

161 FERC ¶ 61,245
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Advanced Energy Economy

Docket No. EL17-75-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued December 1, 2017)

1. On June 5, 2017, Advanced Energy Economy (AEE) filed a petition for declaratory order (Petition), pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,¹ seeking declaratory rulings that, among other things: the Commission has exclusive jurisdiction under the Federal Power Act (FPA) to regulate the participation of certain energy efficiency resources (EER) in the wholesale electricity markets; relevant electric retail regulatory authorities (RERRA) lack authority to bar, restrict, or otherwise condition the participation of certain EERs in wholesale electricity markets; it is unlawful for RERRAs to change the terms and conditions of certain EER participation in wholesale markets; and that the stakeholder process is an inappropriate vehicle to resolve these jurisdictional issues. AEE also seeks findings regarding the requirements that the Commission would impose on a future request that the Commission provide RERRAs with authority to bar, restrict, or condition the sale of EERs or other energy technologies into the wholesale electricity markets.

2. In this order, we grant in part and deny in part the Petition, as discussed below.

I. Background

3. In Order No. 719, the Commission required Regional Transmission Organizations/Independent System Operators (RTO/ISO) to amend their market rules as necessary to permit an aggregator of retail customers (ARC) to bid demand response on behalf of retail customers directly into the RTO's/ISO's organized markets, unless the laws or regulations of the RERRA do not permit a retail customer to participate.² On

¹ 18 C.F.R. § 385.207 (2017).

² *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281, at P 154 (2008) (cross-referenced at 125 FERC

rehearing of Order No. 719, the Commission found that it has jurisdiction, under its authority to regulate practices directly affecting wholesale prices, to regulate the market rules under which an RTO/ISO accepts a demand response bid into a wholesale market. However, the Commission explained that Order No. 719 was not intended to classify retail customers and their representatives as wholesale customers or make findings about retail customers' eligibility, under state or local laws, to bid demand response into the organized markets, either independently or through an ARC, or make findings as to whether ARCs' contracts with their retail customers are subject to state and local law.³ To address petitioners' allegation that the rule would impose a burden on smaller entities, the Commission stated that, in the case of ARCs aggregating bids from the customers of small utilities, RTOs/ISOs are required to accept bids from an ARC only if the RERRA permits such customers' demand response to be bid into organized markets by an ARC. Otherwise, the Commission required RTOs/ISOs to accept bids from an ARC unless the RERRA prohibits demand response from being bid into organized markets by an ARC.⁴

4. The Commission also required each RTO/ISO to assess and report on any remaining barriers to treatment of demand response resources comparable with other

61,071), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009). The Commission used the phrase "aggregator of retail customers," or ARC, to refer to an entity that aggregates demand response bids (which are mostly from retail loads).

³ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 54.

⁴ *Id.* PP 49-51; 18 CFR § 35.28(g)(1)(iii) (2017) ("Aggregation of retail customers. Each Commission-approved independent system operator and regional transmission organization must accept bids from an aggregator of retail customers that aggregates the demand response of: (1) the customers of utilities that distributed more than four million megawatt-hours in the previous fiscal year, and (2) the customers of utilities that distributed four million megawatt-hours or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers. An independent system operator or regional transmission organization must not accept bids from an aggregator of retail customers that aggregates the demand response of: (1) the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, where the relevant electric retail regulatory authority prohibits such customers, or (2) the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers.").

resources.⁵ However, the Commission did not require RTOs/ISOs to study energy efficiency⁶ or distributed generation, stating that they are “valuable resources . . . however, the scope of [Order No. 719] is limited to removing barriers to comparable treatment of demand response resources in the organized markets.”⁷ Notwithstanding the limited scope of the rule, the Commission noted that nothing in Order No. 719 precluded RTOs/ISOs from analyzing barriers to energy efficiency measures in their markets and proposing revisions to their tariffs that integrate those measures into their markets.⁸

5. In order to procure sufficient capacity to enable PJM Interconnection, L.L.C. (PJM) to maintain a reliable transmission system, PJM operates a Reliability Pricing Model (RPM) program, a capacity market in which it purchases capacity on a three-year-forward basis through an auction mechanism. In connection with the RPM’s annual Base Residual Auction, PJM receives bids from resources for commitments to perform during periods of peak demand. PJM pays resources that clear in the market at the capacity resource clearing price for the location in which the resource resides.⁹

⁵ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 274.

⁶ Order No. 719 noted that “[t]he Commission’s staff has defined “energy efficiency” to refer to using less energy to provide the same or improved level of service to energy consumers in an economically efficient way. Energy efficiency uses less energy by employing products, technologies, and systems to use less energy to do the same or better job than by conventional means. Energy efficiency saves kilowatt-hours on a persistent basis, rather than being dispatchable for peak hours, as are some demand-response programs. Energy efficiency can include switching to energy-saving appliances (such as Energy Star® certified products) and advanced lighting (compact fluorescent or LED lighting); improving building design and construction (better insulation and windows, tighter ductwork, use of high-efficiency heating, ventilation, and air conditioning); and redesigning manufacturing processes (advanced electric motor drives, heat recovery systems) to use less energy, thus reducing use of electricity and natural gas.” Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 197 n.277 (citing Federal Energy Regulatory Commission, Assessment of Demand Response & Advance Metering: Staff Report at A-4 (September 2007)).

⁷ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 276.

⁸ *Id.*

⁹ *See, e.g.*, PJM Manual 18, § 9.3 Auction Credits and Charges (“Auction Credits [equals] MW Cleared in LDA [multiplied by] Resource Clearing Price in LDA”).

