

145 FERC ¶ 61,162  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony Clark.

Demand Response Supporters

v.

Docket No. EL13-74-000

New York Independent System Operator, Inc.

ORDER GRANTING COMPLAINT, IN PART

(Issued November 22, 2013)

1. On June 17, 2013, Demand Response Supporters<sup>1</sup> (Complainants) filed a complaint (Complaint) against the New York Independent System Operator, Inc. (NYISO) alleging that NYISO's tariffs discriminate against demand response facilitated by behind-the-meter generation,<sup>2</sup> in violation of the Federal Power Act (FPA), Order No. 745,<sup>3</sup> and other Commission orders and regulations. Complainants seek a Commission order directing NYISO to modify definitions contained in the NYISO Market Administration and Control Area Services Tariff (Services Tariff) so that demand response facilitated by behind-the-meter generation is eligible to participate in NYISO's Day-Ahead Demand Response Program (DADRP) and, thus, is eligible to receive compensation at full Locational Based Marginal Price (LBMP) as provided by the

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<sup>1</sup> Demand Response Supporters consist of EnerNOC, Inc.; Viridity, Inc.; Walmart Stores, Inc.; Comverge, Inc.; and EnergyConnect, a Johnson Controls Company.

<sup>2</sup> "Behind-the-meter" generation refers to a generator located behind the retail delivery point that can directly serve the host customer's electrical demand in lieu of or in addition to electricity the customer takes through the NYISO grid.

<sup>3</sup> *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322, *order on reh'g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh'g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012).

DADRP.<sup>4</sup> For the reasons discussed below, the Commission grants the Complaint, in part, denies in part, and directs NYISO to make a compliance filing.

## **I. Background**

2. NYISO administers four demand response programs: the DADRP; the Emergency Demand Response Program (EDRP); the Special Case Resource (SCR) program; and the Demand Side Ancillary Services Program (DSASP). Of these programs, only the DADRP excludes the participation of demand response facilitated by behind-the-meter generation.

3. DADRP participants are permitted to submit day-ahead demand reduction bids, which are treated as a functional equivalent of traditional bids to sell energy into the day-ahead market by NYISO's Security Constrained Unit Commitment analysis. Although initially allowed to participate in the DADRP, demand response facilitated by behind-the-meter generation was excluded from participation in 2003 when the Commission accepted a NYISO tariff provision that eliminated "on-site" Local Generators<sup>5</sup> from participation in that program.<sup>6</sup>

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<sup>4</sup> Complainants use the term Locational Marginal Pricing (LMP), while NYISO uses the term Locational Based Marginal Price (LBMP). For our purposes here, the two are equivalent and we use the NYISO terminology.

<sup>5</sup> Local Generator is defined as:

a resource operated by or on behalf of a Load that is either: (i) not synchronized to a local distribution system; or (ii) synchronized to a local distribution system solely in order to support a Load that is equal to or in excess of the resource's Capacity. Local Generators supply Energy only to the Load they are being operated to serve and do not supply Energy to the distribution system.

Services Tariff § 2.12.

<sup>6</sup> *New York Indep. Sys. Operator, Inc.*, 103 FERC ¶ 61,374 (2003) (June 30, 2003 Order). Between 2001 to 2003, the program excluded only demand response facilitated by diesel behind-the-meter generators while allowing participation by demand response facilitated by other behind-the-meter generators. See *New York Indep. Sys. Operator, Inc.*, 95 FERC ¶ 61,223 (2001). The program was later modified in 2003 to exclude all behind-the-meter generators.

4. Order No. 745 required each RTO and ISO in which demand response participates in its energy market to pay a demand response resource the market price for energy, also referred to as the locational marginal price (LMP), when two conditions are met. First, the demand response resource must have the capability to balance supply and demand as an alternative to a generation resource. Second, dispatch of the demand response resource must be cost-effective as determined by a net benefits test. Order No. 745 required each RTO and ISO to submit a compliance filing to implement the compensation approach adopted by the Commission to include, among other things, an assessment of its demand response measurement and verification protocols and any modifications to those protocols that may be necessary to ensure adequate baseline measurement and verification of demand response performance.

