO/ISO markets may allow these resources, in the aggregate, to meet certain qualification and performance requirements, particularly if the operational characteristics of different

[71] *See* Order No. 2222, 172 FERC ¶ 61,247 at P 142 (finding that the requirement for RTOs/ISOs to allow heterogeneous aggregations will 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); *see also id.* P 1 (finding 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), P 3 (finding that restrictions on competition can reduce the efficiency of RTO/ISO markets, potentially leading an RTO/ISO to dispatch more expensive resources to meet its system needs and that, by removing barriers to the participation of distributed energy resource aggregations in RTO/ISO markets, the final rule will enhance competition and help to ensure that RTO/ISO markets produce just and reasonable rates); *see NARUC*, 964 F.3d at 1189 (finding that the Commission's decision not to include an opt-out in Order No. 841 was not arbitrary or capricious when the Commission considered the benefits of enabling broad electric storage resource participation to promoting just and reasonable wholesale rates, including the effect of increased competition and the promotion of diversity in technology types).

[72] *See, e.g.*, Public Interest Organizations Request for Rehearing at 23-24.

distributed energy resources in a distributed energy resource aggregation complement each other."[73] We agree with Public Interest Organizations that diverse aggregations that include demand response can provide capabilities that are valuable to the efficiency and reliability of the grid.[74] For instance, the inclusion of demand response resources in a heterogeneous distributed energy resource aggregation can allow the aggregation to collectively deliver ancillary services that those resources would not otherwise be able to provide.[75] The aggregation of demand response resources with other types of resources may also enable a distributed energy resource aggregation to collectively satisfy reliability needs in order to meet certain performance requirements.[76] Accordingly, we conclude that extending the Order No. 719 opt-out to demand response resources that

[73] Order No. 2222, 172 FERC ¶ 61,247 at P 26.

[74] *See* Public Interest Organizations Request for Rehearing at 23-24.

[75] *See* Direct Energy Comments (RM18-9) at 3-4 (describing how the aggregation of a battery storage project with flexible load from industrial customer sites enables the REstore virtual power plant to provide frequency response services by efficiently managing between the two resources and dispatching on a second-by-second basis to respond to system needs).

[76] *See* Exelon Comments (RM16-23) at 6 (explaining that pairing a summer-only demand response resource, such as air conditioning load, with wind that blows more in the winter months can create an aggregated product that satisfies the reliability needs of PJM's Capacity Performance product) (citing *PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,159 (2018)); Icetec Comments (RM18-9) at 5-6 (explaining that allowing sites that mix load reductions and other types of distributed energy resources to offer their combined capability enables the delivery of full-year capacity to qualify as a Capacity Performance resource and allows rational energy and ancillary services offer stacks that combine relatively inexpensive resources with relatively expensive load curtailments).

seek to participate in heterogeneous distributed energy resource aggregations would undermine one of the advantages of Order No. 2222.

25. Similarly, we find that interpreting the Commission's regulations to preclude certain demand response resources from participating in heterogeneous distributed energy resource aggregations would significantly undermine our goal of removing barriers to the participation of distributed energy resource aggregations in the wholesale markets.[77] Distributed energy resource aggregations can be composed of a diverse range of different resource types—including energy-efficient lightbulbs, distributed generation (such as roof top solar), electric vehicles, and smart appliances.[78] 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 our mandate to ensure that Commission-jurisdictional rates are just and reasonable.[79]

26. In addition to enhancing competition, this diversity also facilitates these non-traditional resources' ability to provide a wide range of services in RTO/ISO markets, as discussed above.[80] We agree with Public Interest Organizations that applying

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[77] *See* Order No. 2222, 172 FERC ¶ 61,247 at P 60 ("[W]e find that the benefits of allowing distributed energy resource aggregators broader access to the wholesale market outweigh the policy considerations in favor of an opt-out.").

[78] *See id.* P 114.

[79] *See* 16 U.S.C. 824e.

[80] *See* Order No. 2222, 172 FERC ¶ 61,247 at P 141 (finding that limiting the types of technologies that are allowed to participate in RTO/ISO markets through a

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.[81] Ensuring that demand response resources can participate in heterogeneous distributed energy resource aggregations throughout the country has the potential to enable significantly more such complementary aggregations, which will also help to break down barriers to the entry of emerging and future technologies, thus enhancing competition and contributing to ensuring just and reasonable rates.

27. Lastly, we also find 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."[82] Because we find that the Order No. 719 opt-out does not apply to heterogeneous distributed energy resource aggregations, we conclude that the goal of resource neutrality

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distributed energy resource aggregator would create a barrier to entry for emerging or future technologies, potentially precluding them from being eligible to provide all of the capacity, energy, and ancillary services that they are technically capable of providing).

[81] *See* Public Interest Organizations Request for Rehearing at 23-24.

[82] Order No. 2222, 172 FERC ¶ 61,247 at P 26.

supports requiring RTOs/ISOs to allow demand response resources to participate in such aggregations on a level playing field as other distributed energy resources.[83]

28. In summary, we conclude that if a distributed energy 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. The Commission has not proposed to overturn the Order No. 719 opt-out in this rulemaking and, to the extent parties ask that we do so on rehearing, we find that such requests are out of scope. However, we also conclude that heterogeneous distributed energy resource aggregations that include demand response do not fall squarely within the Order No. 719 opt-out. For the reasons discussed above, we find that allowing a RERRA to preclude demand response from participating in heterogeneous distributed energy resource aggregations would sufficiently undermine the goals of Order No. 2222. As a result, on rehearing, we conclude that demand response resources may participate in heterogeneous aggregations, even when located in states that have exercised the Order No. 719 opt-out. We also clarify that the small utility opt-in adopted in Order No. 2222 still applies to all

[83] We note that the Order No. 719 opt-out is arguably inconsistent with that goal. The Commission has not proposed to modify the relevant regulations in this proceeding and it would be inappropriate to do so on rehearing. Nevertheless, we note that the Commission is contemporaneously issuing a notice of inquiry to examine the Order No. 719 opt-out and whether it remains just and reasonable. (cross-referenced at 174 FERC ¶ 61,198).

distributed energy resource aggregations, including those containing demand response resources.[84]

29. Finally, AEE/AEMA request that the Commission clarify that the opt-out and opt-in requirements of Order No. 719 will apply only to the non-injection portion of an individual distributed energy resource and not to the injection portion of an individual distributed energy resource. We clarify that, if an individual distributed energy 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). 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. 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.[85]

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[84] Order No. 2222, 172 FERC ¶ 61,247 at P 64.

[85] *See, e.g.*, Order No. 841-A, 167 FERC ¶ 61,154 at P 53 ("Therefore, when an electric storage device chooses to participate in the RTO/ISO markets as demand response, it is not participating as an 'electric storage resource' or injecting electricity onto the grid and should not be subject to the market rules applicable to electric storage resources. Accordingly, because demand response and electric storage resources have differing ways of interacting with RTO/ISO markets and are subject to different market

3. Small Utility Opt-In

30. In Order No. 2222, the Commission acknowledged that, notwithstanding its finding that the benefits of the final rule outweigh the policy considerations in favor of a broad opt-out, the final rule may place a potentially greater burden on smaller utility systems.[86] The Commission stated that, recognizing this potentially greater burden on small utility systems, the Commission would exercise its discretion to include in the final rule an opt-in mechanism for small utilities similar to that provided in Order No. 719-A.[87] Specifically, the Commission determined that an RTO/ISO must not accept bids from a distributed energy resource aggregator if its aggregation includes distributed energy resources that are customers of utilities that distributed 4 million MWh or less in the previous fiscal year, unless the RERRA affirmatively allows such customers to participate in distributed energy resource aggregations. The Commission found that this opt-in mechanism appropriately balances the benefits that distributed energy resource aggregation can provide to RTO/ISO markets with a recognition of the burdens that such aggregation may create for small utilities in particular.[88]

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rules, it is not arbitrary or inconsistent for the Commission to take different policy approaches when integrating those resources into the RTO/ISO markets.").

[86] Order No. 2222, 172 FERC ¶ 61,247 at P 64 (citing APPA Comments (2018 RM18-9) at 7, 9-10; APPA/NRECA Comments (RM16-23) at 39; NRECA Comments (2018 RM18-9) at 14, 26-28; TAPS Comments (RM16-23) at 15-16).

[87] *Id.* P 64.

[88] *Id.* P 65.

a. Requests for Clarification or Rehearing

31. Public Interest Organizations argue that the Commission erred by providing RERRAs the power to prevent distributed energy resource aggregations for utilities that provide 4 million MWh or less annually from participating in wholesale markets.[89] First, Public Interest Organizations assert that, pursuant to the FPA, state authorities lack jurisdiction to directly determine whether resources are permitted to participate in RTO/ISO markets because such state actions directly "aim at" wholesale transactions and are therefore field preempted.[90]

32. Second, Public Interest Organizations assert that the 4 million MWh threshold for the opt-in is not supported by substantial evidence and should be removed, clarified, or otherwise revisited.[91] According to Public Interest Organizations, the Commission acknowledged that the Small Business Size Standards system no longer uses a numerical MWh metric to determine the appropriate classification for utilities, and therefore it is not reasonable for the Commission to presume that this threshold reflects a meaningful point at which the substantial benefits of Order No. 2222 are outweighed by its burdens.[92] They argue that the Commission did not identify record evidence to demonstrate that this scale of utility operation has meaningful relation to any harm such entities may face due

[89] Public Interest Organizations Request for Rehearing at 5.

[90] *Id.* at 26 (quoting *Hughes*, 136 S.Ct. at 1298).

