UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF THE CALIFORNIA AIR RESOURCES BOARD, THE MAINE OFFICE OF PUBLIC ADVOCATE, AND THE ATTORNEYS GENERAL OF MARYLAND, MASSACHUSETTS, AND RHODE ISLAND

Pursuant to the Federal Energy Regulatory Commission's ("Commission" or "FERC") notice of inquiry dated March 25, 2021, the California Air Resources Board (CARB), the Maine Office of Public Advocate, and the Attorneys General of Maryland, Massachusetts, and Rhode Island (collectively, "States") submit these comments on how FERC should consider the "Demand Response Opt-Out" provisions of its prior Orders 719 and 719-A.[1] *Participation of Aggregators of Retail Demand Response Customers in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 86 Fed. Reg. 15,933 (Mar. 25, 2021) (NOI). The States support the repeal of the Demand Response Opt-Out, consistent with the Commission's treatment of other aggregations of resources at the generation, retail, or

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

distribution levels, but urge that, if the Commission finalizes that repeal, it do so while recognizing the States' traditional, statutorily preserved jurisdiction.

I. BACKGROUND

Over the past decade, as the Commission has progressively removed barriers to wholesale market participation by novel and beneficial resources, the States have supported these decisions. Orders 719, 719-A, and 745, regarding demand response; the Advanced Energy Economy Declaratory Orders,[2] regarding third-party energy efficiency resources; Orders 841 and 841-A,[3] regarding energy storage resources (ESRs); and Orders 2222 and 2222-A,[4] regarding distributed energy resources (DERs), accelerate the potential for these innovative resources to improve the efficiency of wholesale electricity markets, lower the environmental burdens of meeting electric demand, increase the grid's reliability, and reduce our ratepayers' electric bills. Several of the States and their agencies supported the Commission's demand response orders at the Supreme Court in *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260 (2016) (*EPSA*).[5]

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[2] *Order on Petition for Declaratory Order*, 161 FERC ¶ 61,245 (2017) (AEE Decl. Order), *order on reh'g*, Order Denying Rehearing & Granting Clarification in Part, 163 FERC ¶ 61,030 (2018) (AEE Reh'g Order).

[3] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), *order on reh'g*, Order No. 841–A, 167 FERC ¶ 61,154 (2019).

[4] *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222, 85 Fed. Reg. 67,094 (Oct. 21, 2020), 172 FERC ¶ 61,247 (2020), *corrected*, 85 Fed. Reg. 68,450 (Oct. 29, 2020), *order on reh'g*, Order No. 2222-A, 174 FERC ¶ 61,197 (2021), *order on reh'g*, Order No. 2222-B, 86 Fed. Reg. 33,853 (Jun. 28, 2021). Order 2222-B set aside Order 2222-A's application of the Demand Response Opt-Out to heterogeneous DER aggregations in order to consider the issue as part of this NOI. Order 2222-B, ¶ 26.

[5] The California Public Utilities Commission and States of Maryland and Pennsylvania filed briefs in support of the Commission as parties; agencies in Delaware, Illinois, and the District

(continued…)

Other States supported the Commission's decision regarding wholesale market participation by ESRs in Order 841 as amici curiae before the D.C. Circuit in *National Ass'n of Regulatory Utility Commissioners v. FERC*, 964 F.3d 1177 (2020) (*NARUC*).[6]

In *NARUC*, the challengers targeted the Commission's decision not to include an opt-out provision, similar to the Demand Response Opt-Out, whereby Regional Transmission Organizations and Independent System Operators (RTO/ISOs) could not accept participation in their wholesale electricity markets from resources located in States whose regulations prohibited such participation. Amici States agreed that the wholesale market rules adopted in Order 841 were within the Commission's authority, notwithstanding the lack of an explicit opt-out. However, we cautioned against certain statements the Commission had made in Order 841-A regarding state jurisdiction, including, for example, the assertion that state regulations that "broadly prohibited" participation by retail- or distribution-level resources in wholesale markets would be preempted. ESR Amicus Br. at pp. 25-27. In our comments, we expand on our concerns with the Commission's articulation of federal and state jurisdiction in its orders concerning aggregated generation or retail- and distribution-level resources, which the Commission has framed in similar terms with respect to DER participation. *See* Order 2222, ¶¶ 56-61; Order 2222-A, ¶ 6; *but see* Order 2222-B, ¶ 26 (setting aside Order 2222-A in relevant part).

