

155 FERC ¶ 61,151
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Demand Response Supporters

Docket No. EL13-74-001

v.

New York Independent System Operator, Inc.

ORDER DENYING REHEARING

(Issued May 9, 2016)

1. On November 22, 2013, the Commission granted, in part, and denied, in part, a complaint (Complaint) by Demand Response Supporters¹ against the New York Independent System Operator, Inc. (NYISO).² The Complaint alleged that NYISO's tariffs discriminate against demand response facilitated by behind-the-meter generation³ in violation of the Federal Power Act (FPA),⁴ Order No. 745,⁵ and other Commission orders and regulations.

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

² *Demand Response Supporters v. New York Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,162 (2013) (November 22, 2013 Order).

³ "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.

⁴ 16 U.S.C. § 791a *et seq.* (2012).

⁵ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322, *order on reh'g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh'g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216

2. In this order, the Commission denies rehearing of the November 22, 2013 Order.

Background

3. In the November 22, 2013 Order, the Commission found the NYISO tariff provisions that establish the terms of NYISO's Day-Ahead Demand Response Program (DADRP) to be unduly discriminatory because they 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.⁶

4. The Commission rejected arguments that demand response facilitated by behind-the-meter generation is not similarly situated to demand response not facilitated by such behind-the-meter generation. The Commission stated that, from the perspective of the transmission grid, demand response produces a load reduction in the wholesale market from a validly established baseline, whether it involves only a curtailment of load or is instead facilitated by the use of behind-the-meter generation. The Commission added that NYISO had failed to show why demand response that used behind-the-meter generation to achieve a load reduction should not be able to participate in the DADRP on an equal footing with other demand response. The Commission also found that claimed technological requirements and calculation complexities that NYISO attributed to demand response facilitated by behind-the-meter generation do not create a significant enough difference between demand response facilitated by behind-the-meter generation and demand response not facilitated by behind-the-meter generation to outweigh the similarity between these resources.⁷

5. The Commission also rejected arguments that the DADRP is just and reasonable because it was approved in 2003. The Commission recognized that, in 2003, it approved NYISO's proposed exclusion from the DADRP of demand response facilitated by behind-the-meter generation. However, the Commission found that, since that time, NYISO has developed rules that now allow demand response resources facilitated by behind-the-meter generation to participate in NYISO's other demand response programs.⁸

(D.C. Cir. 2014), *rev'd & remanded sub nom. FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016).

⁶ November 22, 2013 Order, 145 FERC ¶ 61,162 at P 31.

⁷ *Id.* P 32.

⁸ *Id.* P 34.

6. With respect to the matter of appropriate relief, the Commission declined to grant the specific relief requested, i.e., the request for a relatively minor change in the tariff's definitions, and instead directed NYISO to develop and file appropriate tariff language for integrating demand response facilitated by behind-the-meter generation into the DADRP. The Commission found that the tariff revisions needed to permit the inclusion of such resources in the DADRP will need to be more extensive than simply changing tariff definitions as proposed in the Complaint. The Commission directed NYISO to file, within 180 days, proposed tariff provisions that 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. The Commission explained that 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 reliability and ensures that the resources are compensated only for the demand response service that they actually provide.⁹

Request for Rehearing

7. On December 23, 2013, the Electric Power Supply Association (EPSA) and the Independent Power Producers of New York, Inc. (IPPNY) filed a joint request for rehearing (Joint Request for Rehearing). EPSA and IPPNY state that the Commission did not address the question of whether behind-the-meter generation constitutes demand response as defined by Commission regulations, whether such generation is similarly situated to demand response not facilitated by behind-the-meter generation, and whether its finding in the November 22, 2013 Order ignored the alleged damaging effects on the market raised in parties' protest to the Complaint.

8. EPSA and IPPNY assert that, in the November 22, 2013 Order, the Commission erroneously found that excluding behind-the-meter generation from the DADRP is unduly discriminatory, and also ignored undue discrimination against other generation that results from allowing behind-the-meter generation to participate in the DADRP, based on a false assumption that operating behind-the-meter generation reduces consumption. EPSA and IPPNY assert that the Commission failed to address the threshold question of whether behind-the-meter generation, or reduced retail purchases facilitated by behind-the-meter generation, is really demand response. They state that Commission 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.”¹⁰ EPSA and IPPNY contend that the common meaning

⁹ *Id.* PP 36-37.

¹⁰ Joint Request for Rehearing at 6, citing 18 C.F.R. § 35.28(b)(4) (2015).

of “consumption” involves end use and no reduction in consumption occurs when behind-the-meter generation is used to provide demand response because behind-the-meter generation is being substituted for purchases by a customer that is selling demand response. EPSA and IPPNY argue that there is no reduction in consumption and therefore, no demand response. They contend that the Commission arbitrarily and capriciously disregarded its own definition of “demand response.”