5. In a May 16, 2013 order, the Commission accepted, in part, and rejected, in part, NYISO's filing made in compliance with Order No. 745 and required a further compliance filing.<sup>7</sup> As relevant here, the May 16, 2013 Order responded to arguments that behind-the-meter generation should be allowed to participate in the DADRP. The Commission found that Order No. 745 neither required, nor prohibited, the differentiation between demand response resources for which demand response is facilitated by behind-the-meter generation and other demand response resources. The Commission stated that if NYISO or its stakeholders determine that changes to NYISO's existing practice are warranted, such changes should be presented to the Commission in a separate proceeding.<sup>8</sup>

## **II. Complaint**

6. Complainants argue that demand response facilitated by operational shutdowns is the same as demand response facilitated by behind-the-meter generation. According to Complainants, the Commission's wholesale market design approach does not distinguish among the sources of services, and the Commission does not permit different levels of energy market compensation for supply resources based on how the supply resource's metered injection into the grid is produced. They add that, to be comparable, a single market clearing price should be paid to all demand resources. According to Complainants, any and all reductions of metered usage that comply with the

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<sup>7</sup> *New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,134 (2013) (May 16, 2013 Order). NYISO's further compliance filing, filed August 14, 2013, in Docket No. ER11-4338-002 is pending before the Commission.

<sup>8</sup> May 16, 2013 Order, 143 FERC ¶ 61,134 at P 101. Demand Response Supporters have requested rehearing of the May 16, 2013 Order. The Commission will act separately on that and other requests for rehearing of the May 16, 2013 Order.

measurement and verification rules, and otherwise comply with Order No. 745, should be compensated at full LBMP. They also assert that the Commission's regulations do not distinguish the sources of demand response.<sup>9</sup>

7. Complainants assert that not compensating demand response facilitated by behind-the-meter generation departs from Commission practice with respect to other RTOs. They argue that full LBMP compensation for demand response facilitated by behind-the-meter generation is in line with other organized wholesale markets. Complainants state that the Commission approved ISO New England Inc.'s (ISO-NE) decision to compensate demand response facilitated by behind-the-meter-generation at full LMP and stated that:

from the perspective of the grid, the manner in which a customer is able to produce a load reduction in the wholesale market from its validly established baseline (whether by shifting production, using internal generation, consuming less electricity, or other means) does not change the effect or value of the reduction to the wholesale grid.<sup>10</sup>

Complainants state that PJM Interconnection, LLC (PJM) and Midcontinent Independent System Operator, Inc. (MISO) take similar approaches by compensating at full LMP any demand response that is facilitated by the use of behind-the-meter generation. Complainants further state that the Commission rejected MISO's proposal to exclude demand response facilitated by behind-the-meter generation as part of its Order No. 745 compliance and ordered MISO to file tariff revisions that removed the discrimination against demand response resources facilitated by behind-the-meter generation.<sup>11</sup>

8. Complainants also argue that barring LBMP compensation for this type of demand response is fundamentally inconsistent with Order No. 745.<sup>12</sup> Complainants assert that the Commission has made clear that differing compensation methods for demand response participation present a barrier to demand response participation that is

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<sup>9</sup> Complaint at 7 (citing Commission Brief at 15).

<sup>10</sup> Complaint at 8 (citing *ISO New England Inc.*, 138 FERC ¶ 61,042, at P 76 (2012); Order No. 745-A, 137 FERC ¶ 61,215 at P 66).

<sup>11</sup> Complaint at 9 (citing *Midwest Independent Transmission System Operator, Inc.*, 137 FERC ¶ 61,212, at P 71 (2011) (MISO)).

<sup>12</sup> Complaint at 9.

inconsistent with Order No. 745 and result in unreasonable and discriminatory rates.<sup>13</sup> They state that one of the primary goals of Order No. 745 is to treat demand response comparably to generation and that Order No. 745 does not permit, or require, NYISO to go beyond a retail customer's meter to determine what prompted the demand response. According to Complainants, the only relevant evaluation is the decrease in the customer's metered consumption relative to anticipated consumption. They add that, by allowing NYISO to exclude demand response facilitated by behind-the-meter generation from eligibility for full LBMP compensation, the Commission, contrary to Order No. 745, effectively erects a barrier to the provision of a grid-balancing service and associated reliability benefits.