6. In 2008, the Commission required PJM to permit EERs to participate in the Base Residual Auction¹⁰ and EERs subsequently became eligible for participation beginning with the 2012/2013 Delivery Year. The Commission has also approved the participation of energy efficiency in ISO New England Inc.'s (ISO-NE) capacity market, as well as the capacity construct operated by Midcontinent Independent System Operator (MISO).¹¹ In Order No. 676-G the Commission incorporated by reference business practice standards adopted by the North American Energy Standards Board that support the measurement and verification rules for energy efficiency products.¹²

7. In PJM, EERs may aggregate and offer into the RPM for a maximum of four years.¹³ EER providers that clear in the market are assessed daily auction credits (revenues) during the delivery year and billed weekly. Starting with the Base Residual Auction for the 2019/2020 Delivery Year, PJM put into place a new load forecasting model that reflects EERs in the peak load forecast.¹⁴ In December 2015, PJM implemented changes to its manuals, approved by stakeholders, to include an energy efficiency add-back mechanism.¹⁵ The mechanism aims to prevent double-counting EERs as both a supply-side resource and a load forecast reduction. Under the mechanism, PJM reconstitutes (i.e., adds-back) load reductions resulting from supply-side EERs to its forecasted demand curve. According to PJM, this add-back of EER capacity is necessary to ensure that sufficient quantities of non-EERs are procured to meet PJM's reliability standard.

¹⁰ *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,272, at P 44 (2008).

¹¹ *ISO New England, Inc.*, 119 FERC ¶ 61,045, at PP 151-152 (2007); *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,199, at PP 233-237 (2012).

¹² *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676-G, FERC Stats. & Regs. ¶ 31,343 (2013) (cross-referenced at 142 FERC 61,131), *reh'g denied*, 146 FERC ¶ 61,088 (2014).

¹³ *See* PJM Manual 18B, § 1.1.

¹⁴ *See* PJM Manual 18, § 4.4.

¹⁵ Effective December 17, 2015, stakeholders endorsed the EER market rule changes at the PJM Markets and Reliability Committee Meeting: <http://www.pjm.com/-/media/committees-groups/committees/mrc/20151217/20151217-item-04-draft-manual-18-and-18b-revisions-presentation.ashx>.

II. Related Proceedings

8. On May 19, 2004, the Kentucky Public Service Commission (Kentucky Commission) approved the integration of Kentucky Power Company (Kentucky Power) into PJM.¹⁶ The parties to that case, including PJM, executed and filed with the Kentucky Commission an agreement (Kentucky Power Stipulation) stating, among other things, that

any PJM-offered *demand side response or load interruption programs* will be made available to Kentucky Power for its retail customers at Kentucky Power's election. No such program will be made available by PJM directly to a retail customer of Kentucky Power. . . . Any such programs would be subject to the applicable rules of the [Kentucky] Commission and Kentucky law.¹⁷

On June 17, 2004, the Commission approved a settlement containing the Kentucky Power Stipulation, without condition or modification.¹⁸ The Kentucky Commission subsequently issued orders authorizing integration into PJM of Duke Energy Kentucky, Inc. (Duke Kentucky) and East Kentucky Power Cooperative (EKPC), both of which imposed a requirement for Kentucky Commission approval of retail customer participation in any "PJM Demand Response program."¹⁹

¹⁶ *In re: Ky. Pub. Serv. Comm'n, Application of Kentucky Power Company D/B/A American Electric Power for Approval, to the Extent Necessary, to Transfer Functional Control of Transmission Facilities Located in Kentucky to PJM Interconnection, L.L.C. pursuant to KRS 278.218, Case No. 2002-00475 (May 19, 2004) (Kentucky Power Integration Order).*

¹⁷ *Id.* at Appendix A (Agreed Stipulation), at 3-4 (emphasis added).

¹⁸ *New PJM Companies*, 107 FERC ¶ 61,272 (2004) (2004 Stipulation Order). In the order, the Commission noted that the settlement does not change the authority of this Commission or the Kentucky Commission.

¹⁹ *See In re: Ky. Pub. Serv. Comm'n, Application of Duke Energy Kentucky, Inc. for Approval to Transfer Functional Control of Its Transmission Assets from the Midwest Independent Transmission System Operator to the PJM Interconnection Regional Transmission Organization, Case No. 2010-00203, at 16-18 (Dec. 22, 2010) (Duke Kentucky Integration Order); In re: Ky. Pub. Serv. Comm'n, Application of East Kentucky Power Cooperative, Inc. to Transfer Functional Control of Certain*

9. On March 13, 2017, EKPC filed with the Kentucky Commission an application for a declaratory order regarding the legality of retail electric customers in Kentucky to participate in wholesale electric markets. EKPC argued that it lacks the ability to accurately estimate its load for purposes of bidding into PJM's capacity market as a result of EER providers bidding EER-capacity products originating in EKPC's territory into the same market at the same time. According to EKPC, this results in EKPC acquiring more capacity than needed, with the cost of the excess capacity paid by EKPC's retail customers, while EKPC's payment to PJM for the excess capacity flows back to the EER providers. EKPC sought an order from the Kentucky Commission to prevent direct or indirect participation of retail customers in PJM markets except through either a tariff or special contract on file with the Kentucky Commission. EKPC stated that it did so in order to prevent potential unjust enrichment and potential reliability issues from inaccurate estimates of the amount of energy efficiency on EKPC's system being bid into PJM's capacity market. In that same proceeding, PJM submitted a letter to the Kentucky Commission stating that, among other things, it would engage in a stakeholder effort to change its tariff to allow state regulators to restrict EER participation in PJM's wholesale markets in a manner similar to state restrictions on demand response resources.²⁰

10. On June 6, 2017, the Kentucky Commission issued an order finding that “[n]o retail electric customer is authorized to participate directly or indirectly in any PJM wholesale market, including but not limited to [demand response] programs and EER programs, except under a tariff or special contract on file with the Kentucky Commission.”²¹ The Kentucky Commission stated that it is not asserting any jurisdiction over third parties involved in aggregating or bidding EERs in PJM markets. However, the Kentucky Commission found that “[a]ny Kentucky retail customer that participates directly or indirectly in any wholesale electric market in the absence of authorization under a tariff or contract with the [Kentucky] Commission is in violation of Kentucky

Transmission Facilities to PJM Interconnection, LLC., Case No. 2012-00169, at 17-18 & n.9 (Dec. 20, 2012) (EKPC Integration Order).