[91] *Id.* at 27, 32.

[92] *Id.* at 28 (citing Order No. 2222, 172 FERC ¶ 61,247 at PP 67, 63 n.152).

to the implementation of Order No. 2222. They assert that the Commission's justification that it has used this standard in prior orders is arbitrary because those orders involved different industries unrelated to the burdens faced by utilities with respect to distributed energy resources.[93] Public Interest Organizations further contend that Order No. 719-A is inapposite, positing that the Commission failed to show in what way the technical or cost-based challenges faced by utilities 11 years ago with respect to demand response resources relate to the challenges faced by utilities now with respect to distributed energy resources.[94] They assert that the Commission must provide a rational connection between the numerical threshold chosen and the purported burdens it proposes to ease.[95] Public Interest Organizations also contend that the record contains only generic allegations of costs distribution utilities may face but no basis for the Commission to conclude that such costs are likely to occur.[96]

33. AEE/AEMA argue that the small utility opt-in should not apply to energy efficiency resources. AEE/AEMA state that the Commission established the small utility opt-in due to concerns that the participation of distributed energy resources in wholesale

[93] *Id.* at 28-29.

[94] *Id.* at 29.

[95] *Id.* at 30.

[96] *Id.* at 30-31.

markets "may place a potentially greater burden on smaller utility systems."[97] However, AEE/AEMA contend that energy efficiency resources do not negatively impact the distribution system's cost, operation, or reliability because they passively reduce demand, do not require a dispatch signal to operate, and do not inject electricity onto the distribution grid. According to AEE/AEMA, the Commission has already recognized that energy efficiency resources are unlikely to present operational or planning complexities that might otherwise interfere with day-to-day operations of utility systems.[98] AEE/AEMA further argue that, although the Commission based the small utility opt-in on that provided in Order No. 719, the Commission has expressly found that Order No. 719 does not apply to energy efficiency resources.[99] AEE/AEMA thus conclude that the opt-in as applied to energy efficiency resources is arbitrary, unreasonable and unduly discriminatory under the FPA and the Administrative Procedure Act.[100]

b. Commission Determination

34. We disagree with Public Interest Organizations' arguments on rehearing. As discussed above, in Order No. 719-A, the Commission required RTOs/ISOs to accept

[97] AEE/AEMA Request for Rehearing at 19-20 (quoting Order No. 2222, 172 FERC ¶ 61,247 at P 64).

[98] *Id.* at 20 (citing AEE Declaratory Order, 161 FERC ¶ 61,245 at PP 60, 63).

[99] *Id.* at 21 (citing AEE Declaratory Order, 161 FERC ¶ 61,245).

[100] *Id.* at 22 (citing 5 U.S.C. 706(2)(A); 16 U.S.C. 824d(b), 824e(a)).

bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million MWh in the previous fiscal year, unless the RERRA prohibits such customers' demand response to be bid into RTO/ISO markets (i.e., unless the RERRA opts out).[101] However, the Commission exercised its discretion to take a different approach with small utilities by requiring that RTOs/ISOs accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed 4 million MWh or less in the previous fiscal year, only where the RERRA affirmatively permits such customers' demand response to be bid into RTO/ISO markets (i.e., only where the RERRA opts in).[102] In Order No. 2222, the Commission appropriately exercised its discretion to adopt an opt-in similar to that provided in Order No. 719-A. A RERRA that elects not to opt in under either Order No. 719 or Order No. 2222 does not intrude on the Commission's exclusive authority over practices that directly affect wholesale rates because the Commission chose to provide such an opt-in and expressly codified this opt-in in the Commission's regulations.[103]

35. We also disagree that the 4 million MWh threshold for the opt-in is not supported by substantial evidence or that it is outdated due to the Small Business Administration no longer using the same measure for its purposes. As the Commission explained in Order

[101] Order No. 719-A, 128 FERC ¶ 61,059 at P 51.

[102] *Id.*

[103] *See* 18 CFR 35.28(g)(1)(iii), 35.28(g)(12)(iv).

No. 2222, the Commission has used the 4 million MWh threshold in multiple contexts, including, as noted, the analogous situation in Order No. 719-A.[104] Importantly, Public Interest Organizations overlook the fact that this threshold is also consistent with similar, currently effective thresholds in the FPA.[105] Further, while certain entities requested in their comments that the Commission use the 4 million MWh threshold,[106] no commenters suggested that a different standard would be appropriate. In fact, Public Interest Organizations also do not suggest a more appropriate standard in their request for rehearing. Finally, we disagree with Public Interest Organizations that the record contains only generalized allegations that smaller distribution utilities will incur costs as a result of the final rule; the record contains numerous specific comments regarding these costs. For example, commenters identify costs and burdens associated with the Commission's proposed action that relate to studying and processing a higher volume of interconnection requests, as well as increasing the flexibility requirements of the

[104] *See* Order No. 719-A, 128 FERC ¶ 61,059 at PP 59-60; *Wolverine Power Supply Coop. Inc.*, 127 FERC ¶ 61,159, at P 15 (2009); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. in Mkts. Operated by the CAISO*, 125 FERC ¶ 61,297, at P 24 (2008).

[105] *See* 16 U.S.C. 824(f); 16 U.S.C. 824j-l(c)(1); Order No. 719-A, 128 FERC ¶ 61,059 at P 51 (explaining same).

[106] NRECA Comments (2019 RM18-9) at 4-5; TAPS Comments (RM16-23) at 16-17; TAPS Comments (2018 RM18-9) at 19 & n.27.

supervisory control and data acquisition system, the robustness of the communications system, and the capacity of information systems.[107]

36. We also deny AEE/AEMA's requested clarification. As a general matter, we agree with AEE/AEMA that energy efficiency resources do not typically pose the same planning and operational challenges on the distribution system as other distributed energy resources.[108] However, the Commission granted the small utility opt-in in Order No. 2222 not based on the effect of any particular type of distributed energy resource on the distribution system, but rather on the overall indirect burden borne by small utilities due to the participation of distributed energy resource aggregators in the RTO/ISO

[107] NRECA Comments (2018 RM18-9) at attach. B ¶¶ 8, 10 (Statement of Kenneth M. Raming on behalf of Ozark Elec. Coop., Inc.); *id.* attach. B ¶ 9 (Statement of Brian Callnan on behalf of New Hampshire Elec. Coop., Inc.); *id.* attach. B ¶¶ 8-9 (Statement of Gerry Schmitz on behalf of Adams-Columbia Elec. Coop.); *see also id.* at 14 (citing Triplett Aff. ¶ 38) (discussing how systems and processes that do not exist today will need to be created and maintained to meet RTO/ISO requirements); *id.* attach. B ¶ 13 (Statement of Kevin Short on behalf of Anza Elec. Coop., Inc.) (maintaining that the electric cooperative lacks the funding and technical capabilities to increase the adoption of distributed energy resources); *id.* attach. B ¶ 7 (Statement of Craig C. Turner on behalf of Dakota Elec. Ass'n) (explaining that the electric cooperative would no longer be able to rely on non-wired solutions to reduce its members' costs and would need to construct expensive additional substation and distribution system capacity).

[108] *See* AEE Declaratory Order, 161 FERC ¶ 61,245 at P 63 ("Unlike demand response resources, [energy efficiency resources] are not likely to present the same operational and day-to-day planning complexity that might otherwise interfere with [a load serving entity's] day-to-day operations.").

markets.[109] For instance, commenters raised such concerns as smaller distribution utilities lacking the necessary staff or resources to coordinate with distributed energy resource aggregators and RTOs/ISOs.[110] Thus, we find that the specific effects that any particular type of distributed energy resource may or may not have on the distribution system are not determinative. Finally, we disagree that the opt-in as applied to energy efficiency resources is arbitrary in light of the AEE Declaratory Order. There the Commission found that "RERRAs may not bar, restrict, or otherwise condition the participation of [energy efficiency resources] in wholesale electricity markets unless the Commission expressly gives RERRAs such authority."[111] Order No. 2222 expressly gives RERRAs such authority with respect to distributed energy resource aggregators that fall under the 4 million MWh threshold.[112] Accordingly, if a RERRA affirmatively allows customers of utilities that distributed 4 million MWh or less in the previous fiscal year to participate in distributed energy resource aggregations, an RTO/ISO can accept bids from a distributed energy resource aggregator if its aggregation includes such customers. However, an RTO/ISO cannot accept bids from a distributed energy resource

[109] Order No. 2222, 172 FERC ¶ 61,247 at P 64 (exercising discretion to include in the final rule an opt-in mechanism for small utilities due to the potential for a greater burden on small utility systems).

[110] *Id.* n.157 (citing APPA Comments (2018 RM18-9) at 7, 9-10; APPA/NRECA Comments (RM16-23) at 39; NRECA Comments (2018 RM18-9) at 14, 26-28; TAPS Comments (RM16-23) at 15-16).

[111] AEE Declaratory Order, 161 FERC ¶ 61,245 at P 57.

[112] Order No. 2222, 172 FERC ¶ 61,247 at P 64.

aggregator if its aggregation includes distributed energy resources that are customers of utilities that distributed 4 million MWh or less in the previous fiscal year if the RERRA does not affirmatively allow such customers to participate in distributed energy resource aggregations.