9. With respect to the June 30, 2003 Order, which accepted NYISO's proposal to revise its Services Tariff to exclude demand response facilitated by behind-the-meter generation from participation in the DADRP, Complainants state that, while it may be true that, prior to Order No. 745, NYISO received Commission approval not to compensate demand response facilitated by behind-the-meter generation,<sup>14</sup> Order Nos. 719<sup>15</sup> and 745 (and other, more recent orders) have significantly altered the landscape and call for the removal of these barriers to demand response. According to Complainants, in 2003, when the Commission approved NYISO's decision not to compensate demand response facilitated by behind-the-meter generation, Order No. 745 had not yet mandated that demand response resources be compensated at full LBMP in the RTOs and ISOs. Additionally, Complainants state, in the June 30, 2003 Order, the Commission did not discuss the proposed distinction among types of behind-the-meter generation at all, and the distinction was not subject to any protests ostensibly because demand response and competition for the provision of demand response services was still in its infancy in NYISO. Complainants assert that the June 30, 2003 Order appeared to be a package compromise from the NYISO stakeholder process, and many more recent Commission orders have trended in a much different direction.<sup>16</sup> In short, they assert, the

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<sup>13</sup> Complaint at 6 (citing *Electric Power Supply Association v. FERC*, Case Nos. 11-1486, *et al.*, Brief for Respondent Federal Energy Regulatory Commission, U.S. Court of Appeals for the District of Columbia Circuit at 21 (filed Aug. 28, 2012)).

<sup>14</sup> Complaint at 11.

<sup>15</sup> *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008) (cross-referenced at 125 FERC ¶ 61,071 (2008)), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 (2009) (cross-referenced at 128 FERC ¶ 61,059 (2009)), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

<sup>16</sup> Complaint at 11.

June 30, 2003 Order has been rendered obsolete by all that has occurred since it was issued.

10. Complainants state that formally recognizing as demand response the actual demand response that is facilitated by behind-the-meter generation is fully consistent with Order No. 719, and it requires RTOs and ISOs to accept balancing bids from demand response so long as the demand response resources:

(1) are technically capable of providing the ancillary service and meet the necessary technical requirements; and (2) submit a bid under the generally-applicable bidding rules at or below the market-clearing price, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. All accepted bids would receive the market-clearing price.<sup>17</sup>

Complainants also point to Commission statements that inclusion of demand response resources will potentially expand the resource pool in organized markets.<sup>18</sup>

11. Complainants also argue that Commission precedent supports looking only at the net impact on the grid, i.e., behind-the-meter netting, and in light of this “netting” principle, neither NYISO nor the Commission should look beyond the retail customer meter and they should not require market participants to provide any behind-the-meter information.<sup>19</sup> Complainants further argue that the FPA defines the scope of the Commission’s authority as stopping at the retail meter.

12. Complainants request that the Commission order NYISO to modify the Services Tariff so that demand response facilitated by behind-the-meter generation will be eligible for compensation at full LBMP. Specifically, Complainants submit proposed tariff changes to the definition of Demand Reduction Incentive Payment, a payment made to Demand Reduction Providers in the DADRP. Complainants would remove the Local Generator exclusion from this definition. They also propose to change the definition of Demand Side Resources to specifically state that the resource may reduce demand by either curtailment or by activating a Local Generator. Complainants also state that the

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<sup>17</sup> Complaint at 12 (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 47 (cross-referenced at 125 FERC ¶ 61,071)).

<sup>18</sup> *Id.* (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 54 (cross-referenced at 125 FERC ¶ 61,071)).

<sup>19</sup> *Id.* at 13 (citing *Cal. Indep. Sys. Operator Corp.*, 110 FERC ¶ 61,122, at P 10 (2005)).