²⁰ Ky. Pub. Serv. Comm'n, *Application of East Kentucky Power Cooperative, Inc. for Declaratory Order Confirming the Effect of Kentucky Law and Commission Precedent on Retail Electric Customers' Participation in Wholesale Electric Markets*, Case No. 2017-00129, Application of East Kentucky Power Cooperative, Inc. (Mar. 10, 2017) (EKPC Application).

²¹ *In re: Ky. Pub Serv. Comm'n, Application of East Kentucky Power Cooperative, Inc. for a Declaratory Order Confirming the Effect of Kentucky Law and Commission Precedent on Retail Electric Customers' Participation in Wholesale Electric Markets*, Case No. 2017-00129, at ordering para. 1 (June 6, 2017) (June 2017 Kentucky Commission Order).

statutes and [Kentucky] Commission Orders and is subject to termination of service by its retail electric supplier”²²

11. The Kentucky Commission also found that PJM failed to honor its commitments to the Kentucky Commission to ensure that no Kentucky retail customer would be able to participate directly or indirectly in the PJM wholesale markets absent prior approval by the Kentucky Commission. The Kentucky Commission concluded that the issues raised by EKPC’s petition cause it to “question whether it will be necessary to initiate an investigation to determine whether a change needs to be made in the functional control of transmission assets due to PJM actions that are inconsistent with Kentucky’s regulated electric market.”²³ The Kentucky Commission directed EKPC, Kentucky Power, and Duke Kentucky to file a status report by December 6, 2017 describing the actions taken by PJM to comply with the commitments and provisions of prior Kentucky Commission orders approving the transfer of functional control of transmission assets to PJM. The Kentucky Commission indicated that it would decide on the need for an investigation after receiving the status report.

III. AEE’s Petition

12. AEE states that its Petition concerns a certain type of EERs, separate from energy efficiency programs operated by electric utilities and approved by retail regulators.²⁴ According to AEE, third-party EERs can be created, for example, when an EER provider enters into a contract with both the manufacturer and retailer of an energy efficient product (such as more efficient light bulbs, modern heating and cooling systems, high efficiency appliances, etc.). AEE asserts that in such a contract, the manufacturer and retailer represent that they own and are selling all non-physical environmental attributes, including legal claim to the load-reducing capabilities, to the EER provider. According to AEE, the EER provider incentivizes the sale of the energy efficient product (e.g., through a rebate to customers) in exchange for the legal claims stipulated in the contract and, after meeting PJM’s Measurement and Verification plan requirements to ensure that they will deliver promised energy savings and provide capacity on the same basis as other

²² June 2017 Kentucky Commission Order, Case No. 2017-00129 at ordering para. 2.

²³ *Id.*

²⁴ While AEE refers to such resources as “Wholesale EERs,” this order will use the term “third-party EERs” to refer to EERs other than those created under retail energy efficiency programs.

resources, sells the load reduction created by adoption of the product into the capacity market.²⁵

13. AEE claims that recent events have raised concerns that new barriers to the participation of third-party EERs could soon be created. Specifically, AEE states that, on April 12, 2017, PJM submitted a proposal to initiate a stakeholder process to develop revisions to PJM's tariffs, manuals, and other governing documents that would (1) give RERRAs authority to bar, restrict, or otherwise condition the participation of EERs in the RPM, and (2) remove existing EERs that have already cleared a past RPM auction.²⁶ According to AEE, PJM sponsored this proposal to fulfill an assurance it made to the Kentucky Commission in the proceeding there regarding the ability of EERs in Kentucky to participate in the PJM markets.²⁷ AEE asserts that stakeholders were divided over whether the FPA and Commission precedent support providing RERRAs with authority to bar, restrict, or condition the participation of EERs in wholesale electricity markets. AEE further asserts that stakeholders also questioned whether the stakeholder process should continue given the jurisdictional uncertainty surrounding the proposal.

14. To provide guidance to the entities engaged in PJM's stakeholder process and resolve the ongoing market uncertainty, AEE requests that the Commission issue a declaratory order finding that:

1. The Commission has exclusive jurisdiction over the participation of third-party EERs in the wholesale electricity markets;
2. A RERRA may not bar, restrict, or otherwise condition the participation of third-party EERs in wholesale electricity markets unless the Commission expressly adopts rules or regulations giving states and retail regulators such authority;
3. Order No. 719 does not provide for a RERRA to exercise an "opt-out" and bar or restrict the sale into the wholesale electricity markets of third-party EERs originating in its state or local area;
4. Use of an RTO/ISO stakeholder process to develop tariff provisions giving a RERRA such "opt-in/opt-out" authority is improper;

²⁵ Petition at 3-5, 15; AEE Answer at 8-9. AEE states that the EER provider's M&V plans are approved by PJM pursuant to established tariff and manual provisions. *See, e.g.*, PJM Manual 18B, Section 2, <http://pjm.com/~media/documents/manuals/m18B.ashx>.

²⁶ *See* Petition at 1, 6, Tab A.

²⁷ *Id.* at 2 (Ky. Pub. Serv. Comm'n, EKPC Application (citing Case No. 2017-00129 (Mar. 10, 2017))).