4. Distributed Energy Resource Interconnection

37. In Order No. 2222, the Commission found that a large influx of distribution-level interconnections could create uncertainty as to whether certain interconnections are subject to Commission jurisdiction or state/local jurisdiction, and whether they would require the use of an RTO's/ISO's standard interconnection procedures and agreement.[113] The Commission further found that such an influx could burden RTOs/ISOs with an overwhelming volume of interconnection requests. The Commission stated that, given those concerns and the confluence of local, state, and federal authorities over distributed energy resource interconnections, the Commission declined to exercise its jurisdiction over the interconnections of distributed energy resources to distribution facilities for the

[113] *Id.* P 95. The Commission explained in detail its historical jurisdictional approach to resources interconnecting to a distribution facility. Specifically, interconnections are governed by the applicable state or local law in the case of the first interconnection to a distribution utility for the purpose of making wholesale sales. Moreover, the Commission has jurisdiction in the case of subsequent interconnections of resources to the same distribution facility for the purpose of engaging in wholesale sales or transmission in interstate commerce. The Commission further noted that it adopted this approach—labeled the "first use" test in practice by some RTOs/ISOs—to avoid crossing a jurisdictional line established by Congress. *Id.* PP 92-94.

purpose of participating in RTO/ISO markets exclusively as part of a distributed energy resource aggregation.[114]

38. The Commission found that requiring use of the RTOs'/ISOs' standard interconnection procedures and agreement terms for these interconnections was unnecessary to advance the objectives of Order Nos. 2003, 2006, and 845, which established standard interconnection procedures and agreements in order to prevent undue discrimination, preserve reliability, increase energy supply, lower wholesale prices for customers by increasing the number and types of new generation that would compete in the wholesale electricity market, reduce interconnection time and costs, and facilitate development of non-polluting alternative energy sources.[115] Rather, the Commission agreed with commenters that state and local authorities, which have traditionally

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[114] *Id.* PP 96-97.

[115] *Id.* P 96 (citing *Standardization of Generator Interconnection Agreements & Procedures*, Order No. 2003, 68 FR 49846 (Aug. 19, 2003), 104 FERC ¶ 61,103, at P 1 (2003), *order on reh'g*, Order No. 2003-A, 69 FR 15932 (Mar. 26, 2004), 106 FERC ¶ 61,220, *order on reh'g*, Order No. 2003-B, 70 FR 265 (Jan. 4, 2005), 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 70 FR 37661 (June 30, 2005), 111 FERC ¶ 61,401 (2005), *aff'd sub nom. Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008); *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, 70 FR 34190 (June 13, 2005), 111 FERC ¶ 61,220, at P 1, *order on reh'g*, Order No. 2006-A, 70 FR 71760 (Nov. 30, 2005), 113 FERC ¶ 61,195 (2005), *order granting clarification*, Order No. 2006-B, 71 FR 42587 (July 27, 2006), 116 FERC ¶ 61,046 (2006), *corrected*, 71 FR 53,965 (Sept. 13, 2006); *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 83 FR 21342 (May 9, 2018), 163 FERC ¶ 61,043 (2018), *errata notice*, 167 FERC ¶ 61,123, *order on reh'g and clarification*, Order No. 845-A, 84 FR 8156 (Mar. 6, 2019), 166 FERC ¶ 61,137, *errata notice*, 167 FERC ¶ 61,124, *order on reh'g*, Order No. 845-B, 168 FERC ¶ 61,092 (2019)).

regulated distributed energy resource interconnections, have the requisite experience, interest, and capacity to oversee these distribution-level interconnections.

39. The Commission found that the interconnection of distributed energy resources for the purpose of participating in a distributed energy resource aggregation would not constitute a first interconnection for the purpose of making wholesale sales under the "first use" test.[116] The Commission further clarified that only a distributed energy resource requesting interconnection to the distribution facility for the purpose of directly engaging in wholesale transactions (i.e., not through a distributed energy resource aggregation) would create a "first use" and any subsequent distributed energy resource interconnecting to that distribution facility for the purpose of directly engaging in wholesale transactions would be considered a Commission-jurisdictional interconnection. The Commission thus stated that it believes that this approach will minimize any increase in the number of distribution-level interconnections subject to the Commission's jurisdiction that the final rule may cause. The Commission further stated that Order No. 2222 does not revise the Commission's jurisdictional approach to the interconnections of QFs that participate in distributed energy resource aggregations.[117]

a. Requests for Clarification and Clarification or Rehearing

40. AEE/AEMA request clarification, or in the alternative rehearing, of the Commission's findings with respect to the interconnection of distributed energy

[116] *Id.* P 97.

[117] *Id.* P 98.

resources. AEE/AEMA request that the Commission clarify what it means by "directly engaging in wholesale transactions," particularly in light of potential single-resource aggregations.[118] AEE/AEMA also suggest that the Commission may need to clarify what happens after the triggering of "first use" if a distributed energy resource in an aggregation seeks to interconnect to a distribution facility for the purpose of participating in a distributed energy resource aggregation.[119] According to AEE/AEMA, the Commission is clear what happens if that resource is interconnecting for the purpose of directly engaging in wholesale transactions, but it is not clear what happens if the resource is interconnecting for the purpose of participating in a distributed energy resource aggregation.

41. Xcel requests clarification regarding the statement that the Commission is not revising its jurisdictional approach to QF interconnection, which it asserts could be interpreted to mean either that: (1) the Commission is not changing its existing policy, and therefore any distributed energy resource which is part of an aggregation that will sell to an RTO/ISO market, and is also a QF, *is* subject to the Commission's jurisdiction for purposes of interconnection; or (2) the Commission believes its prior approach to the interconnections of QFs that participate in distributed energy resource aggregations was already consistent with Order No. 2222's holding that the Commission will not assert jurisdiction over distributed energy resources in distributed energy resource

[118] AEE/AEMA Request for Rehearing at 24-25.

[119] *Id.* at 25.

aggregations.[120] Xcel asks the Commission to clarify whether the interconnection of QFs seeking to participate in distributed energy resource aggregations will be subject to the Commission's jurisdiction.[121] Xcel also asks the Commission to hold a technical conference and to consider a rulemaking to simplify its interconnection rules, which Xcel states could provide additional guidance for following the existing rules that both utilities and resource developers could rely upon.[122]

b. Commission Determination

42. We deny AEE/AEMA's request to clarify what is meant by "directly engaging in wholesale transactions." With regard to single-resource aggregations, the Commission already explained in Order No. 2222 that the Commission will not exercise jurisdiction over the interconnection to a distribution facility of a distributed energy resource for the purpose of participating in RTO/ISO markets exclusively through a single-resource distributed energy resource aggregation.[123] As to AEE/AEMA's suggestion to clarify what happens after the triggering of "first use," we reiterate that the Commission will not exercise jurisdiction over the interconnection to a distribution facility of a distributed

[120] Xcel Request for Clarification at 3.

[121] *Id.* at 1, 3.

[122] *Id.* at 1-2, 6. AEE/AEMA support Xcel's request for a technical conference. AEE/AEMA Request for Rehearing at 3, 26.

[123] Order No. 2222, 172 FERC ¶ 61,247 at P 186.

energy resource for the purpose of participating in RTO/ISO markets exclusively through a distributed energy resource aggregation, even after first-use has been triggered.

43. We grant Xcel's request to clarify the Commission's jurisdictional approach to the interconnections of QFs that participate in distributed energy resource aggregations. Specifically, as discussed further below, we clarify that we decline to exercise our jurisdiction over the interconnections of distributed energy resources, *including the interconnections of QFs*, to distribution facilities for the purpose of participating in RTO/ISO markets exclusively as part of a distributed energy resource aggregation.

44. As explained in Order No. 2222, the Commission in Order Nos. 2003 and 2006 established the "first use" test for distribution system interconnections.[124] With respect to QFs, the Commission found that when an electric utility interconnecting with a QF does not purchase all the QF's output and instead transmits the QF's power in interstate commerce, the Commission exercises jurisdiction over that interconnection.[125] Thus, for purposes of Order Nos. 2003 and 2006, the Commission concluded that it exercises jurisdiction over a QF's interconnection to a Commission-jurisdictional transmission system if the QF's owner sells any of the QF's output to an entity other than the electric utility directly interconnected with the QF.[126] The Commission later clarified that, where

[124] *See id.* P 72 (citing Order No. 2003, 104 FERC ¶ 61,103 at P 804).

[125] Order No. 2003, 104 FERC ¶ 61,103 at P 813; Order No. 2006, 111 FERC ¶ 61,220 at P 516.

[126] Order No. 2003, 104 FERC ¶ 61,103 at PP 813-814; Order No. 2006, 111 FERC ¶ 61,220 at PP 516-517. Order No. 2003 describes the term "Transmission

a QF seeks interconnection to a distribution facility not subject to an OATT to make jurisdictional wholesale sales, the Commission has jurisdiction over this interconnection, even though Order No. 2003 does not apply.[127] Thus, the Commission has interpreted its authority over QFs to include all interconnections of QFs that intend to make wholesale sales, not just interconnections of QFs to distribution facilities that are already subject to an OATT.

45. The Commission has also clarified that its jurisdiction applies to a new QF that plans to sell its output to a third party, *and to an existing QF* interconnected to a Commission-jurisdictional transmission system that historically sold its total output to an interconnected utility or on-site customer and *now plans to sell output to a third party*.[128] However, the Commission stated in Order No. 2003 that a former QF that plans to sell to a third party need not submit a new interconnection request if it represents that the output of the generating facility will be substantially the same as before.[129]

46. We agree with Xcel that it would be helpful to provide clarification regarding the Commission's jurisdictional approach to the interconnections of QFs participating in

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System" to include distribution facilities already being used for transmission in interstate commerce. Order No. 2003, 104 FERC ¶ 61,103 at P 804.