Commission should require NYISO to amend any other sections of its tariffs that bar demand response facilitated by behind-the-meter generation from being compensated at LBMP.<sup>20</sup>

### **III. Notice of Filing and Responsive Pleadings**

13. Notice of the Complaint was published in the *Federal Register*, 78 Fed. Reg. 38,023 (2013), with interventions and protests due on or before July 8, 2013.
14. New York Transmission Owners (NYTOs),<sup>21</sup> Calpine Corporation, Electric Power Supply Association (EPSA), American Forest & Paper Association, Exelon Corporation, Consolidated Edison Solutions, Inc., Independent Power Producers of New York, Inc. (IPPNY), Verso Paper Corp., American Public Power Association, and NRG Companies filed timely motions to intervene. On July 18, 2013, Southern California Edison Company filed a motion to intervene out-of-time.
15. TC Ravenswood, LLC filed a motion to intervene and comments. EPSA and IPPNY jointly filed a protest. PSEG Power New York LLC and PSEG Energy Resources & Trade LLC (PSEG) filed a motion to intervene and protest.
16. On July 8, 2013, NYISO filed an answer to the Complaint. On July 23, 2013, Complainants filed an answer to NYISO's answer.

#### **A. NYISO's Answer to the Complaint**

17. NYISO states that it administers four separate demand response programs and qualifying behind-the-meter generation is eligible to participate in all but one of these programs, NYISO's DADRP. NYISO responds that the ineligibility of demand response facilitated by behind-the-meter generation to participate under the DADRP is just and reasonable and not unduly discriminatory. NYISO states that the Commission has recognized that the "dissimilar treatment of dissimilar resources does not constitute undue discrimination," and it argues that demand response facilitated by behind-the-meter generation differs from other demand response resources and raises particular market and

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<sup>20</sup> Complaint at 5 & Attachment 1, at 24-25.

<sup>21</sup> For purposes of this proceeding the NYTOs consist of: Consolidated Edison Company of New York, Inc.; Central Hudson Gas & Electric Corporation; Orange and Rockland Utilities, Inc.; Niagara Mohawk Power Corporation; Rochester Gas and Electric Corporation; New York State Electric & Gas Corporation; New York Power Authority; and Long Island Power Authority.

reliability concerns that justify its current ineligibility.<sup>22</sup> NYISO states its existing DADRP is designed for load curtailment resources and that participation of demand response facilitated by behind-the-meter generation would require NYISO to develop and implement new rules that recognize the use of behind-the-meter generation as a supply resource in the energy market. NYISO states the “simplistic” tariff revisions proposed by Complainants ignore that implementation considerations and revisions are complex and require careful evaluation. NYISO also responds that Order No. 745 does not require an ISO/RTO to make changes to the eligibility for participation in demand response programs of demand response facilitated by behind-the-meter generation.

18. With respect to its market and reliability concerns, NYISO asserts that because behind-the-meter generators are not subject to metering or reporting requirements, NYISO has limited operational control over, and limited visibility into, their availability and performance. NYISO states that this hinders NYISO’s ability to identify when these resources are running and for what reason they are running.<sup>23</sup> NYISO adds that this would impede its ability under the DADRP to establish an accurate baseline for demand response facilitated by behind-the-meter generation and to measure and verify whether such demand response actually occurs. Moreover, according to NYISO, such limited control and visibility would create opportunities under the DADRP for demand response facilitated by behind-the-meter generation to receive multiple payments for the same output and to potentially game the DADRP rules to receive payments without actually reducing demand.

19. NYISO argues that there are legitimate grounds for distinguishing between different sources of demand response for purposes of the DADRP and to further distinguish behind-the-meter generators from conventional in-front-of-the-meter generators because behind-the-meter generation is not subject to the same metering, reporting, and operational requirements. NYISO explains that the output of conventional generators is measured and reported through real-time telemetry at six second intervals with meters installed, maintained, and independently verified by the Transmission Owner in the Transmission District in which the generator is located. In addition, according to NYISO, conventional generators must satisfy NYISO’s interconnection study processes as well as extensive operational availability and outage reporting requirements.

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<sup>22</sup> NYISO July 8, 2013 Answer at 2 (citing *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,061, at P 70 (2007)).

<sup>23</sup> NYISO states that it addressed similar concerns for the DSASP, after conducting an extensive stakeholder process, by requiring metering and other requirements for behind-the-meter generation. NYISO July 8, 2013 Answer at 11-12.

20. NYISO acknowledges that other regions, such as ISO-NE, allow participation in the energy market by demand response facilitated by behind-the-meter generation; however, such regions include more metering requirements.<sup>24</sup> NYISO states that it currently does not have similar provisions in its tariff or procedures, and that these provisions need to be carefully evaluated with its stakeholders. NYISO also asserts that neither Order No. 745 nor other Commission orders require that there be a standard market design among ISOs/RTOs for their demand response programs.