9. EPSA and IPPNY assert that the Commission failed to reconcile its finding that the existing DADRP rules are unduly discriminatory with its prior acceptance of those rules. They also argue that the Commission did not meet its burden when it found that behind-the-meter generation is similarly situated for purposes of participation in a demand response program.¹¹

10. EPSA and IPPNY further assert that the November 22, 2013 Order results in an undue preference for behind-the-meter generation, violates the FPA, and results in undue discrimination against generators located in front of the meter. They state that, when behind-the-meter generation is allowed to participate in the wholesale markets as demand response, it avoids the obligations that would be imposed if it were to participate in the wholesale market as generation—obligations of “public utilities” that include interconnection and filing requirements, performance, and regulatory oversight by the Commission.

11. Finally, EPSA and IPPNY contend that the Commission ignored the alleged damaging effects of allowing behind-the-meter generation to participate in the market as demand response, rather than on a comparable basis to other generation. EPSA and IPPNY state that the Commission did not address arguments presented in a policy paper prepared by economist William W. Hogan and an *amicus curiae* brief submitted by a group of economists in connection with the appeal of Order No. 745 that was attached to EPSA and IPPNY’s July 7, 2013 protest to the Complaint, which they claim demonstrate why allowing behind-the-meter generation to participate in the markets on this basis is harmful to the markets. EPSA and IPPNY state that Professor Hogan explained that what he described as the overcompensation problem of Order No. 745 is particularly acute where behind-the-meter generation is allowed to participate as demand response because it would lead to certain generators effectively being paid more if they sit “behind” the meter, rather than “in front” of the meter. Further, they note that he asserted that more efficient generators would be displaced by inefficient backup behind-the-meter generation that burn diesel oil or natural gas at much higher heat rates. EPSA and IPPNY assert that the attachments to their protest show that such an outcome would result in perverse economic incentives to move generation to behind-the-meter, which they state does nothing to promote increased efficiency and would only increase the burden on

¹¹ *Id.* at 9.

consumers in markets administered by independent system operators by forcing them to pay not only for the electricity generated for their own use but also to cover the costs of the imputed demand response program. Finally, EPSA and IPPNY assert that the *amicus curiae* brief attached to their protest shows that, because behind-the-meter generation saves the demand response resource the cost of buying electricity, paying demand response facilitated by behind-the-meter generation the full Locational Marginal Price - the same as generation located in front of the meter - arbitrarily compensates large users more for generating electricity solely for their own use than for “putting it into the grid.”¹²

Commission Determination

12. We deny rehearing.¹³

13. EPSA and IPPNY argue that the Commission did not address the threshold question petitioners raised of whether reducing retail purchases by running behind-the-meter generation is “demand response” as defined by section 35.28(b)(4) of the Commission’s regulations.¹⁴ They argue that the definition of demand response contained in the Commission’s regulations requires a reduction in “consumption” of energy by customers, whereas operation of behind-the-meter generation involves an increase in generation and no reduction in “consumption” by the customer. They also argue that the Commission’s decision conflicts with the common meaning of “consumption.” We disagree. A reduction in “consumption,” as that term is used in section 35.28(b)(4), refers to reduced consumption of electricity from the grid because, as we stated in the November 22, 2013 Order, the provision of demand response by a reduction in load is properly determined from the perspective of the grid.¹⁵ As the Commission stated in Order No. 745-A: “the manner in which a customer is able to produce such a load reduction from its validly established baseline (whether by shifting production, using internal generation, consuming less electricity, or other means) does

¹² Joint Request for Rehearing at 15.

¹³ We note that NYISO submitted its compliance filing, in Docket No. ER14-2006-000, to comply with the Commission’s order in this proceeding. We intend to act on the compliance filing in Docket No. ER14-2006-000 in a separate, future order.

¹⁴ 18 C.F.R. § 35.28(b)(4) (2015) (“*Demand response* means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.”).

¹⁵ November 22, 2013 Order, 145 FERC ¶ 61,162 at P 32.

not change the effect or value of the reduction to the wholesale grid.”¹⁶ Thus, a reduction in metered load on the grid, even a reduction facilitated by behind-the-meter generation, is still a reduction and thus is appropriately considered demand response as defined in section 35.28(d)(4).

14. We also reject the claim that the Commission erred because it previously found in 2003 that the DADRP (which excluded demand response facilitated by behind-the-meter generation) was just and reasonable. First, EPSA and IPPNY’s apparent argument that because the Commission at one time made a determination, it is barred from evaluating the continuing reasonableness of that prior determination and reaching a different conclusion, is inconsistent with the Federal Power Act, as well as court and Commission precedent.¹⁷ Second, in the November 22, 2013 Order, the Commission explained that organized markets and Commission regulations have changed since 2003, when the Commission found that NYISO’s restriction on behind-the-meter generation in DADRP was just and reasonable.¹⁸ Significantly, since 2003, NYISO itself has allowed demand response facilitated by behind-the-meter generation to qualify for other NYISO demand response programs.¹⁹ Those changes suggest that in the absence of distinctive characteristics of the DADRP not demonstrated here, the exclusion of demand response facilitated by behind-the-meter generation from that program may have become unjust, unreasonable, or unduly discriminatory or preferential. Additionally, the Commission has approved provisions that allow demand response facilitated by behind-the-meter generation to provide demand response in other regional transmission organizations and

¹⁶ Order No. 745-A, 137 FERC ¶ 61,215 at P 66.