Columbia (including Attorneys General, Public Utilities Commissions, and/or Public/Consumer Advocates) filed an amici curiae brief in support of the Commission. *FERC v. EPSA*, Nos. 14-840, 14-841 (S.Ct. July 9 & 16, 2015).

[6] *See* Brief of Massachusetts, California, District of Columbia, Michigan, and Rhode Island as Amici Curiae in Support of Respondent, *NARUC v. FERC*, Nos. 19-1142 & 19-1147 (D.C. Cir. Feb. 7, 2020) (ESR Amicus Br.).

II. COMMENTS

The Commission's continued facilitation of demand response resources' participation in the organized wholesale electricity markets is a powerful means to ensure these markets benefit consumers and the environment alike. The States support the Commission aligning RTO/ISO rules across demand response, energy storage, and DERs by eliminating the Demand Response Opt-Out. Consistent with the D.C. Circuit's decision in *NARUC*, the Federal Power Act does not require the Commission to maintain the Demand Response Opt-Out. However, in repealing the Demand Response Opt-Out, or in declining to include opt-out provisions in similar, future circumstances, the Commission should refrain from introducing unnecessary confusion regarding the interplay between its orders and the States' retained authority. States maintain jurisdiction over generation resources and transmission at the distribution and retail levels—irrespective of any Commission-created opt-out or lack thereof. The Commission should therefore avoid employing overly expansive language concerning its jurisdiction and forego expressing views about whether States *lack* jurisdiction over such resources.

A. The Commission Should Continue to Support the Full Participation of Demand Response Resources in Wholesale Electricity Markets

The States support the Commission's repeal of the Demand Response Opt-Out. As the Commission has recognized, participation of demand response in the organized wholesale electricity markets provides significant benefits in improving competitive markets, improving reliability, reducing consumer electricity costs, and reducing pollution. *See, e.g.*, Order 719, ¶ 16; *EPSA*, 577 U.S. at 269-270. In the years since Order 719 and *EPSA*, several of the undersigned States have developed innovative energy efficiency programs that harness the innate potential of energy storage and DERs to provide demand response. FERC Staff Rep., 2019 ASSESSMENT OF

DEMAND RESPONSE AND ADVANCE METERING, at 31-39 (Dec. 2019).[7] As the Commission's and States' experiences show, applying different opt-out rules to the same resources, based on a distinction between demand response and demand-side storage or generation, presents a host of needless complexities and inefficiencies. *See, e.g.*, Order 2222-A, ¶¶ 22-29 (discussing the Demand Response Opt-Out's application to heterogeneous DER aggregations that include demand response). Removing the Demand Response Opt-Out to align rules across the overlapping categories of demand response, storage, and DERs is more rational, better serves the Commission's objectives of efficient, competitive markets, and aligns with States' objectives in securing cleaner air and affordable, reliable power for consumers.

B. The Commission Should Use Caution when Asserting its "Affecting" Jurisdiction

In addressing the Demand Response Opt-Out, and similar issues, the Commission should confine its assertion of jurisdiction to RTO and ISO rules concerning the *eligibility* of resources to participate in their markets—the subject of the orders at issue. The Commission need not, and should not, opine on all rules or practices that may *impact* resource participation. To be clear, the States acknowledge that the Commission has exclusive authority under the Federal Power Act to regulate practices "affecting" wholesale electricity rates (16 U.S.C. § 824e(a)). But that by no means encompasses the entire field of electricity resources and markets. When the Commission makes unnecessary statements about the role played by state-jurisdictional resources in wholesale markets, it risks creating confusion about the preemptive effect of Commission orders.