21. Responding to Complainants' arguments that NYISO and the Commission have no jurisdiction with respect to behind-the-meter activities, NYISO states that both it and the Commission have legitimate grounds for concern about what happens behind the meter with respect to opportunities for multiple payments and possible gaming. NYISO states that in New York, loads with behind-the-meter generation are permitted to sell output to the local distribution utility under a retail tariff that typically reflects the NYISO LBMP. NYISO explains that existing DADRP rules do not address the scenario that, if demand response facilitated by behind-the-meter generation were to receive a DADRP schedule during any hour in which the energy was being provided to the local distribution utility under the retail tariff provision, the load reduction would be compensated twice, once under the retail tariff and once under the DADRP. NYISO also states that given its lack of visibility and control over behind-the-meter generation, the demand response resource or its representative in the wholesale market could misrepresent the load reduction either by manipulating the baseline or withholding information that is relevant to the demand response resource's enrollment or participation.<sup>25</sup>

22. NYISO states that the Commission has been clear that Order No. 745 "focused exclusively on the amount of payment demand response would receive and did not require any changes with respect to whether load relying on behind-the-meter generation

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<sup>24</sup> NYISO July 8, 2013 Answer at 12 (citing ISO-NE, Compliance Filing, Docket No. ER11-4336-000 (filed Aug. 19, 2011)).

<sup>25</sup> NYISO cites to recent Commission enforcement actions. NYISO July 8, 2013 Answer at 14-15 (citing *Rumford Paper Co.*, 140 FERC ¶ 61,030 (2012)).

would be entitled to demand response compensation.”<sup>26</sup> NYISO adds that the Commission has rejected, as outside the scope of Order No. 745, changes to the eligibility for compensation of demand response facilitated by behind-the-meter generation,<sup>27</sup> and that the Commission specifically refused to find that NYISO’s exclusion of demand response facilitated by behind-the-meter generation from its demand response program was inconsistent with Order No. 745.<sup>28</sup>

23. NYISO asserts that the Commission should not permit Complainants to make an end-run around an ongoing stakeholder process that is currently exploring revisions to its demand response programs including discussions on the role of behind-the-meter generation. NYISO states that, in October 2012 and December 2012, it presented to the NYISO Business Issues Committee its market design concepts for dispatchable demand response in the real-time energy market including discussions of market design changes to allow participation of behind-the-meter generation. In addition, according to NYISO, it began work in June 2013 on a study on distributed energy resources to determine information that will inform the development of requirements for the participation of behind-the-meter generation in a revised economic demand response program. NYISO states that allowing short-cuts around its process would create harmful incentives to avoid collaboration and compromise.

#### **B. Protests**

24. PSEG, and EPSA and IPPNY,<sup>29</sup> similar to NYISO, argue that Complainants have failed to satisfy their burden of proof. They assert that the Commission made it clear that ISO/RTOs were not required to adopt any generic treatment of demand response facilitated by behind-the-meter generation and were instead permitted to maintain the status quo with respect to their treatment of these resources.<sup>30</sup> They argue that the

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<sup>26</sup> NYISO July 8, 2013 Answer at 17 (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,059, at P 29 (2012)).

<sup>27</sup> *Id.* (citing, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,212, at P 71 (2011); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,216, at P 94 (2011)).

<sup>28</sup> *Id.* (citing May 16, 2013 Order, 143 FERC ¶ 61,134 at P 101).

<sup>29</sup> TC Ravenswood, LLC filed comments stating that it supports the protest of EPSA and IPPNY.

<sup>30</sup> EPSA and IPPNY July 8, 2013 Protest at 7 (citing, *inter alia*, Order No. 745-A, 137 FERC ¶ 61,215, at P 66 (2011)).