¹⁷ See, e.g., 16 U.S.C. § 824e (2012) (authorizing both complaints and *sua sponte* Commission action to change filed rates); accord *New Jersey Board of Public Utilities v. FERC*, 744 F.3d 74, 100 (3rd Cir. 2014) (noting that “[c]ourts have repeatedly held that an agency may alter its policies despite the absence of a change in circumstances.” (citing *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)); *Tennessee Gas Pipeline Co.*, 105 FERC ¶ 61,120, at P 35 (2003) (the Commission’s prior acceptance of tariff provisions does not preclude the Commission from reconsidering its policies), *aff’d Tennessee Gas Pipeline Co. v. FERC*, 400 F.3d 23 (D.C. Cir. 2005).

¹⁸ November 22, 2013 Order, 145 FERC ¶ 61,162 at PP 34-36 and 39.

¹⁹ NYISO’s Emergency Demand Response Program, Special Case Resource program, and Demand Side Ancillary Services Program permit the participation of demand response facilitated by behind-the-meter generation.

independent system operators.²⁰ Accordingly, we affirm the Commission's previous finding that the terms of the DADRP are unduly discriminatory because they exclude from participation demand response facilitated by behind-the-meter generation.

15. EPSA and IPPNY contend that the November 22, 2013 Order results in undue discrimination against generators located in front of the meter because behind-the-meter generation is not subject to the filing requirements and other public utility regulation of generation located in front of the meter, and that this alleged undue preference for behind-the-meter generation violates the FPA. In considering other demand response programs, the Commission has not previously found that allowing demand response facilitated by behind-the-meter generation to participate in Commission-jurisdictional markets results in undue discrimination relative to other generators,²¹ and we decline to make such a finding here. We note that use of behind-the-meter generation to facilitate demand response serves only the entity engaging in that demand response and, therefore, is distinguishable from sales from generation in front of the meter into a wholesale market subject to the Commission's jurisdiction.²² For this reason, we find that, in the circumstances presented here, behind-the-meter generation facilitating demand response is not similarly situated to generation making sales in the wholesale market, and thus there is no undue discrimination.

16. Finally, EPSA and IPPNY argue that the Commission, in its November 22, 2013 Order, failed to address what they claimed are the damaging effects of allowing behind-the-meter generation to participate in the market as demand response. Their arguments regarding alleged inefficient cost consequences and overcompensation are a collateral

²⁰ See, e.g., *PJM Interconnection L.L.C.*, 137 FERC ¶ 61,216, at P 90 (2011) (accepting PJM Interconnection L.L.C.'s proposed revisions to its existing tariff provisions that allow demand response facilitated by behind-the-meter generation); *order on reh'g and compliance*, 139 FERC ¶ 61,256 (2012); *ISO New England, Inc.*, 138 FERC ¶ 61,042, at P 77 (2012) (accepting ISO New England's proposed tariff revisions that allow demand response facilitated by behind-the-meter generation); *reh'g denied*, 139 FERC ¶ 61,116 (2012).

²¹ See, e.g., *supra* P 14 & nn.19-20.

²² Based on the facts of this case, we need not address here in what circumstances use of behind-the-meter generation for purposes other than to facilitate demand response also is properly distinguishable. Moreover, we note that generators located in front of the meter often are subject to different filing requirements among themselves, based on the characteristics of the generation owner and the market in which it operates.

attack on Order No. 745, *et al.*, which addressed this same line of argument.²³ EPSA and IPPNY also assert that the Commission has created incentives for other generators to move behind the meter. We find any claimed movement of generation from the NYISO marketplace to behind the meter to be speculative.

17. Accordingly, we deny EPSA and IPPNY's request for rehearing, for the reasons stated above.

The Commission orders:

EPSA and IPPNY's request for rehearing is hereby denied.

By the Commission. Commissioner Clark is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²³ *See, e.g.*, Order No. 745-A, 137 FERC ¶ 61,215 at PP 64-65 (rejecting argument that payment for demand response should reflect savings from not having to purchase electricity and noting that, at P 61 of Order No. 745, the Commission pointed out that examining cost avoidance by demand response is not consistent with the treatment of generation).

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CLARK, Commissioner, *concurring*:

I concur in this order and agree in its finding that concerns regarding the compensation of the resources at issue here are outside the scope of this docket and constitute a collateral attack on Order No. 745. Yet I note, the mere fact that the argument is raised out-of-place does not make the concerns expressed over the Order No. 745 compensation regime any less valid or worthy of Commission attention in an appropriate venue.²⁴

For these reasons, I respectfully concur with this order.

Tony Clark
Commissioner

²⁴ See Commissioner Clark January 27, 2016 statement on the Supreme Court's decision in *FERC v. EPSA*, 136 S. Ct. 760 (2016) (encouraging the Commission "to turn its attention towards a thorough assessment of the underpinnings of a compensation regime that continues to be widely panned by market experts"); Commissioner Clark April 1, 2016 concurrence in part in *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,004 (2016) (urging PJM, other regional grid operators, and stakeholders to "expand work towards developing methodologies which find better insight into Demand Response and its particular attributes").