5. To the extent an RTO/ISO develops a new opt-out procedure allowing a RERRA to bar or restrict the sale into wholesale electricity markets of third-party EERs, such an opt-out may only be applied prospectively and not to third-party EERs that already cleared an auction; and
6. In the event a RERRA requests that the Commission adopt a rule, regulation, or policy giving RERRAs authority to opt out and bar, restrict, or otherwise condition the sale of third-party EERs or other energy technologies into the wholesale electricity markets, the Commission will consider whether: (1) the RERRA has a compelling interest and is acting within its legal authority to bar, restrict, or otherwise condition the technology's participation in the markets; and (2) providing the RERRA such authority would satisfy the Commission's obligations under the FPA to ensure that the rates, terms, and conditions of wholesale markets are just and reasonable and not unduly discriminatory or preferential.²⁸

15. AEE requests that the Commission clarify the scope of its jurisdiction and the authority of RERRAs with respect to third-party EER participation in RTO/ISO markets. AEE posits that the Commission has exclusive jurisdiction to regulate the rates, terms, and conditions of the participation of third-party EERs in RTO/ISO markets and that a RERRA may not bar, restrict, or otherwise condition their participation in wholesale markets in the absence of a Commission rule, regulation, or order giving RERRAs such authority.²⁹ AEE asserts that third-party EERs are developed wholly outside of the retail electric utility service that the FPA commits to exclusive state jurisdiction.³⁰ According to AEE, the energy savings from third-party EERs are developed separate and apart from any purchases or sales of retail electricity. AEE explains that third-party EERs provide capacity through permanent load reductions without the need for dispatch by individual retail customers, by an aggregator of retail customers, or by an electric utility. AEE states that, because third-party EERs act passively to achieve load reductions without the need for dispatch or coordination with end users, they provide capacity without the need for ongoing relationships with end-use retail customers. Thus, AEE claims that third-party EERs have no nexus with or connection to retail electric utility service that buyers and users of these energy efficient products may receive.³¹

²⁸ *Id.* at 9-12.

²⁹ *Id.* at 23, 26.

³⁰ *Id.* at 23.

³¹ *Id.* at 5, 14-16.

16. AEE further argues that, even if one were to assume that third-party EERs somehow impact retail matters, the U.S. Supreme Court's recent decision in *FERC v. EPSA* confirms that the Commission would still have jurisdiction under the FPA to regulate their participation in wholesale electricity markets.³² AEE states that, in holding that the Commission has exclusive jurisdiction to regulate the participation of demand response resources in wholesale electricity markets, the U.S. Supreme Court concluded that the fact that retail customers are involved did not diminish the Commission's authority to address the participation of demand response resources in the wholesale markets. AEE argues that, like demand response, third-party EERs directly impact the wholesale energy markets, giving the Commission jurisdiction to regulate their participation in such markets despite any incidental impact they might have on retail matters.³³

17. AEE requests that the Commission declare that Order No. 719 does not provide for a RERRA to exercise an "opt in/opt out" right with respect to third-party EERs. According to AEE, PJM's stakeholder proposal and PJM's letter to the Kentucky Commission committing to begin the stakeholder process both draw an extensive analogy to the "opt in/opt out" procedures applied to demand response resources.³⁴ AEE states that, in Order No. 719, the Commission set forth procedures to allow RERRAs to affirmatively "opt in/opt out" retail customers in their jurisdiction from wholesale demand response programs.³⁵ AEE further states that in response to Order No. 719, PJM adopted procedures requiring demand response aggregators to submit their aggregated resources for review by the appropriate retail electric distribution entity to ensure that their aggregation complies with any requirements imposed by a RERRA. Thus, AEE contends that Order No. 719 does not apply to third-party EERs because the Commission did not address the authority of RERRAs regarding EER participation, and expressly stated that the rule did not address EERs.³⁶

18. AEE asserts that it would make little sense to apply the "opt in/opt out" provisions to third-party EERs because the concerns of state regulators and utilities that drove the Commission to adopt the "opt-in/opt-out" procedures in Order No. 719 – in particular,

³² *Id.* at 24 (citing *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760 (2016) (*EPSA*)).

³³ *Id.* (citing *EPSA*, 136 S.Ct. at 775-777).

³⁴ *See id.*, Tab A.

³⁵ *Id.* at 29 (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 155).

³⁶ *Id.* at 30 (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 276).

the concern that allowing retail customers to participate in wholesale demand response activities could interfere with retail demand response programs, burden retail regulators, or create new jurisdictional conflicts – are inapplicable to the participation of third-party EERs.³⁷ AEE argues that, because third-party EERs do not involve retail electricity purchases or sales, their participation in the wholesale market will not “interfere with the operation of” any state-regulated utility energy efficiency programs. AEE also argues that, because EERs provide capacity without the need for dispatch by retail consumers, they will not impose an “undue burden on state and local regulators.” Finally, AEE contends that, because *EPSA* confirms that the Commission has jurisdiction to regulate the participation of third-party EERs in wholesale electricity markets, there are no “new concerns regarding federal and state jurisdiction” here.³⁸

19. AEE requests that the Commission declare that the use of an RTO/ISO stakeholder process to develop tariff provisions giving a RERRA “opt in/opt out” authority is improper. AEE argues that the stakeholder process is an inappropriate vehicle to initiate a request that the Commission cede or share some of its exclusive jurisdiction over wholesale market participation with states and other retail regulators. According to AEE, the use of the stakeholder process will allow an entirely new policy of shared jurisdiction and potential exclusion of one type of market participant to be considered under the just and reasonable standard of FPA section 205, with the added deference traditionally given to the results of an RTO/ISO stakeholder process. AEE further argues that the particular circumstances of the stakeholder process initiated here raise concerns regarding the independent role of an RTO/ISO in administering the markets and its obligations to market participants in fulfilling that role. According to AEE, PJM appears to have initiated this stakeholder process under pressure from a single market participant (EKPC), and based on a pledge or commitment to a state commission (the Kentucky Commission). AEE asserts that an RTO/ISO should not feel any obligation to use its own weight and authority to pursue tariff changes based on a “pledge” or “commitment” to any particular stakeholder or market participant.³⁹

20. AEE requests that the Commission declare that, to the extent an RTO/ISO develops a new opt-out procedure allowing a RERRA to bar or restrict the sale into wholesale electricity markets of third-party EERs, such an opt-out may only be applied

³⁷ *Id.* at 31 (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 155 (“The Commission’s intent was not to interfere with the operation of successful demand response programs, place an undue burden on state and local retail regulatory entities, or to raise new concerns regarding federal and state jurisdiction.”)).