Commission has accepted as just and reasonable NYISO's 2003 modifications to its Services Tariff that clearly exclude demand response facilitated by behind-the-meter generation from participation in the DADRP. They assert that Complainants have not demonstrated this exclusion to be unjust and unreasonable, but even if they had, Complainants have not demonstrated that their advocated approach is just, reasonable and not unduly discriminatory; and, according to EPSA and IPPNY, the opposite is true. They contend that the clear focus of the Commission's regulation is on reducing consumption and makes no suggestion that incremental supply should be considered. They assert that the introduction of the behind-the-meter generation in the energy market would lead to inefficiencies as economically competitive and environmentally efficient generation would be displaced by behind-the-meter generation that is uneconomic and environmentally less efficient, thus harming both the competitive market and the environment.<sup>31</sup>

### C. Complainants' Answer

25. Complainants reiterate their argument that demand response facilitated by behind-the-meter generators is not dissimilar from other types of demand response. They assert that NYISO's argument regarding the difficulty of establishing a measurement and verification approach for demand response facilitated by behind-the-meter generation participating in the DADRP is flawed. They contend that NYISO admits that it addressed similar concerns regarding participation of demand response facilitated by behind-the-meter generation in the DSASP, which necessitated metering and other requirements.<sup>32</sup> Complainants note that PJM has addressed measurement and verification protocols, and that, according to NYISO, ISO-NE has measurement and verification procedures in place that address the concerns raised by NYISO.<sup>33</sup> Complainants assert that NYISO has the ability to develop such procedures to alleviate its concerns.

26. Complainants further argue that developing measurement and verification rules will also address NYISO's concerns with respect to multiple payments for output and potential gaming of DADRP rules to receive payments without actually reducing demand. Complainants state that these risks are also present with demand response facilitated by load curtailment, and that NYISO can address these risks with the same

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<sup>31</sup> In support of their argument, EPSA and IPPNY attach to their filing a policy paper by Economist William W. Hogan, *Implications for Consumers of the NOPR's Proposal to Pay the LMP for All Demand Response*, dated May 12, 2010, previously submitted in Docket No. RM10-17-000.

<sup>32</sup> Complainants Answer at 4.

<sup>33</sup> *Id.* at 5.

rules for both sources of demand response. Complainants also assert that NYISO has the ability to develop the appropriate measurement and verification rules to alleviate NYISO's concerns about possible double payments resulting from loads selling the output of their behind-the-meter generation to the local distribution utility and the output appearing as a load reduction from the distribution system, and, in turn, being compensated as demand response.

27. Likewise, Complainants contend that NYISO can develop rules that address manipulation of baseline calculations or the withholding of information relevant to demand response enrollment or participation. Complainants cite PJM's solution to addressing the manipulation of baselines<sup>34</sup> and point out that NYISO has recognized that ISO-NE has dealt with potential manipulation issues by requiring "[d]ata on the output of behind-the-meter generators...to determine whether such 'gaming' is occurring."<sup>35</sup> Complainants also point out that the Commission is aware of the potential for manipulation and has brought enforcement actions against companies that have attempted to engage in such manipulation.<sup>36</sup> Complainants state that these actions provide a remedy to NYISO's concerns and that these remedies and rules address NYISO's double payment concerns for behind-the-meter generation and can be addressed in the same manner that they are currently addressed for load curtailment-facilitated demand response.

28. Complainants further argue that the determination of whether demand response facilitated by behind-the-meter generation must be treated the same as demand response by other means cannot be addressed in the stakeholder process; this issue requires a determination by the Commission.<sup>37</sup> Complainants question NYISO's claim that it is addressing revisions to its demand response programs through the stakeholder process and state that, as of July 23, 2013, there has been no substantive discussion regarding demand response facilitated by behind-the-meter generation.<sup>38</sup> Complainants state that contemplating the participation of behind-the-meter generation in the development of

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<sup>34</sup> *Id.* at 7 (citing PJM Interconnection, L.L.C., "Economic DR in energy market clarification," (Nov. 13, 2012), *available at*: <http://www.pjm.com/~media/committees-groups/subcommittees/drs/20121113/20121113-item-04-economic-dr-clarification.ashx>).

<sup>35</sup> *Id.* (citing NYISO Answer at 13-14 (citing *ISO New England, Inc.*, Order No. 745 Compliance Filing, Docket No. ER11-4336-000 (Aug. 19, 2011), Attachment V, Yoshimura Aff. ¶ 27)).

<sup>36</sup> *Id.* (citing NYISO Answer at 14-15).

<sup>37</sup> *Id.* at 8.