[7] *Available at* https://www.ferc.gov/sites/default/files/2020-04/DR-AM-Report2019_2.pdf (last accessed June 23, 2021).

A more measured and precise framing of the Commission's jurisdiction will reduce confusion and the risk to state policies from unjustified preemption claims.

The risk of overbroad interpretations of the Commission's "affecting" jurisdiction is well established. *EPSA*, 577 U.S. at 277-78 (rejecting a "hyperliteral" reading of the statute that would give it "near-infinite breadth"); *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 403-4 (D.C. Cir. 2004) (remarking on the "drastic implications" of an unlimited "affecting" jurisdiction). As the Commission and reviewing courts have long recognized, state and federal actions can and do have economic impacts in each other's arenas. "It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other." *EPSA*, 577 U.S. at 281. Just as the Commission may regulate "what takes place on the wholesale market, as part of carrying out its charge to improve how that market runs, … no matter the effect on retail rates," *EPSA*, 577 U.S. at 281-82, States may regulate within their jurisdictions, no matter the effect on wholesale rates, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 (2016) ("States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain."). These economic interactions of wholesale and retail markets are especially apparent in the recent opt-out debates over demand response, energy storage, and DERs. The States recognize and applaud the Commission's pragmatic efforts to incorporate these resources into the wholesale markets. But the States have long-standing, pre- and post-FPA jurisdiction over these resources as well, given States' exclusive authority over, *inter alia*, the retail customers whose demand response is or is not aggregated and the generation and storage resources located in their territories.

Countless long-standing state policies—accepted by the Commission and the courts as valid exercises of state authority—affect which resources can participate in wholesale markets as well as how many ultimately do. Thus, the D.C. Circuit agreed with the Commission that, despite the rejection of an opt-out for energy storage in Order 841-A, "States retain their authority to impose safety and reliability requirements" and "ESRs must still obtain all requisite permits, agreements, and other documentation necessary to participate in federal wholesale markets, all of which may lawfully hinder FERC's goal of making the federal markets more friendly to local ESRs." *NARUC*, 964 F.3d at 1188. One example of such a reliability requirement, raised in the States' *NARUC* amicus brief, is the California Public Utilities Commission's requirement that storage resources prioritize local grid congestion relief over selling capacity into the wholesale market. *Decision on Multiple-Use Application Issues*, Cal. Pub. Util. Comm'n D.18-01-003 (Jan. 11, 2018); ESR Amicus Br. at p. 24 n.24. Under the Federal Power Act, States retain the authority to impose such requirements, and neither the Commission nor the courts have viewed such state actions to intrude on exclusive federal jurisdiction. An improperly expansive view of the Commission's "affecting" jurisdiction, however, could very well impugn such legitimate state regulations.

Given the risk of overbreadth, the Commission should be particularly mindful when characterizing its jurisdiction over practices affecting rates as "exclusive." When the Supreme Court affirmed the Commission's assertion of "affecting" jurisdiction over the matters regulated in Orders 719 and 745, it emphasized that those practices "*directly* affect[ed] the wholesale rate," *EPSA*, 577 U.S. at 278, as part of a "regulatory plan" whose "every aspect … happen[ed] exclusively on the wholesale market and govern[ed] exclusively that market's rules," *id.* at 282. Similarly, Order 2222 exercised FERC's exclusive jurisdiction to "establish[] the criteria for