[127] *PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,087, at P 7 (2008).

[128] Order No. 2003, 104 FERC ¶ 61,103 at P 814. The Commission has explained that it will exercise jurisdiction or require the filing of an interconnection agreement only if there is some manifestation of a QF's "plan to sell" output to third parties. *Fla. Power & Light Co.*, 133 FERC ¶ 61,121, at P 21 (2010).

[129] Order No. 2003, 104 FERC ¶ 61,103 at P 815.

distributed energy resource aggregations. We clarify that, in finding that the final rule does not revise the Commission's jurisdictional approach to the interconnections of QFs, the Commission was not modifying how it has applied any of its existing QF interconnection policies. As described above, the Commission has generally exercised jurisdiction over a QF's interconnection if the QF sells any of its output to an entity other than the electric utility directly interconnected with the QF.[130] However, the presence of distributed energy resource aggregations represents a new circumstance not previously considered in the Commission's QF interconnection precedent. Order No. 2222 addresses only distributed energy resource aggregators' participation in RTO/ISO markets, which, as the final rule itself makes clear, is meaningfully different from a distributed energy resource's direct participation in those markets.[131] The Commission has not previously addressed how an aggregated participation model affects the Commission's QF interconnection policies.

47. Here we clarify that the interconnections of QFs that participate in RTO/ISO markets exclusively through distributed energy resource aggregations will be treated the same under the final rule as the interconnections of non-QF distributed energy resources

[130] Order No. 2003, 104 FERC ¶ 61,103 at PP 813-814; Order No. 2006, 111 FERC ¶ 61,220 at PP 516-517.

[131] *See* Order No. 2222, 172 FERC ¶ 61,247 at P 97 ("As such, only a distributed energy resource requesting interconnection to the distribution facility for the purpose of directly engaging in wholesale transactions (i.e., not through a distributed energy resource aggregation) would create a "first use" and any subsequent distributed energy resource interconnecting for the purpose of directly engaging in wholesale transactions would be considered a Commission-jurisdictional interconnection.").

that participate in distributed energy resource aggregations. This approach helps to avoid a significant increase in the number of distribution-level QF interconnections subject to the Commission's jurisdiction, which, as the Commission observed in Order No. 2222, could create uncertainty and potentially impose an overwhelming burden on RTOs/ISOs.[132] Thus, due to these concerns and in recognition of the confluence of local, state, and federal authorities over QF distributed energy resource interconnections, we clarify that we decline to exercise our jurisdiction over the interconnections of distributed energy resources, *including the interconnections of QFs*, to distribution facilities for the purpose of participating in RTO/ISO markets exclusively as part of a distributed energy resource aggregation. We note that, if a QF distributed energy resource participates in RTO/ISO markets directly, rather than exclusively through a distributed energy resource aggregation, then the Commission's long-standing QF interconnection policies, as described earlier, would continue to apply.

48. Though Xcel and AEE/AEMA request that the Commission hold a technical conference to consider a rulemaking to simplify the Commission's existing interconnection rules, we decline to do so here. Our clarification here that the interconnections of QFs participating in RTO/ISO markets exclusively through a distributed energy resource aggregation will be treated the same as other distributed energy resources participating in aggregations addresses the specific QF

[132] *See id.* P 95.

interconnection-related issues raised by Order No. 2222. The broader inquiry into interconnection issues requested by Xcel is outside the scope of this rulemaking.

B. Eligibility to Participate in RTO/ISO Markets through a Distributed Energy Resource Aggregation

1. Participation Model

49. In Order No. 2222, the Commission required each RTO/ISO to establish distributed energy resource aggregators as a type of market participant and to allow distributed energy resource aggregators to register distributed energy resource aggregations under one or more participation models in the RTO's/ISO's tariff that accommodate the physical and operational characteristics of the distributed energy resource aggregation.[133] The Commission stated that each RTO/ISO can comply with this requirement by modifying its existing participation models to facilitate the participation of distributed energy resource aggregations, by establishing one or more new participation models for distributed energy resource aggregations, or by adopting a combination of those two approaches.[134]

a. Request for Clarification or Rehearing

50. AEE/AEMA request clarification, or in the alternative rehearing, of the Commission's findings with respect to participation models. AEE/AEMA request that the Commission clarify the criteria by which new and existing participation models will

[133] *Id.* P 130.

[134] *Id.*

be evaluated to ensure that they allow distributed energy resource aggregations to provide all the services they are technically capable of providing.[135] AEE/AEMA explain that a single customer site could have several technologies capable of providing market services aggregated at a single point of interconnection, such as distributed generation paired with demand response, or energy storage paired with distributed solar.[136] AEE/AEMA state that these types of configurations may appear as demand response resources, reducing the customer's peak load during peak load periods, while having excess generation available other times of the year. Moreover, AEE/AEMA state, many distributed energy resources located behind a customer meter are sought, in part, for some resiliency benefit, which assumes a design close to the host facility's peak. AEE/AEMA argue that the tendency for RTOs/ISOs to devise two mutually exclusive participation models around generation and demand response is one of the parts of existing participation models that limits distributed energy resources from providing and commercializing their full capability in RTO/ISO markets. Thus, AEE/AEMA request that the Commission confirm that Order No. 2222 requires that RTOs/ISOs accommodate facilities that include both generation and curtailment in a single resource in a manner that allows for participation in all markets commensurate with the resource's technical capabilities.

[135] AEE/AEMA Request for Rehearing at 3, 15-18.

[136] *Id.* at 17.

51. AEE/AEMA assert that there is no question as to whether this can be accomplished utilizing RTOs'/ISOs' existing "generation" and "demand response" market constructs.[137] AEE/AEMA note that in ISO-NE's Active Demand Capacity Resource participation model, distributed generation resources can be co-located with load reducing resources, and the aggregate dispatch capability of the facility, up to and including net injections, is eligible for energy, capacity and reserve market obligations.[138] Instead, AEE/AEMA state that they are requesting that the Commission confirm that RTOs/ISOs must demonstrate that existing constructs and participation models or new participation models created for distributed energy resource aggregations will accommodate distributed energy resources in these various but common configurations as a single resource.[139]

52. AEE/AEMA assert that their requested clarification is necessary to ensure that compliance with Order No. 2222 is not achieved through a disparate collection of participation models, with separate registration, metering, and interconnection processes and market participation parameters.[140] AEE/AEMA claim that, while technically feasible on paper, applying these separate models to individual technologies configured as a single resource would be practically impossible. AEE/AEMA further contend that

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[137] *Id.*

[138] *Id.* at 17-18.

[139] *Id.* at 18.

[140] *Id.*

requiring separate participation models for individual technologies configured as a single resource would not satisfy the Commission's directive to revise existing participation models or create new participation models, but instead would lead to several isolated paths that each impose tradeoffs on distributed energy resource aggregators. AEE/AEMA assert that these isolated paths would not only result in reduced or sub-optimal market participation of single distributed energy resource sites with multiple technologies, but also pose substantial administrative barriers for heterogeneous aggregations.

b. Commission Determination

53. We deny AEE/AEMA's request to clarify the criteria by which new and existing participation models will be evaluated to ensure that they allow distributed energy resource aggregations to provide all the services that they are technically capable of providing. With regard to AEE/AEMA's concern that RTOs/ISOs may propose to achieve compliance through a collection of participation models, we reiterate that the Commission provided each RTO/ISO with flexibility to facilitate the participation of distributed energy resource aggregations in its markets in a way that is efficient and cost-effective as well as fits its market design, including the ability to establish one or more new participation models that accommodate the physical and operational characteristics of each distributed energy resource aggregation.[141] Regardless of the approach, as explained in Order No. 2222, the Commission will evaluate each

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

RTO's/ISO's compliance proposal to determine whether it meets the goals of Order No. 2222 to allow distributed energy resources to provide all services that they are technically capable of providing through aggregation.[142]

54. To the extent that AEE/AEMA are concerned that RTOs/ISOs will exclude demand response from participating in distributed energy resource aggregations, we note that, in Order No. 2222, the Commission clarified that "customer sites capable of demand reduction" may meet the definition of a distributed energy resource.[143] In addition, in Order No. 2222, the Commission required each RTO/ISO to revise its tariff to allow different types of distributed energy resource technologies to participate in a single distributed energy resource aggregation (i.e., allow heterogeneous distributed energy resource aggregations).[144] The Commission found that, while ISO-NE would prefer to exclude demand response resources from distributed energy resource aggregations to simplify settlement and the allocation of charges and credits to load, the benefits of requiring that RTOs/ISOs allow heterogeneous aggregations outweigh ISO-NE's preference to limit the types of resources that can participate in aggregations.[145]

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[142] *Id.*

[143] *Id.* P 115 (citing AEE Comments (RM16-23) at 21).

[144] *Id.* P 142.

[145] *Id.* PP 142-43, 145.

2. Double Counting

55. In Order No. 2222, the Commission required each RTO/ISO to revise its tariff to: (1) allow distributed energy resources that participate in one or more retail programs to participate in its wholesale markets; (2) allow distributed energy resources to provide multiple wholesale services; and (3) include any appropriate restrictions on the distributed energy resources' 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.[146]

56. The Commission stated that it is appropriate for RTOs/ISOs to place narrowly designed restrictions on the RTO/ISO market participation of distributed energy resources through aggregations, if necessary to prevent double counting of services.[147] The Commission stated that, for instance, 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. The Commission further stated that, if a distributed energy resource is registered to provide the same service twice in an RTO/ISO market (e.g., as part of multiple distributed energy resource aggregations, as part of a distributed energy resource aggregation and a standalone demand response resource, and/or a standalone distributed energy resource), then that resource would also be double counted and double

[146] *Id.* P 160.