<sup>38</sup> *Id.* at 9.

market rules provides no assurance that behind-the-meter generation will eventually be able to participate as an economic resource, especially given the requirements of stakeholder approval for NYISO to make a section 205 filing.<sup>39</sup> They also argue that NYISO has a history of failing to timely address issues and processes.

#### **IV. Commission Determination**

##### **A. Procedural Matters**

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept Complainants' answer filed in this proceeding because it provides information that assisted in our decision-making process.

##### **B. Substantive Matters**

31. We grant the Complaint in part, and deny in part. We agree with Complainants that the NYISO tariff provisions that establish the terms of the DADRP are unduly discriminatory because the current provisions exclude from participation in the DADRP demand response facilitated by behind-the-meter generation, while permitting participation by similarly-situated demand response accomplished without the use of such behind-the-meter generation. However, at this time we decline to grant the specific relief requested, and instead, as discussed below, direct NYISO to develop and file appropriate tariff language for integrating into the DADRP demand response facilitated by behind-the-meter generation.

32. At the outset, we reject NYISO's arguments that, due to claimed technological requirements and calculation complexities, demand response facilitated by behind-the-meter generation is not similarly situated to demand response not facilitated by such behind-the-meter generation. We find that those claimed technological requirements and calculation complexities do not create a significant enough difference to outweigh a similarity between these resources: from the perspective of the transmission grid, demand response produces a load reduction in the wholesale market from a validly established baseline, whether the demand response involves only curtailment of load or is facilitated by the use of behind-the-meter generation.<sup>40</sup> NYISO has not shown why

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<sup>39</sup> *Id.*

<sup>40</sup> See Order No. 745-A, 137 FERC ¶61,215 at P 66.

resources that reduce the amount of energy purchased through the NYISO grid should not be able to participate in the DADRP, on an equal footing with other demand response resources, regardless of the mechanism that they use to reduce the amount of energy purchased.

33. We agree that Order Nos. 745 and 745-A do not require that NYISO permit participation in its DADRP by demand response facilitated by behind-the-meter generation. Likewise, Order Nos. 745 and 745-A do not preclude such participation. In light of the record in this proceeding, however, we find that NYISO's failure to revise its tariff to allow such providers of demand response to participate in the NYISO DADRP constitutes undue discrimination.<sup>41</sup>

34. Certain parties argue that, as is, the DADRP is just and reasonable because it was approved by the Commission in 2003. However, the instant Complaint alleges that demand response facilitated by behind-the-meter generation is treated in an unduly discriminatory manner. In 2003, the Commission did approve NYISO's proposed exclusion from the DADRP of demand response facilitated by behind-the-meter generation. Since that time, NYISO has developed rules that allow demand response resources facilitated by behind-the-meter generation to participate in NYISO's other demand response programs such as the DSASP and EDRP, and to sell SCR demand response capacity in NYISO's installed capacity market. As discussed above, we find that the Complainants have shown that demand response facilitated by behind-the-meter generation is treated in an unduly discriminatory manner by NYISO.

35. Various parties raise arguments about the limits of Commission jurisdiction, and whether or not provisions of NYISO's tariff that relate to activities that occur behind a retail customer's meter are subject to the Commission's jurisdiction under the FPA. The Commission's determinations herein relate to the provision of a Commission-jurisdictional service and payment for that service pursuant to the terms of the NYISO tariff. In its answer, NYISO concedes that there are valid reasons to consider activity behind a retail customer's meter as it relates to the provision of service in the NYISO market, such as to ensure accurate measurement and verification of demand response and to prevent gaming.<sup>42</sup> Similarly, Complainants acknowledge in their answer that such

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<sup>41</sup> With respect to the argument raised by PSEG that the same issue raised in the Complaint has been raised by the same parties in a request for rehearing of the May 16, 2013 Order, we clarify that our findings and directives in this proceeding are not based on a NYISO compliance obligation associated with Order No. 745, but rather are based on the merits of the Complaint.

<sup>42</sup> NYISO July 8, 2013 Answer at 14-15.

market rules will need to be developed.<sup>43</sup> We therefore disagree with parties arguing that the Commission would exceed its jurisdiction by requiring changes to prevent undue discrimination in the DADRP.