participation in RTO/ISO markets" (at ¶ 57), while Order 841 "addresses—and addresses only—transactions occurring on the wholesale market" (Order 841-A, ¶ 44). *See also* AEE Decl. Order, ¶ 61 ("[T]he terms of eligibility of [energy efficiency resources'] participation in the wholesale market has a direct effect on wholesale rates. The Commission may set the terms of transactions occurring in the organized wholesale markets, including which resources are eligible to participate, to ensure the reasonableness of wholesale prices and the reliability of the interstate grid."). These clear and certain articulations of the Commission's jurisdiction become muddled when the Commission uses them interchangeably with assertions of exclusive "affecting" jurisdiction over a resource type's "participation" in wholesale markets. *See, e.g.*, AEE Decl. Order, ¶¶ 60, 61 (asserting an "exclusive jurisdiction to regulate the *participation* of EERs in wholesale markets" as "a practice directly affecting wholesale markets, rates, and prices") (emphasis added). The Commission's exclusive jurisdiction embraces RTOs/ISOs' *eligibility* criteria for the various resource types—rules that operate "exclusively on the wholesale market"—and this jurisdiction is enough to decide the future of the Demand Response Opt-Out. However, the Commission should avoid asserting that any regulation affecting wholesale market *participation* falls under the Commission's exclusive jurisdiction: it does not.

Put differently, there is a difference between rules that determine eligibility to participate in the wholesale markets and rules that affect which resources actually do. There is no doubt that the Commission may direct the RTOs and ISOs to allow all resources of a certain type that meet certain criteria to participate in the market. But it is quite another matter for the Commission to assert exclusive jurisdiction over any action—including, *e.g.*, a renewable portfolio standard or a statewide "net-zero" greenhouse gas emissions target—that may affect the number of participants of a given type in the market. Even if the number or type of participants influences

the ultimate wholesale rate, such state policies do not intrude on the Commission's jurisdiction "merely because … [wholesale] rates might be affected." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 387-88 (2015). These policies may alter "the background marketplace conditions that affect[] both [Commission] jurisdictional and nonjurisdictional rates," by impacting which resources can and do participate in wholesale markets, but that does not render them preempted. *Id.* at 389. Asserting otherwise "would be largely to nullify" Congress's express preservation of state authority. *Id.* at 388. The States request that the Commission honor the States' sphere of authority by being exceedingly clear in describing its "affecting" jurisdiction in any order on the Demand Response Opt-Out and in any future, similar orders.

C. The Commission Should Discontinue Asserting that State Actions "Broadly Prohibiting" Participation in the Wholesale Market Are Preempted

In declining to extend an opt-out for States in Orders 841-A and 2222, the Commission asserted that "broad prohibitions" by States on participation by relevant resources would be preempted. Order 841-A, ¶ 41; Order 2222, ¶ 58; *see also* Order 2222-A, ¶ 6; AEE Decl. Order, ¶¶ 61, 63. This categorical interpretation of federal preemption is both unnecessary and unclear. It could also have unintended adverse consequences.

Ordinarily, preemption is a case-by-case judicial analysis, and the Commission's efforts to delineate in advance and in the abstract the categories of state action that might intrude on its jurisdiction risk sowing doubt about state actions that are well established as within States' power. *See* Order 2222 (Danly, Comm'r, dissenting) at ¶ 3 ("Respect for the States' role in our federal system and under the FPA would counsel against even modest, non-essential declarations of our authority, if done at the States' expense."). While the Federal Power Act does not authorize the Commission to speak to preemption with the force of law, the Commission's

statements may nonetheless mislead potential litigants into bringing unjustified preemption claims against proper, state-jurisdictional regulations, as well as judicial consideration of such cases. And the risk of confusion may be especially heightened in this field, where the boundaries between retail and wholesale transactions will often blur. *Cf. EPSA*, 575 U.S. at 281 (noting "a 'Platonic ideal' of strict separation between federal and state realms cannot exist") (quoting *Oneok*, 575 U.S. at 388); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (observing the mutual effects of exercises of state and federal jurisdiction is the "inevitable consequence of a system in which power is shared between state and national governments").