[147] *Id.* P 161.

compensated if it clears the market as part of both market participants. The Commission therefore found that it is appropriate for RTOs/ISOs to place restrictions on the RTO/ISO market participation of distributed energy resources through aggregations after determining whether a distributed energy resource that is proposing to participate in a distributed energy resource aggregation is: (1) registered to provide the same services either individually or as part of another RTO/ISO market participant; or (2) included in a retail program to reduce a utility's or other load serving entity's obligations to purchase services from the RTO/ISO market.

a. Request for Clarification or Rehearing

57. AEE/AEMA request clarification, or in the alternative rehearing, of the Commission's findings regarding allowing RTOs/ISOs to limit the participation of resources in RTO/ISO markets through a distributed energy resource aggregator that are receiving compensation for the same services as part of another program.[148]

58. AEE/AEMA request clarification that RTOs/ISOs do not need to place restrictions on wholesale market participation by a distributed energy resource participating in a retail program if the RTO/ISO has mechanisms in place to prohibit the same distributed energy resource from both reducing the amount of a service the RTO/ISO procures on a forward basis and acting as a provider of that service in the same delivery period.[149] AEE/AEMA argue that placing broad restrictions on distributed energy resources that are "included in

[148] AEE/AEMA Request for Rehearing at 2-4.

[149] *Id.* at 2-3, 8-9, 12 (quoting Order No. 2222, 172 FERC ¶ 61,247 at P 161).

a retail program to reduce a utility's or other load serving entity's obligations to purchase services from the RTO/ISO market," could undermine the Commission's directive to allow dual participation.[150]

59. AEE/AEMA explain that, for reliability and system planning purposes, the same distributed energy resource should not reduce 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 delivery period.[151] AEE/AEMA state that the Commission appeared to be concerned with that possibility when it 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."[152] According to AEE/AEMA, some RTOs/ISOs, such as New York Independent System Operator, Inc. (NYISO) and ISO New England Inc. (ISO-NE), already have instructive mechanisms in place to avoid the Commission's concern of double counting a distributed energy resource as both load reduction and a supply resource, and others could easily create mechanisms on compliance.[153] AEE/AEMA state that NYISO adds back any load reductions from

[150] *Id.* at 10.

[151] *Id.*

[152] *Id.* (quoting Order No. 2222, 172 FERC ¶ 61,247 at P 161).

[153] *Id.* at 10-11.

Special Case Resources[154] that occur during retail-level demand response program dispatches to NYISO's future load forecast, and also applies this mechanism to its Distributed Energy Resource Participation Framework. Importantly, AEE/AEMA maintain, NYISO places no restrictions on a distributed energy resource participating in a wholesale aggregation and a retail program.[155] AEE/AEMA state that ISO-NE adds back all supply-side demand response to future load forecasts; therefore, participation in a retail-level demand response program will not reduce ISO-NE's Installed Capacity Requirement.[156]

60. AEE/AEMA express concern that the Commission's language broadly referring to retail programs could be interpreted to restrict wholesale participation from any distributed energy resource that participates in a retail program where the program has the potential to reduce a utility's or other load serving entity's obligations to purchase services from the RTO/ISO market.[157] AEE/AEMA contend that, without clarification, the Commission's language could prohibit many, if not most, distributed energy resources from participating in both retail programs and the wholesale market, and that

[154] NYISO defines Special Case Resources as "Demand Side Resources whose Load is capable of being interrupted upon demand at the direction of the ISO, and/or Demand Side Resources that have a Local Generator . . . ." NYISO, NYISO Tariffs, NYISO MST, 2.19 MST Definitions - S (25.0.0).

[155] AEE/AEMA Request for Rehearing at 10-11.

[156] *Id.* at 11.

[157] *Id.*

such restrictions are unnecessary to address the Commission's concerns over double counting.[158] AEE/AEMA recommend clarification because the Commission's reference to retail programs that "reduce a utility's or other load serving entity's obligations to purchase from the RTO/ISO market" risks sweeping in a broad swath of distributed energy resources participating in long-standing retail distributed energy resource policies and programs aimed at providing benefits to customers that do not broadly implicate the Commission's double counting concerns and could result in restrictions that prevent the dual participation the Commission intended.[159]

61. AEE/AEMA argue that clarification is also warranted because the Commission's generic language would be unwieldy to implement in that it would force each RTO/ISO to become familiar with the specifics of every retail program in its territory.[160] Furthermore, AEE/AEMA contend, this would risk further exacerbating state and RTO/ISO tensions because the RTO/ISO would have to judge these programs regardless of the state's intent. AEE/AEMA suggest that the RTOs/ISOs instead focus on their own system planning and demand forecasting practices.[161]

62. AEE/AEMA contend that, to the extent the Commission or RTOs/ISOs are concerned about the potential for conflicting dispatches of the same distributed energy

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[158] *Id.* at 12.

[159] *Id.* at 12-13.

[160] *Id.* at 10.

[161] *Id.* at 13.

resource in a retail program and the wholesale markets, there is significant infrastructure in place to allow for better coordination between RTOs/ISOs and distribution system operators.[162] AEE/AEMA point out that there are also tools RTOs/ISOs currently use to ensure that wholesale market participation by distributed energy resources is well-coordinated with retail distributed systems. AEE/AEMA lastly argue that providing this clarification and focusing the RTOs/ISOs on determining whether a distributed energy resource is able to reduce the amount of a service procured on a forward basis and act as a provider of that service in the same delivery period would make sense as a legal and jurisdictional matter, given the FPA's separation of the wholesale and retail markets.[163]

b. Commission Determination

63. In Order No. 2222, the Commission required each RTO/ISO to revise its tariff to include any appropriate restrictions on distributed energy resources' 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.[164] We clarify that AEE/AEMA is correct 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

[162] *Id.* at 14.

[163] *Id.* at 15.

[164] Order No. 2222, 172 FERC ¶ 61,247 at P 160.

be double counted as both load reduction and a supply resource,"[165] 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.

64. We also clarify that, to the extent an RTO/ISO already has restrictions in place to avoid double counting of services, it is not required to propose new restrictions but rather must explain on compliance how these existing restrictions prevent double counting.[166] Such restrictions would only be appropriate "if necessary to prevent double counting of services,"[167] and each RTO/ISO must otherwise "allow distributed energy resources that participate in one or more retail programs to participate in its wholesale markets."[168] Thus, such distributed energy resources should not be prevented from participating in distributed energy resource aggregations unless that is the only possible way to prevent double counting of services. We note that, while AEE/AEMA describe existing mechanisms in the NYISO and ISO-NE tariffs, we will not prejudge these here but

[165] *Id.* P 161.

[166] *Id.* (requiring each RTO/ISO "to describe how it will properly account for the different services that distributed energy resources provide in the RTO/ISO markets").

[167] *Id.* P 161.

[168] *Id.* P 160.

instead examine whether particular mechanisms comply with the requirements of Order No. 2222 when evaluating each RTO's/ISO's compliance filing.

C. Coordination

1. Distribution Utility Review

65. In Order No. 2222, the Commission required each RTO/ISO to modify its tariff to incorporate a comprehensive and non-discriminatory process for timely review by a distribution utility of the individual distributed energy resources that comprise a distributed energy resource aggregation, which is triggered by initial registration of the distributed energy resource aggregation or incremental changes to a distributed energy resource aggregation already participating in the markets.[169]

a. Requests for Clarification or Rehearing

66. AEE/AEMA argue that energy efficiency resources should not be included in the pre-aggregation distribution utility review process because such resources never pose a risk to reliable or safe operation of the distribution system.[170] AEE/AEMA assert that a review process that is virtually guaranteed to reach the same conclusion every time regarding the non-impact of energy efficiency resources is precisely the type of arbitrary barrier to wholesale market participation that the Commission acted to remove in Order No. 2222.[171] Similarly, Public Interest Organizations also state that, for resources that do

[169] *Id.* P 292.

[170] AEE/AEMA Request for Rehearing at 22-23.

[171] *Id.* at 19-21.

not inject power into the distribution system, there should be a presumption of no impact.[172]

67. Public Interest Organizations request that the Commission clarify that the distribution utility actually hosting the distributed energy resource being added to a distributed energy resource aggregation should be the only utility given an opportunity to conduct the distribution utility review.[173] In addition, they request that the Commission clarify that a distribution utility should not be permitted to object to the withdrawal of a resource from a distributed energy resource aggregation, and that distribution utility review is only required when a resource joins an existing aggregation, not when a resource leaves an aggregation.[174]

68. Public Interest Organizations request that the Commission's direction that the length of time needed to complete the distribution utility review "should not exceed 60 days" be clarified to indicate that 60 days is the firm limit on the amount of time for distribution utility review.[175] Public Interest Organizations also urge the Commission to encourage development of shorter review periods involving initial registration of

[172] Public Interest Organizations Request for Rehearing at 39.

[173] *Id.* at 36.

[174] *Id.* at 36-37.