³⁸ *Id.* at 31-32 (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 155).

³⁹ *Id.* at 32-35.

prospectively and not to third-party EERs that already cleared an auction. AEE states that the Commission generally prohibits RTOs/ISOs from applying changes to their tariffs and market rules to Delivery Years for which an auction has already occurred unless the benefits of those changes outweigh the market harm that would result from upsetting settled market expectations.⁴⁰ AEE argues that there are no conceivable benefits to the functioning of the RPM that would outweigh the harm to market certainty from removing a significant amount of existing already-cleared resources from the market or the harm to investors and financiers of existing third-party EERs. AEE also argues that the rule against retroactive ratemaking and the filed-rate doctrine prohibit PJM from removing from the market existing already-cleared third-party EERs because it would retroactively change the rates, terms, and conditions under which third-party EERs participated in those past auctions.⁴¹

21. AEE also requests that the Commission provide declarations to guide any future request to grant RERRAs authority to bar, restrict, or otherwise condition the participation of third-party EERs or other energy technologies in wholesale electricity markets. Specifically, AEE argues that the Commission should ensure that a RERRA has a compelling interest within its legal authority that would justify such market participation restrictions. AEE further asserts that the Commission should ensure that providing the RERRA such authority would satisfy the Commission's obligations under the FPA to ensure that the rates, terms, and conditions of wholesale markets are just and reasonable and not unduly discriminatory or preferential.⁴²

22. AEE states that EERs benefit consumers and the electric grid by: (i) encouraging purchases of energy efficient products by lowering the consumer costs of such products; (ii) reducing energy usage without the need for any dispatch instructions, thus lowering consumer bills; (iii) reducing RTO/ISO capacity requirements, and improving reliability, by reducing the electric load in a region; and (iv) improving competition and reducing RTO/ISO capacity prices by increasing the supply of capacity resources.⁴³ According to AEE, allowing RERRAs to bar participation of third-party EERs in the wholesale markets would result in significant harm to competition in the wholesale markets; run contrary to the Commission's consistent policy to eliminate unjust and unreasonable barriers to participation by all technically-capable resources; result in unjust and unreasonable rates and undue discrimination in violation of the FPA; and hinder the

⁴⁰ *Id.* at 37-38 (citing *ISO New England, Inc.*, 145 FERC ¶ 61,095, at P 29 (2013)).

⁴¹ *Id.* at 39-40.

⁴² *Id.* at 40-44.

⁴³ *Id.* at 4.

ability of RTOs/ISOs to independently administer their markets. AEE asserts that the proposal to restrict EER participation in PJM is already causing harm to existing and potential sellers of EERs because of the significant uncertainty regarding their future business. AEE urges that the declarations sought are critical to resolve the questions raised in the PJM stakeholder process regarding the procedural, legal, and policy basis for allowing states and other retail regulators to regulate EER wholesale market participation and to resolve uncertainty regarding participation by EERs and other energy technologies across the RTO/ISO markets.⁴⁴

IV. Notice of Filing and Responsive Pleadings

23. Notice of the Petition was published in the *Federal Register*, 82 Fed. Reg. 26,922 (2017), with interventions and comments due on or before July 5, 2017. Numerous parties filed timely motions to intervene or notices of intervention and some of those parties also filed comments or protests.⁴⁵

24. On June 29, 2017, the Organization of MISO States (OMS) filed a motion for extension of time to respond and AEE filed a notice of supplemental authority and activity regarding the June 2017 Kentucky Commission Order and a June 7, 2017 meeting of PJM's Markets Implementation Committee. Answers to the motion for extension of time were filed by AEE, the Kentucky Commission, and PJM. On July 5, 2017, the Commission extended to July 19, 2017 the deadline to respond to the Petition.

25. Motions to intervene out-of-time were filed by: Alliant Energy Corporate Services, Inc.; EMC Development Company, Inc. (EMC); and Sierra Club, Natural Resources Defense Council, Sustainable FERC Project, and Environmental Defense Fund (Public Interest Organizations). A motion to intervene out-of-time and file comments out-of-time was filed by Public Interest Organizations. A motion to file comments out of time and comments was filed by the Illinois Commission. Motions for leave to answer and answers were filed by AEE, EMC, Midwest TDUs, OMS, and PJM Utilities.

A. Supporting Comments

26. ELCON and Public Interest Organizations filed comments generally supporting the Petition. ELCON is concerned about RTO/ISO tariffs and market rules that artificially limit or bar participation by particular types of market players or

⁴⁴ *Id.* at 3-5.

⁴⁵ *See* Appendix A.

technologies.⁴⁶ ELCON argues that the result is likely to be higher energy costs, which lead to higher production costs and a less competitive position in global markets.⁴⁷ ELCON states that it is troubled by the possibility that RTOs/ISOs will seek to redesign their markets and adopt new administrative market interventions in an effort to accommodate state policies that restrict competition. ELCON argues that such efforts threaten to balkanize the interstate wholesale markets based on individual state choices.⁴⁸

27. ELCON agrees with AEE that no existing law, regulation, or Commission policy gives RERRAs the authority to bar or restrict EERs from participating in the wholesale markets and that there is no legitimate market or technical justification for such regulation.⁴⁹ ELCON also agrees with AEE that barring or restricting EERs in the wholesale markets would harm competition in those markets by removing resources that have provided significant economic benefits and helped efficiently balance supply and demand at just and reasonable rates.⁵⁰

28. Public Interest Organizations believe that the Commission should affirm that it has exclusive jurisdiction over third-party EERs because they occur outside the state's regulated retail service products.⁵¹ Public Interest Organizations further state that the Commission has recognized that EERs provide a host of benefits to wholesale markets, including in particular, in PJM. They point out that PJM's Independent Market Monitor estimates that EERs have saved customers over \$94 million in the 2019-2020 capacity auction alone.⁵²

29. Public Interest Organizations argue that the current stakeholder process is problematic because it is wrongly targeted toward a predefined outcome, which shows a lack of independence contrary to appropriate RTO/ISO functioning, is detrimental to stakeholder confidence in its markets, and appears to favor one member over the interests

⁴⁶ ELCON Comments at 2.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 3.