36. Turning to the matter of Complainants' requested relief, which consists of directing a revision to NYISO's tariff definitions, NYISO raises concerns regarding the development and complexity of the rules it claims will be required in order to allow participation of demand response facilitated by behind-the-meter generation in the DADRP. As discussed above, we find that these concerns are not sufficient to warrant the unduly discriminatory exclusion of such resources from participating in the DADRP. Nonetheless, we agree that NYISO's concerns must be addressed in fashioning appropriate relief pursuant to the Complaint. As noted in the pleadings, other RTO/ISOs, such as ISO-NE, have developed rules to allow such participation<sup>44</sup> and, as noted above, NYISO itself has developed rules to allow such resources to participate in other programs including DSASP, EDRP and the SCR capacity market program.<sup>45</sup> Therefore, we find that it is not only reasonable, but necessary, to require that such rules be developed for the DADRP in order to address the concerns raised by NYISO.

37. Given our finding that NYISO will need to develop and put in place new market rules, we deny, in part, the Complainants' requested relief by rejecting the limited tariff definition changes they propose. Because we find that NYISO has demonstrated that the tariff revisions needed to permit the inclusion of such resources in the DADRP will need to be more extensive and complex than only changing two tariff definitions, we direct NYISO to file, within 180 days of the issuance of this order, proposed tariff provisions that will allow resources providing demand response facilitated by behind-the-meter generation to participate in the DADRP on a comparable basis as all other demand response resources. These tariff provisions should address appropriate eligibility, measurement, verification, and control requirements to ensure that demand response facilitated by behind-the-meter generation is provided in a manner that maintains system

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<sup>43</sup> Complainants July 23, 2013 Answer at 6-7.

<sup>44</sup> *See supra* n.22.

<sup>45</sup> *See supra* n.21.

reliability and ensures that the resources are compensated only for the demand response service that they actually provide.<sup>46</sup>

38. Additionally, in directing NYISO to develop and file the foregoing tariff provisions, we reject as unfounded arguments that the Complainants are attempting an “end run” around the NYISO stakeholder process. However, based on the record in this proceeding, we find that it is appropriate to direct NYISO to undertake a stakeholder process and present the Commission within 180 days of this order, tariff provisions that will permit behind-the-meter generation to participate in the DADRP.

39. Finally, in making our findings, we remain cognizant of the Commission’s prior statements in Order No. 719 regarding the appropriate role of relevant electric retail regulatory authorities. In Order No. 719, the Commission removed certain barriers to the participation of demand response resources in organized wholesale electric markets, and in doing so, the Commission required RTOs/ISOs to accept bids by aggregators on behalf of retail customers unless the laws or regulations of the relevant electric retail regulatory authorities do not permit a retail customer to participate.<sup>47</sup> Accordingly, we take this action in this proceeding without placing limitations on rules that may be established by the New York Public Service Commission (or other relevant electric retail regulatory authority) in accordance with Order No. 719-A (and section 35.28(g)(1)(iii) of the Commission’s regulations).<sup>48</sup>

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<sup>46</sup> NYISO acknowledges that it has worked through its stakeholder process to address similar measurement and verification concerns with regard to behind-the-meter generation's participation in the DSASP. For the DSASP, there are telemetry requirements to send real-time data between the DSASP Resource and NYISO. Further, the DSASP resource receives and must follow NYISO's basepoint signals, which are provided in six-second intervals. In addition, NYISO operations tests all DSASP resources for their ability to transmit the required telemetry data and satisfy other requirements that demonstrate that NYISO has adequate visibility and control of the resource before it is qualified to participate in the program. NYISO Answer at 11-12.

<sup>47</sup> Order No. 719, FERC Stats. & Regs. ¶ 32,281 at P 154 (cross-referenced at 125 FERC ¶ 61,071). In Order No. 719-A, the Commission clarified this provision by adopting a 4 million megawatt-hour threshold. Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 51 (cross-referenced at 128 FERC ¶ 61,059).

<sup>48</sup> See 18 C.F.R. § 35.28(g)(i)(iii) (2013).

The Commission orders:

(A) The Commission hereby grants the Complaint, in part, as discussed in the body of this order.

(B) NYISO is hereby directed to make a further compliance filing within 180 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Moeller is dissenting with a separate statement to be issued at a later date.

( S E A L )

Kimberly D. Bose,  
Secretary.