[175] *Id.* at 37 (quoting Order No. 2222, 172 FERC ¶ 61,247 at P 295).

aggregations under a certain size or additions of resources under certain sizes to an existing aggregation.[176]

b. Commission Determination

69. We deny AEE/AEMA's and Public Interest Organizations' requested clarifications with respect to energy efficiency resources and resources that do not inject power into the distribution system. Although such resources participating in distributed energy resource aggregations may be less likely to pose distribution reliability concerns than other types of distributed energy resources, we find that including them in the distribution utility review process is also necessary in order for the reviewing utility to consider non-reliability issues associated with such resources as part of an aggregation, such as the potential for double-counting of peak load reductions provided by energy efficiency resources that participate in both retail programs and wholesale markets. Further, assuming that AEE/AEMA and Public Interest Organizations are correct that such resources by nature have no negative reliability impacts,[177] the incremental time and effort required by the reviewing utility to reach that conclusion will likely be negligible,

[176] *Id.* at 37-38.

[177] *See, e.g.*, AEE/AEMA Request for Rehearing at 20 ("By their very nature, energy efficiency resources do not burden utility systems because neither they nor their aggregators negatively impact the cost, operation, or reliability of distribution utilities or the distribution system. Energy efficiency resources effectively reduce electricity demand without the need for an RTO/ISO or a utility to take any actions—they operate without a dispatch signal and do not put any power out onto the distribution grid.").

therefore diminishing the value of the presumption requested by Public Interest Organizations.

70. We grant Public Interest Organizations' request to clarify that only the distribution utility hosting a distributed energy resource (i.e., the utility that owns and/or operates the distribution system to which the resource is interconnected) should be given an opportunity to review the addition of that resource to a distributed energy resource aggregation. We believe that adding a resource to a distributed energy resource aggregation is unlikely to directly affect the distribution system of more than the one distribution utility that hosts the distributed energy resource. Disputes regarding the distribution utility review process—including those between non-host distribution utilities and a host distribution utility or the RTO/ISO—may be resolved through the RTO's/ISO's dispute resolution process, the Commission's Dispute Resolution Service, or complaints filed pursuant to FPA section 206 at any time.[178]

71. We deny Public Interest Organizations' requested clarification regarding distribution utility review when a distributed energy resource leaves an aggregation. Although any modification triggers the distribution utility review process, the Commission clarified that it may be appropriate for each RTO/ISO to abbreviate the distribution utility's review of modifications to distributed energy resource aggregations, including the addition or removal of individual resources.[179] As the Commission

[178] Order No. 2222, 172 FERC ¶ 61,247 at P 299.

[179] *Id.* P 337.

explained, in most cases, removal of an individual resource from an aggregation should not negatively impact the distribution system. Nevertheless, the Commission found that an abbreviated process allows distribution utilities to update their records and ensure that the removal does not create negative impacts. Occasionally, the removal of a resource, particularly a large resource, from an aggregation could drastically change the operation and configuration of an aggregation on the distribution system and would need to be examined by a distribution utility. However, because such drastic impacts will likely be the exception more than the rule, we encourage RTOs/ISOs to propose abbreviated distribution utility review processes for modifications to existing aggregations. For example, an RTO/ISO may propose an abbreviated distribution utility review process as a default when an existing aggregation is modified but allow for a more fulsome review when a modification surpasses some materiality threshold or meets certain criteria.

72. We grant Public Interest Organizations' request to limit the length of distribution utility review to no more than 60 days. As the Commission stated in Order No. 2222, a lengthy review time or the lack of a deadline could erect a barrier to distributed energy resource participation in the RTO/ISO markets and may unduly delay participation.[180] We expect that 60 days should be the maximum time needed for most distribution utility reviews. If an RTO/ISO believes unusual circumstances could give rise to the need for additional distribution utility review time, it may propose provisions for certain exceptional circumstances that may justify additional review time. In addition, as Public

[180] *Id.* P 295.

Interest Organizations request, we encourage shorter review periods for smaller aggregations and resources to the maximum extent practicable, and reiterate that any proposed review period must be shown to be reasonable based on what is being reviewed.

2. Information Sharing and Procedural Safeguards

73. In Order No. 2222, the Commission required each RTO/ISO to establish market rules that address information and data requirements for distributed energy resource aggregations.[181] To support the distribution utility review process, the Commission required RTOs/ISOs to share any necessary information and data about individual distributed energy resources with distribution utilities, and that the results of a distribution utility's review be incorporated into the distributed energy resource aggregation registration process.[182] The Commission also directed RTOs/ISOs to ensure that their distribution utility review processes are transparent and contain specific review criteria.[183] Finally, the Commission required each RTO/ISO to revise its tariff to establish a process for ongoing coordination, including operational coordination, that addresses data flows and communication among itself, the distributed energy resource aggregator, and the distribution utility.[184]

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[181] *Id.* P 236.

[182] *Id.* P 292.

[183] *Id.* P 293.

[184] *Id.* P 310.

a. Request for Clarification or Rehearing

74. Public Interest Organizations request that the Commission clarify that an aggregator should receive any information that a distribution utility provides an RTO/ISO regarding one of its resources, whether related to registration or ongoing operational coordination.[185] Public Interest Organizations argue that this will enable efficient responses by aggregators to regulatory and market conditions and also provide the opportunity for aggregators to supplement or correct information, helping support information quality. In addition, Public Interest Organizations request clarification that any decision to deny wholesale market access to a resource should require clear and convincing evidence of a threat to distribution system reliability caused by specific changes in distributed energy resource operation as a result of wholesale market participation.

b. Commission Determination

75. We grant Public Interest Organizations' requested clarification that the specific information regarding a distributed energy resource that is provided by a distribution utility to an RTO/ISO as part of the distribution utility review process should be shared with the distributed energy resource aggregator. Such information could include whether a resource: (1) affects the safety and reliability of the distribution system; or (2) is capable of participating in an aggregation.[186] We agree that this information sharing will

[185] Public Interest Organizations Request for Rehearing at 38.

[186] *See* Order No. 2222, 172 FERC ¶ 61,247 at P 292.

provide the transparency sought by Public Interest Organizations and provide aggregators the opportunity to supplement or correct information as necessary. In addition, on a more general level, to the extent a distribution utility declines to provide distributed energy resources the information needed to participate in RTO/ISO markets via an aggregation, we expect that RTOs/ISOs will provide an avenue to facilitate those resources' participation, including, where appropriate, the use of the RTO/ISO dispute resolution procedures.

76. We deny Public Interest Organizations' request to clarify that wholesale market access cannot be denied without clear and convincing evidence of a threat to distribution system reliability. However, we clarify that, to the extent a distribution utility recommends removal of a distributed energy resource from an aggregation due to a reliability concern, an RTO/ISO should not remove the resource without a showing that the resource's market participation presents a threat to distribution system reliability.[187] In Order No. 2222, the Commission required that each RTO/ISO coordinate with distribution utilities to develop a distribution utility review process that is non-discriminatory and transparent[188] and that includes criteria by which the distribution utilities will determine whether a proposed distributed energy resource will pose

[187] *See id.* P 297 (finding that such a request for removal of a distributed energy resource from an aggregation should be based on specific significant reliability or safety concerns that the distribution utility clearly demonstrates to the RTO/ISO and distributed energy resource aggregator on a case-by-case basis).

[188] *See id*. PP 292-293.

"significant risks to the reliable and safe operation of the distribution system."[189] We are thus providing each RTO/ISO with flexibility to develop review procedures and criteria appropriate for its region, and we recognize that distribution utility review is an important step to ensure that wholesale market participation does not threaten distribution system reliability. We expect, however, that criteria proposed on compliance will require that an RTO/ISO decision to deny wholesale market access to a distributed energy resource for reliability reasons be supported by a showing that the resource presents significant risks to the reliable and safe operation of the distribution system. The Commission also suggested in Order No. 2222 that RTOs/ISOs may consider requiring a signed affidavit or other evidence from the distribution utility that a distributed energy resource's participation in RTO/ISO markets would pose a significant risk to the safe and reliable operation of the distribution system.[190] Such a process would require a distribution utility to justify the removal of, or establishment of operating limits for, a resource that does not inject onto the distribution system.

3. Duplication of Interconnection Review

a. Request for Clarification or Rehearing

77. Public Interest Organizations request that the Commission clarify how the distribution utility review relates to interconnection agreements and standards in order to

[189] *Id.* P 292.

[190] *Id.* P 297.

avoid duplicative review.[191] In particular, where a resource is already subject to an executed distribution network interconnection agreement, Public Interest Organizations argue that the scope of utility review of that resource's inclusion in an aggregation participating in wholesale markets should be strictly limited to matters not already addressed in the interconnection agreement. Furthermore, according to Public Interest Organizations, in order to object to a resource's participation in a wholesale market aggregation, the utility should bear the burden of proving that the manner in which the resource will operate (including the extent and timing of exports) is outside the range of scenarios contemplated in its interconnection agreement.[192]

78. Additionally, where the utility establishes a valid reliability or safety concern associated with a resource's participation in a distributed energy resource aggregation, Public Interest Organizations argue that the utility should be required to give the resource in question an opportunity to modify its interconnection agreement to address the identified concerns and enable wholesale market participation. Finally, with respect to a utility's review of issues not addressed in an interconnection agreement, Public Interest Organizations urge the Commission to clarify its expectation that this would be a narrow range of reliability or safety concerns and to encourage the codification of such concerns into interconnection standards.[193]

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[191] Public Interest Organizations Request for Rehearing at 39-41.

[192] *Id.* at 40.

[193] *Id.* at 40-41.

b. Commission Determination

79. We partially grant Public Interest Organizations' requested clarification to the extent that, when the Commission found that RTOs/ISOs must include potential impacts on distribution system reliability as a criterion in the distribution utility review process,[194] the Commission was referring specifically to any incremental impacts from a resource's participation in a distributed energy resource aggregation that were not previously considered by the distribution utility during the interconnection study process for that resource. For instance, if the original interconnection study process for a particular distributed energy resource did not consider the impacts to distribution system reliability under scenarios that would account for the resource's participation in a distributed energy resource aggregation in RTO/ISO markets, such as the impact of full generation output while associated load is at a minimum level, then that resource's participation in a distributed energy resource aggregation could present previously unconsidered safety and reliability impacts to the distribution system.