⁵⁰ *Id.*

⁵¹ Public Interest Organizations' Comments at 16.

⁵² *Id.* at 5-7.

of others.⁵³ Public Interest Organizations assert that, in Order No. 719, the Commission rejected challenges to its jurisdiction and proposals for onerous state regulations, such as requests for an opt-in requirement, and that the Commission expressly declined to extend that order to EERs.⁵⁴ They argue that third-party EERs do not entail the same intertwined federal-state issues as demand response resources and present a different and more clear-cut case than other categories of EERs originating from end users. Public Interest Organizations explain that, EERs, unlike demand response resources, can be generated at points in the supply chain before the product reaches the end-user, and a retail regulatory authority's powers to influence consumers' choices to reduce electricity consumption vary across jurisdiction.⁵⁵

30. PJM asserts that it appropriately initiated discussion with stakeholders regarding governing document revisions because PJM's stakeholder process is the proper forum to address issues related to market design and market implementation. PJM states that the Commission unquestionably has jurisdiction over EERs participating in the wholesale markets, but that Commission guidance is needed to help inform the PJM stakeholder process going forward. PJM believes that the Commission should recognize the provisions of the 2004 Stipulation Order and the June 2017 Kentucky Commission Order and confirm that PJM is authorized to take the necessary actions to limit EERs' participation in accordance with the June 2017 Kentucky Commission Order.⁵⁶ PJM asserts that the interaction between EERs and retail customers directly impacts the amount of capacity procured by load serving entities (LSEs) in PJM, which in turn directly impacts retail customers' costs. PJM requests that, in light of the Commission's holding in Order No. 719 establishing a role for RERRAs in overseeing the participation of retail customers as demand response resources in wholesale markets, the Commission clarify the role, if any, of states relative to retail customers that participate, either directly or indirectly, as supply-side EERs in the RPM.⁵⁷

B. Protests

31. Several protestors argue that the Commission should dismiss the petition, asserting that the issues raised by AEE are not ready for consideration prior to the completion of

⁵³ *Id.* at 17-18.

⁵⁴ *Id.* at 11, 22.

⁵⁵ *Id.* at 17, 22.

⁵⁶ PJM Comments at 9.

⁵⁷ *Id.* at 10-12.

PJM's stakeholder process or before the Kentucky Commission has decided whether, or on what terms, any specific EERs may participate in PJM's capacity market.⁵⁸ They argue that AEE has failed to demonstrate that a declaratory order is necessary or appropriate.⁵⁹ Specifically, EEI argues that the Petition is beyond the scope of the Commission's guidelines for a petition of declaratory order, qualifying it as a formal complaint that does not meet the burden under section 206 of the FPA.⁶⁰ Some protestors suggest that, rather than issue unnecessarily broad rulings that could extend beyond PJM, the Commission should decline to act on the petition and address any specific issues that are brought to the Commission through individual FPA section 205 or 206 filings.⁶¹ Others ask the Commission to initiate a broad-based evidentiary or technical proceeding to address the issues in the Petition.⁶²

32. Protestors generally argue that PJM's use of a stakeholder process to develop tariff provisions to address impacts of EERs on retail regulation is not improper.⁶³ The Kansas Commission states that, while it agrees that independence from market participants is an important element of an RTO's governance structure, AEE inaccurately characterizes state commissions as "any particular stakeholder or market participant" because, unlike other stakeholders and market participants, state commissions have the obligation to represent the public interest.⁶⁴ PJM Utilities argues that stakeholder proceedings routinely make decisions about what is within the Commission's jurisdiction and therefore what should properly be included in or excluded from proposed revisions to

⁵⁸ See, e.g., AMP/PPANJ Protest at 4-5; APPA/NRECA Protest at 1-4; California Cities Protest at 2; EEI Protest at 3-4; IMEA Protest at 6; PJM Utilities Protest at 10-11.

⁵⁹ See, e.g., AMP/PPANJ Protest at 5; EEI Protest at 3-4; PJM Utilities Protest at 12; OMS Protest at 6.

⁶⁰ EEI Comments at 5-6.

⁶¹ See, e.g., APPA/NRECA Protest at 4; CMUA Protest at 3-4; Kansas Commission Protest at 8.

⁶² See, e.g., Illinois Commission Protest at 3-5; Indiana Commission Protest at 3; OMS Protest at 6-7.

⁶³ See, e.g., AMP/PPANJ Protest at 6-11; Illinois Commission Protest at 7-8; Kansas Commission Protest at 4-5.

⁶⁴ Kansas Commission Protest at 4 (quoting Petition at 34).

Commission-jurisdictional tariffs.⁶⁵ AMP/PPANJ argue that there are no jurisdictional issues because the Commission and the U.S. Supreme Court have already determined that RTOs shall not allow bids from an ARC where the laws or regulations of the RERRA do not permit such participation.⁶⁶

33. Protestors, including the Kentucky Commission, argue that in a state like Kentucky, which has not deregulated its electric markets, allowing EERs to participate without a tariff or special contract with the LSE violates state statutes, implicates important state policies, and results in increased retail electric rates for all of the LSE's retail customers.⁶⁷ Protestors point out that the Kentucky Commission explicitly conditioned the Kentucky LSEs' transfer of control of their facilities to PJM on the requirement that retail customers could participate in the PJM wholesale markets only through specific contracts or tariffs with the Kentucky LSEs and approved by the Kentucky Commission.⁶⁸ They argue that the declarations requested by AEE directly contradict these requirements, and would force the Kentucky LSEs to violate the Kentucky Commission's orders.⁶⁹ Connecticut Consumer Counsel contends that permitting a collateral attack on the Commission's prior acceptance of settlement terms undermines cooperative federalism.⁷⁰

34. Connecticut Consumer Counsel argues that the FPA reserves to states authority over energy efficiency programs as part of integrated resource planning.⁷¹ Protesters generally argue that EERs' participation in the PJM market impacts utility load forecasts, resource planning, capacity procurement, and reliability, and creates additional costs for

⁶⁵ PJM Utilities Protest at 10-11.