The "broad prohibition" construction poses an especially high risk of conflating the different questions discussed earlier: which resources are eligible for participation versus which resources ultimately can and do participate. For example, a state clean energy standard certainly does not intrude on the Commission's authority to "establish[] the criteria for participation in RTO/ISO markets." (Order 2222, ¶ 57.) But if the clean energy standard effectively precludes one or more high-emitting generation resources from selling power to the States' load-serving entities at wholesale (because the load-serving entities cannot lawfully sell such power at retail), those resources or even a whole category of resources may not be able to participate in the wholesale market. Yet the Federal Power Act makes clear that States retain their traditional jurisdiction to regulate their load-serving entities' retail activities in this manner; indeed, if the Commission were to attempt to assert jurisdiction here, it would violate the Federal Power Act's reservation of State jurisdiction over retail markets and generation. 16 U.S.C. § 824(b); *EPSA*, 577 U.S. at 279-80.

The States do not understand the "broad prohibition" language to reach such a case. Rather, the Commission's clear intent is to follow the characterization of prohibited State action

in *Hughes*. *See, e.g.*, Order 841-A, ¶ 41 (discussing state actions that "aim[] directly" at RTO/ISO markets); *Hughes*, 136 S.Ct. at 1298; *see also NARUC*, 964 F.3d at 1187 ("FERC's statement in Order No. 841-A that States may not block RTO/ISO market participation … is simply a restatement of the well-established principles of federal preemption.").

However, as *Hughes* indicates, the jurisdictional line is best understood not in terms of the state regulation's breadth, but as a prohibition of States' targeting Commission market rules and attempting to replace them according to States' own judgments. According to the Supreme Court, *Hughes* involved an effort by Maryland to replace the wholesale rate generated by FERC-approved rules with a rate of the State's own choosing. 136 S.Ct. at 1298-99. Thus, where a State policy does not "second-guess" the Commission's judgment about the wholesale market, *id.* at 1298, the State does not exceed its jurisdiction even if the policy prohibits—expressly or in effect—participation by resources otherwise eligible under FERC-approved wholesale rules. *See also id.* (describing cases finding preemption as those in which "a State determined that FERC had failed to ensure the reasonableness of a wholesale rate").

Courts are best equipped to evaluate when state regulation targets the Commission's judgments about the operation of the wholesale market in this manner. Because so much of preemption analysis depends on the specific facts of the state regulation, the regulation's "aim" or "target," and the federal law or policy implicated, attempts to mark out categories of preempted state actions pose an intolerably high risk of overbreadth. *See also Hughes*, 136 S.Ct. at 1300 (Sotomayor, J., concurring) ("[C]ourts must be careful not to confuse the 'congressionally designed interplay between state and federal regulation,' … for impermissible tension that requires pre-emption under the Supremacy Clause."). Categorical assessments—however well intentioned—may expose perfectly proper state actions to costly and obstructive

challenges without any basis in the Federal Power Act, particularly where other parties attempt to extrapolate the Commission's statements beyond the context of the relevant order.

The Demand Response Opt-Out is, in effect, the Commission's waiver of the above preemption arguments as to demand response. Thus, a repeal of the Opt-Out—or a decision not to offer an opt-out in similar, future cases—would not change any jurisdictional boundaries, but simply would signal to States that they regulate "without a net," so to speak. The States and their regulatory agencies understand the constraints of the Supremacy Clause and Federal Power Act, and have every incentive not to exercise authority that infringes on the Commission's side of the jurisdictional line. But the States ask the Commission, when asserting its "affecting" jurisdiction or attempting to delineate the prohibited *Hughes*-style case in this area, to take care not to give any impression that it would move that line or draw it in a way that appears to threaten States' authority. As technological advancements in more efficient generation and distribution continue, regulation of such advancements in the wholesale power market may invite closer coordination between the Commission and States. However, this must be carefully done without infringing on the jurisdictional provinces of the Commission or the States.

III. CONCLUSION

The States appreciate the Commission's solicitation of public input on the Demand Response Opt-Out. We respectfully urge the Commission to consider the above comments and recommendations as it crafts its order on the Demand Response Opt-Out. Consistent with the Commission's treatment of other aggregated retail- or distribution-level resources, the Commission should repeal the Demand Response Opt-Out, while grounding that repeal in a sound jurisdictional basis that recognizes the States' traditional, statutorily preserved authority.

Dated: July 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at San Diego, California this 23rd day of July, 2021.

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