80. We deny Public Interest Organizations' request to encourage the codification of a distribution utility's reliability or safety concerns into interconnection standards or to require that a distribution utility offer a distributed energy resource an opportunity to modify its interconnection agreement to address such concerns. In Order No. 2222, the Commission declined to exercise its jurisdiction over the interconnections of distributed energy resources to distribution facilities for the purpose of participating in RTO/ISO

[194] Order No. 2222, 172 FERC ¶ 61,247 at P 297.

markets exclusively as part of a distributed energy resource aggregation.[195] Further, the Commission stated that the final rule in no way prevents state and local regulators from amending their interconnection processes to address potential distribution system impacts due to the participation of distributed energy resources in aggregations.[196] Moreover, the distribution utility review process, including its processes for dispute resolution as necessary, will allow a distributed energy resource aggregator to address any concerns raised by the distribution utility and propose additional mitigation measures.

4. RERRA Involvement

81. In Order No. 2222, the Commission required each RTO/ISO to specify in its tariff, as part of the market rules on coordination, how each RTO/ISO will accommodate and incorporate voluntary RERRA involvement in coordinating the participation of aggregated distributed energy resources in RTO/ISO markets.[197]

a. Request for Clarification or Rehearing

82. Public Interest Organizations request that the Commission encourage RTOs/ISOs to explain in their compliance filings how they will ensure that coordination with RERRAs does not unjustly limit distributed energy resource aggregators' access to wholesale markets.[198]

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[195] *Id.* P 90.

[196] *Id.* P 294.

[197] *Id.* P 322.

[198] Public Interest Organizations Request for Rehearing at 41-42.

b. Commission Determination

83. We deny Public Interest Organizations' requested clarification. In Order No. 2222, the Commission recognized the voluntary role that RERRAs can play, as the regulatory agencies governing distribution utilities and the distribution system, in stakeholder discussions to establish RTO/ISO rules for distributed energy resource aggregations.[199] In recognizing this role, the Commission required that each RTO/ISO must specify in its tariff any role for RERRA involvement in coordinating the participation of distributed energy resource aggregations in RTO/ISO markets.[200] Consistent with the goals of Order No. 2222,[201] the Commission will evaluate on compliance whether an RTO's/ISO's proposal delineates a role for RERRAs that would result in unjust and unreasonable limits on the participation of distributed energy resource aggregators in wholesale markets.

III. Information Collection Statement

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

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[199] Order No. 2222, 172 FERC ¶ 61,247 at PP 322-324.

[200] *Id.* P 324.

[201] *See id.* P 279 (stating that "coordination requirements should not create undue barriers to entry for distributed energy resource aggregations"); *see also id.* P 130 ("The Commission will evaluate each 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.").

IV. Regulatory Flexibility Act

85. The Regulatory Flexibility Act of 1980 (RFA)[202] 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 this rule will not have a significant economic impact on a substantial number of small entities.

V. Document Availability

86. 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).

87. 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.

[202] 5 U.S.C. 601-612.

88. 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. Effective Date and Congressional Notification

89. The further revised regulation in this order is effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements

By the Commission. Commissioner Danly is dissenting with a separate statement attached.
Commissioner Christie is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission is proposing to amend Part 35, Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 35 – FILING OF RATE SCHEDULES AND TARIFFS

1. The authority citation for Part 35 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

2. In § 35.28, paragraph (g)(12)(i) is revised as follows:

§ 35.28 Non-discrimination open access transmission tariff.

* * * * *

(g) * * *

(12) * * *

(i) Each independent system operator and regional transmission organization must have tariff provisions that allow distributed energy resource aggregations to participate directly in the organized wholesale electric markets. . . .

(i) Each independent system operator and regional transmission organization must have tariff provisions that allow distributed energy resource aggregations to participate directly in the ~~organized wholesale electric~~ **independent system operator or regional transmission organization** markets. . . .

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators	Docket No.	RM18-9-002

(Issued March 18, 2021)

DANLY, Commissioner, *dissenting*:

1. I dissent from this order on rehearing of Order No. 2222, the Commission's distributed energy resource aggregations mandate, for the same reasons that I dissented from the original.[1] It oversteps the reasonable exercise of the Commission's authority at the expense of the states. I am surprised and disappointed that no party sought rehearing of the Commission's decision not to establish a state opt-out—if parties, especially states, do not vigorously advocate for their own interests before the Commission, their failure denies the Commission the record evidence it needs to weigh the issues at stake in our proceedings and, more critically, they deprive themselves of a vehicle for appeal.

2. I acknowledge the recent cases upon which the Commission relies to exercise its jurisdiction in this order, but these cases concerned whether the Commission possesses claimed authority, reserving the question of whether the Commission has discretion to exercise it.[2] Clearly the Commission has the power, exclusive jurisdiction or not, to establish a state opt-out.[3] I would decline to exercise our jurisdiction to obstruct the states from asserting authority over distributed energy resource aggregations. The Commission owes fidelity to the clear division of jurisdiction between the federal government and the states, a due regard for federalism that is embedded in the very structure of the Federal Power Act (FPA). This order unnecessarily invades an area best

[1] *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 (2020) (Danly, Comm'r, dissenting).

[2] *Compare FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016) (*EPSA*), *with Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020) (*NARUC*).

[3] *See NARUC*, 964 F.3d at 1189 ("The Supreme Court described the opt-out feature as 'cooperative federalism . . . .'") (quoting *EPSA*, 136 S. Ct. at 780).

left to the states, burdening them with another of our Good Ideas, the details of which we leave them to figure out, and the burdens of which we leave to them to bear.

3. And, as always, this decision, which flies in the face of the division of state and federal authority in the FPA, will inevitably lead to more conflicting and incoherent law in which no principled basis can be adduced for why the Commission embraces some actions while at the same time refusing to countenance others. Put another way: blurred lines create fuzzy results. For example, the Commission ruled in Order No. 2222 that it has jurisdiction and chose to exercise it over the electricity sales of distributed energy resource aggregations. Or, as we summarized it in today's order,

> the Commission found that it has jurisdiction to decide which entities may participate in wholesale markets, which means that a [relevant electric retail regulatory authority (RERRA)] cannot broadly prohibit the participation in RTO/ISO markets of all distributed energy resources or of all distributed energy resource aggregators, as doing so would intrude upon the Commission's statutory authority to ensure that wholesale electricity markets produce just and reasonable rates.[4]

4. The Commission's assertion of authority over "RERRAs," including "states," includes electricity sales by qualifying facilities even if the qualifying facility is the sole entity in a distributed energy resource aggregation, which, by the by, strikes me as loading the term "aggregation" with quite a bit more weight than it can reasonably bear.[5]

5. As if to intentionally muddy the waters, we then "clarify" on rehearing that "we decline to exercise our jurisdiction over the interconnections of distributed energy resources" that also are qualifying facilities that participate in a distributed energy resource aggregation.[6] This also is true even if the qualifying facility is the sole entity in a distributed energy resource aggregation.[7] We decline this latter exercise of our authority "to avoid a significant increase in the number of distribution-level [qualifying facility (QF)] interconnections subject to the Commission's jurisdiction, which . . . could

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[4] *Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 2222-A, 174 FERC ¶ 61,197, at P 6 (2021).

[5] *See* Order No. 2222, 172 FERC ¶ 61,247 at P 186.

[6] Order No. 2222-A, 174 FERC ¶ 61,197 at P 47.

[7] *See id*. PP 42-47.

create uncertainty and potentially impose an overwhelming burden on RTOs/ISOs."[8] We also cite the "confluence of local, state, and federal authorities over QF distributed energy resource interconnections."[9]

6. I agree wholeheartedly with every word of that. And these are the exact same excellent reasons to decline to exercise any authority we may have over distributed energy resource aggregations in the first place. It is difficult to square these two outcomes. Either we have jurisdiction over "aggregations" of QF power that allows us to prevent the states from prohibiting QFs from selling in the RTO markets, or we do not. But once we have asserted that we do have such jurisdiction over aggregators selling power generated by QFs interconnected at the distribution level, it is odd indeed to then disclaim jurisdiction over the QF's interconnections. These are the kinds of inconsistent determinations that inevitably arise when the Commission goes too far in exercising its discretion to assert its jurisdiction absent a principled basis. This inconsistency counsels strongly for prudent, deliberate action before the Commission usurps the states' already diminishing power.

7. My point is not that I want the Commission to exercise jurisdiction over QF interconnections at the distribution level, but that I prefer that the Commission stay out of the way when it can—as it certainly can here—and let the states exercise their own authority to the maximum extent possible over distribution systems and retail sales. A free enterprise market system might also develop and do a better job than the Commission at efficiently allocating resources to the development of distributed energy resources. I prefer that free-market, local approach over drawing arbitrary lines between Commission and "RERRA" authority, such as over the sales but not the interconnections of QFs participating—even as the sole entity—in distributed energy resource aggregations.

8. We saw the same jurisdictional inconsistencies when it came to demand response. The Commission previously required (some assert, "allowed") wholesale demand response programs to permit states to opt out.[10] In Order No. 2222, the Commission worked itself into fits to assert jurisdiction over distributed energy resource aggregations, which include many demand response resources, without detracting from the state opt-out the Commission previously required (or "allowed") for wholesale demand response

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[8] *Id*. P 47.