⁶⁶ AMP/PPANJ Protest at 6-11.

⁶⁷ *See, e.g.*, Connecticut Consumer Counsel Protest at 6; Kentucky Commission Protest at 6; PJM Utilities Protest at 19-24.

⁶⁸ *See, e.g.*, Connecticut Consumer Counsel Protest at 2; PJM Utilities Protest at 15, 22.

⁶⁹ *Id.*

⁷⁰ Connecticut Consumer Counsel Protest at 2.

⁷¹ *Id.* at 4-5.

utilities and their customers.⁷² They state that, without the required tariff or contractual relationship with the EERs, an LSE cannot ascertain the amount of EERs being bid into the RPM from within its territory and therefore is unable to accurately estimate and bid its load into the RPM, which results in the LSE overestimating its load and acquiring more capacity than the market actually needs.⁷³

35. Protestors argue that the Commission should recognize the authority of RERRAs to limit retail participation in wholesale EER programs because the rationale the Commission articulated in Order No. 719 applies equally to demand response and EERs.⁷⁴ They assert that the “opt-in/opt-out” provision in Order No. 719 was a reasonable accommodation between the states’ and the Commission’s respective jurisdictions that properly balanced the Commission’s jurisdiction with the states’ regulatory authority over retail markets.⁷⁵ Protestors generally believe that the same “opt-in/opt-out” procedures and restrictions that are imposed on demand response resources under Order No. 719-A should be imposed on EERs because, like demand response resources, EERs are located behind the wholesale delivery meter of the LSE.⁷⁶ Midwest TDUs states that the Commission’s rationale for granting a RERRA opt-in/opt-out to demand response applies even more strongly to third-party EERs because third-party EERs directly impact retail sales and are thus linked to the states’ role in overseeing retail sales. APPA/NRECA and Midwest TDUs both argue that the Petition is an impermissible collateral attack on Order Nos. 719 and 719-A.⁷⁷ PJM Utilities argues that the decision in the first instance of who is allowed to supply retail electric customers, including via participation, directly or indirectly, in wholesale markets, is well within the state’s regulatory authority over its retail electric markets.⁷⁸ PJM Utilities further argues that the U.S. Supreme Court did not remove the regulatory role for state commissions

⁷² See, e.g., PJM Utilities Protest at 14; Midwest TDUs Protest at 10-11; Indiana Commission Comments at 3.

⁷³ *Id.*

⁷⁴ See, e.g., AMP/PPANJ Protest at 9-11.

⁷⁵ See, e.g., *id.* at 8; PJM Utilities Protest at 17.

⁷⁶ See, e.g., AMP/PPANJ Protest at 9-11; IMEA Protest at 6-10.

⁷⁷ APPA/NRECA Protest at 8-9; Midwest TDUs Protest at 16.

⁷⁸ PJM Utilities Protest at 18.

over their retail markets, noting that there remains a “zone of exclusive state jurisdiction.”⁷⁹

36. Finally, protestors reject AEE’s claim that third-party EERs have no nexus with or connection to state-regulated retail electric utility service.⁸⁰ Midwest TDUs argue that third-party EERs clearly do impact retail service and intrude into the RERRAs’ traditional authority over resource adequacy, integrated resource planning, and retail ratemaking. They assert that the non-dispatchability of third-party EERs does not change the fact that their entire purpose is to directly alter retail sales of electricity and the fact that they are not dispatched means that they lack a major characteristic that the U.S. Supreme Court used to justify the Commission’s jurisdiction over wholesale demand response.⁸¹ They further state that, not only do third-party EERs affect an LSE’s total capacity cost, they also affect the allocation of those costs among retail electric customers. They argue that third-party EERs result in a disproportionate allocation of costs and benefits, with other retail customers bearing the vast majority of the capacity costs caused by adding back the third-party EER, while receiving no part of the payment from the RTO to the third-party EER.⁸² Midwest TDUs contend that, because both third-party EERs and retail energy efficiency programs target the same retail customers to install energy efficiency technologies and other measures designed to reduce retail consumption, this overlap between wholesale and retail programs can lead to complexities and potential conflicts, such as complicating Measurement and Verification and introducing errors into load forecasting.⁸³ PJM Utilities also argue that by asserting that there is no “legal nexus or connection with the State-regulated electric utility services,” the Petition ignores the concerns about costs and reliability impacts raised by EKPC and the other Kentucky LSEs both in the PJM stakeholder meetings and in the proceedings before the Kentucky Commission.⁸⁴

⁷⁹ *Id.* (citing *EPISA*, 136 S.Ct. at 767).

⁸⁰ *See, e.g.*, APPA/NRECA Protest at 5-7; Midwest TDUs Protest at 8-14; PJM Utilities Protest at 14-15.

⁸¹ Midwest TDUs Protest at 17 (citing *EPISA*, 136 S.Ct. at 781 n.11).

⁸² *Id.* at 10.

⁸³ *Id.* at 12.

⁸⁴ PJM Utilities Protest at 14.