[9] *Id.*

[10] *See Wholesale Competition in Regions with Organized Elec. Mkts.*, Order No. 719, 125 FERC ¶ 61,071, at P 154 (2008), *order on reh'g*, Order No. 719-A, 128 FERC ¶ 61,059, at P 60, *reh'g denied*, Order No. 719-B, 129 FERC ¶ 61,252 (2009) .

programs.[11] Today we issue a Notice of Inquiry aimed at eliminating the state opt-out for demand response.[12] While one may see this as an admirable first, if small, step toward consistency, it would have been better, and consistent from the outset, if the Commission simply honored the states and their decision whether or not to participate in wholesale programs.

9. But the inconsistency is not cabined merely to this genus of Commission-created wholesale program—no, it is seen in nearly all the Commission's treatment of our jurisdictional markets. The same Commission that asserts jurisdiction over distribution resources and demand response, seemingly to "protect" the wholesale markets, enthusiastically permits the states to suppress wholesale capacity market prices through renewable subsidy programs. We issue such an order today in a ruling that—inexplicably—holds that an expansive Virginia tax break that overwhelmingly targets new solar resources is *not* a state subsidy under PJM's minimum offer price rule because other types of pollution controls also qualify for the relief.[13] The notion that the Commission acts to protect wholesale markets when it deprives the states of their authority over local concerns that may affect those markets cannot be squared with our simultaneous decisions granting the states broad latitude to distort the same markets.

10. As a final thought, I would simply issue a warning. The Commission's longstanding policy has been to promote the development of RTOs and ISOs.[14] As the march of federal overreach into the retail and distribution operations of RTO participants proceeds apace, it becomes increasingly difficult to imagine why any utility that has not already joined an RTO would even consider joining or forming a new one. Assertion of

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[11] *See* Order No. 2222, 172 FERC ¶ 61,247 at P 145; *see also id*. at PP 41-43, 118.

[12] *See Participation of Aggregators of Retail Demand Response Customers in Mkts. Operated by Reg'l Transmission Orgs. and Indep. Sys. Operators*, 174 FERC ¶ 61,198 (2021).

[13] *See Hollow Road Solar LLC*, 174 FERC ¶ 61,200 (2021).

[14] *See*, *e.g.*, *Reg'l Transmission Orgs.*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) (cross-referenced at 89 FERC ¶ 61,285), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (cross-referenced at 90 FERC ¶ 61,201), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish Cty. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001); Order No. 719, 125 FERC ¶ 61,071 at P 1 ("National policy has been, and continues to be, to foster competition in wholesale electric power markets. This policy was embraced in the Energy Policy Act of 2005 . . . and is reflected in Commission policy and practice.") (citation omitted).

jurisdiction, especially when exercised inconsistently and in tension with the statute, will do nothing to encourage the development of our markets.

11. In sum, I would decline to exercise our jurisdiction over distributed energy resource aggregations, including both the sales *and* interconnections of qualifying facilities participating in a distributed energy resource aggregation, whether the sole resource in the aggregation or not.

For these reasons, I respectfully dissent.

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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.	RM18-9-002

(Issued March 18, 2021)

CHRISTIE, Commissioner, *dissenting*:

1. Today the majority doubles down on siding with commercial interests seeking entry into the RTO/ISO markets and against the states and other authorities[1] whose job is to defend the *public*, not private, interest.[2] By doing so, the majority also 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."[3]

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[1] Other Relevant Electric Retail Regulatory Authorities (RERRAs), as referenced in both Orders No. 2222 and 2222-A, include municipal and public-power authorities, and electric co-operatives, all of whom face costly operational compliance challenges. *See, e.g.*, November 6, 2019 Reply Comments of the National Rural Electric Cooperative Association (NRECA) at 3-6, February 13, 2017 Comments of American Public Power Association (APPA) and NRECA at 22; *see also* April 17, 2019 Supplemental Comments of APPA and NRECA at 2-3, 5-6.

[2] *See also* June 26, 2018 Comments of the National Association of Regulatory Utility Commissioners (NARUC) at 3-4 ("State commissions, like FERC, are required to act in the public interest. The limited opt-out provision envisions a scenario in which an entity that is solely motivated by its commercial interests makes a unilateral decision about its participation before the State commission can determine whether this distribution asset should participate in that market, which puts profits before State responsibilities. FERC should not eschew cooperative federalism and attempt to give control over resource adequacy and other crucial State decisions to a commercial stakeholder instead of FERC's longstanding partners in energy regulation, State commissions.")

[3] Technically speaking, Order No. 2222-A is issued today in response to requests for rehearing of Order No. 2222, approved by the Commission last September, when I was not a member. It keeps all the worst aspects of Order No. 2222 largely intact; the relatively minor changes it does make, render Order No. 2222 even worse in its

2. It is indeed ironic that at the same time we hear many, including some members of this Commission, demanding that FERC 'respect' state public policies in capacity markets instead of imposing MOPR-type rules (and I have agreed with trying to accommodate state policies in RTO markets), this order goes in the exact opposite direction. So apparently 'respect' for state public policies only applies when states are doing what some want.

3. 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. A rapid concentration of behind-the-meter aggregated DERs at various locations on the local grid will inevitably require costly upgrades to a distribution grid that has largely been engineered to deliver power *from* the substation *to* end-user retail customers. Meeting the technological challenges of this re-engineering of the local grid are not insuperable but there are substantial costs and we all know these costs will ultimately be imposed on retail consumers. States, public-power authorities and co-operatives are far better positioned to manage these costs and competing interests in their own areas of responsibility than FERC.[4]

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infringement on state policies and potential costly impact on consumers.

[4] While Order No. 2222-A ostensibly leaves state regulators in charge of interconnection, that apparent authority is merely an illusion if state regulators are blocked from the fundamental decision whether interconnection for purposes of entry by aggregators into RTO markets is worth the costs to all consumers of the system upgrades necessary to protect reliability. Even more practically, this order invites endless litigation as commercial interests seeking entry into RTO markets challenge state interconnection policies as illegal barriers to entry and use litigation as a weapon against the state regulators, public-power authorities and co-operatives, which are limited in the resources they have available to fight such litigation. *See, e.g.*, Order No. 2222-A at P 83 ("Consistent with the goals of Order No. 2222, the Commission will evaluate on compliance whether an RTO's/ISO's proposal delineates a *role for RERRAs that would result in unjust and unreasonable limits on the participation of distributed energy resource aggregators in wholesale markets.*" (footnote omitted)) (emphasis added).

5. Order No. 2222-A is not "cooperative federalism,"[5] but its opposite. It undermines the overarching policy framework that Congress incorporated into the Federal Power Act decades ago: *federal* regulation of wholesale rates and the bulk power system; *state* regulation of retail rates and the local distribution grid. Any argument that allowing state policies to determine the entry of aggregated DERS into capacity or other markets will result in a 'checkerboard' or 'patchwork' of different policies, is an argument against state authority itself. The existence of fifty states by definition means a patchwork of 50 state retail regulatory structures, but that goes with the territory in our constitutional structure and is entirely consistent with the Federal Power Act's basic division of federal and state authority. This panoply of diverse state policies is exactly what Justice Brandeis celebrated when he recognized states as laboratories of democracy.[6]

6. Unfortunately this order is a missed opportunity. It could have been a constructive move in the development and deployment of behind-the-meter DERs. For at least the next several years the regime set up should have been made fully "opt out" for all load-serving utilities, including state-regulated, municipals and co-operatives, which this Commission clearly has the authority to do.[7] Providing such flexibility to the states and other RERRAs would allow them to manage the deployment of behind-the-meter DERs in ways necessary to meet their own unique challenges.

7. In addition, at a time when there has been discussion about how to incentivize states to require or allow their utilities to enter RTOs/ISOs, I note that if the cost of entering an RTO/ISO is forfeiting a big chunk of the state's authority to balance protecting its consumers with the costs of new technology deployments and associated grid upgrades, the incentive for states to approve RTO membership just took a nosedive in value with the approval of this order. Combined with the NOI obviously designed to

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[5] *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 780 (2016).

[6] *New State Ice Co. v. Liebman*, 52 S. Ct. 371, 386-87 (1932) (Brandeis, J. dissenting).

[7] The Commission recognizes in today's order that even if it possesses jurisdiction, it may provide opt-outs and opt-ins to the RERRAs. Order at P 34 (in addressing the small utility opt-in, the Commission noted that "[a] RERRA that elects not to opt in under either Order No. 719 or Order No. 2222 does not intrude on the Commission's exclusive authority over practices that directly affect wholesale rates because the Commission chose to provide such an opt-in and expressly codified this opt-in in the Commission's regulations." (footnote omitted)). To my point: even if the Commission believes it has exclusive jurisdiction, the Commission has the *discretion* to provide an opt-out or an opt-in. *See id.*

remove or severely restrict the current opt-out provisions in Order Nos. 719 and 719-A on today's agenda, these two orders may not only deter states currently outside RTOs from participation, but may well cause states in RTOs/ISOs to reconsider whether their consumers' interests are best served by continued participation.

8. Let me be clear: *encouraging the development of DERs is a good thing; eviscerating the states' historic authority in the name of encouraging DER development is not*. On the contrary, it is the states and other local authorities that are far better positioned than FERC to manage successfully the development and deployment of DERs in ways that serve reliability needs, that protect consumers from inflated costs, and that are far more sustainable in the long run.

For these reasons, I respectfully dissent.

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Mark C. Christie
Commissioner

Document Content(s)