37. AMP/PPANJ also argue that the prohibition on retroactive ratemaking should not preclude removing EERs that were unlawfully part of the capacity auction.⁸⁵

C. AEE Answer

38. In response to arguments that its petition is overly broad, AEE asserts that its petition is only concerned with the rights of non-utility third-party EER providers, not any other entity or any retail customer. AEE explains that the third-party EERs that are the subject of its petition do not include EERs created under the auspices of a state-approved energy efficiency program where the contracts or commercial arrangements under that program reflect a RERRA's determinations as to who will own the EERs and whether they will participate in the wholesale market. Rather, AEE states that it only requests declarations regarding the ability of a RERRA to opt out and bar the participation in wholesale markets of third parties who make wholesale sales of EERs developed outside of RERRA-sponsored retail or end-use energy efficiency programs. Therefore, AEE argues that the relief requested will not upend state or utility energy efficiency programs or a RERRA's authority to regulate such programs.⁸⁶

39. AEE contends that protestors do not sufficiently explain their argument that retail customers effectively subsidize third-party EER participation. AEE states that, without the ability to participate in the wholesale market, the EER provider would not receive compensation for its investment in facilitating the adoption of efficient products or practices, and would in turn provide a subsidy (in the form of lower capacity and energy costs) to consumers that do not choose to make an investment in efficient products or practices. AEE argues that there is little to no potential for "double counting" of EERs in both wholesale markets and state-regulated utility energy efficiency programs because sellers of third-party EERs must verify that they alone hold clear title to the value of load reductions. AEE contends that, to the extent protestors are voicing concerns regarding PJM's Measurement and Verification procedures, the appropriate remedy would be a stakeholder or Commission proceeding to review those procedures and consider changes, rather than a stakeholder process seeking to create a broad new barrier to wholesale market participation by independent third-party EER providers and energy efficiency technologies.⁸⁷

40. AEE argues that its Petition does not require the Commission to draw any new jurisdictional line between federal and state authority under the FPA. AEE states that it does not dispute the authority of RERRAs to regulate their energy efficiency programs or

⁸⁵ AMP/PPANJ Protest at 17.

⁸⁶ AEE Answer at 9-14.

⁸⁷ *Id.* at 12.

the participation of their retail utilities in those programs, including the commercial arrangements governing who owns the load reductions produced by those programs and whether they will participate in the wholesale market. However, according to AEE, states do not have any legal authority over any entity involved in the creation of third-party EERs (i.e., manufacturers, suppliers, distributors, retailers of energy efficient products and services, installers of energy efficiency measures and practices, and the non-utility entity that acquires load reductions from them). Thus, AEE argues the requested declarations do not impinge on the traditional authority of states to regulate energy efficiency programs operated by regulated utilities.⁸⁸

41. AEE asserts that any potential impacts of the participation of third-party EERs on LSE planning and operations, retail energy efficiency programs, and other matters are adequately addressed in the tariffs and manuals of PJM and the other RTOs/ISOs. AEE states that concerns regarding the potential for third-party EERs to impact load forecasting and resource adequacy planning appear to stem from PJM's decision in 2015 to include an "add back" in its load forecast to increase the amount of capacity acquired when third-party EERs clear the capacity market. AEE asserts that, contrary to the PJM Utilities' assertions, the add-back has no net impact on other EKPC load.⁸⁹

42. AEE further argues that the petition is ripe and the Commission should provide guidance now. AEE contends that PJM's proposal to create an opt-in/opt-out mechanism for third-party EERs creates uncertainty regarding the ability of new entrants to recoup investment in third-party EERs through participation in the capacity market, which poses a barrier to investment and proliferation of energy efficiency products and services. AEE states that the Commission's regulations permit a petition to be filed to "remove uncertainty."⁹⁰ AEE points out that PJM also requests prompt clarity from the Commission about the role, if any, of states as related to supply-side EERs in the capacity market. AEE states that, if the Commission determines that it would be inappropriate to provide guidance at this time, AEE supports the initiation of a generic Commission policy docket or similar broad, inclusive process to address the issues raised, so long as the status quo is maintained and PJM and stakeholders avoid taking steps to raise unjust and unreasonable barriers to the participation of third-party EERs in the markets in the interim.⁹¹

⁸⁸ *Id.* at 15-16.

⁸⁹ *Id.* at 20-23.

⁹⁰ *Id.* at 25 (citing 18 C.F.R. § 385.207(a)(2) (2017)).

⁹¹ *Id.* at 26-27.

D. PJM Utilities Answer

43. PJM Utilities respond that the compensation to third-party EER providers is funded directly by LSEs who have to pay for the grossed-up (i.e., mathematically derived “load” that is added back in solely to generate revenues to compensate EER providers) load represented by EERs.⁹² PJM Utilities further argue that funding has a direct impact on retail rates.⁹³ As a result, PJM Utilities contend that an EER’s participation in the market without approval from the applicable RERRA could be an unjustified cost to an LSE’s load which is paid to the EER provider. PJM Utilities further contend that, given that EERs’ participation in the market creates the potential that an LSE will pay for more capacity than is actually needed, and the rest of the load served by an LSE will pay for this excess capacity, any EER market participant should be subject to the process approved by the applicable RERRA to ensure EER participation is accurately reflected in load forecasting and resource planning and to prevent this subsidization.⁹⁴

E. Midwest TDUs Answer

44. Midwest TDUs argue that AEE’s assertion that third-party EERs are different from demand response resources because third-party ERRs do not need to be dispatched and do not require ongoing communication or a relationship with the consumer, does not justify, according to state and local regulators, less say regarding the wholesale market participation of third-party EERs than demand response resources.⁹⁵ According to Midwest TDUs, just like demand response resources, retail customer load reductions are the physical basis for third-party EERs, and the Commission should not preclude state and local RERRAs from having a similar say in whether third-party EERs can participate in wholesale markets. Therefore, Midwest TDUs contend that the Commission should deny AEE’s petition, and confirm that RTOs may propose tariffs that apply Order No. 719-A’s opt-in/opt-out procedures to third-party EERs, consistent with “a program of cooperative federalism, in which the States retain the last word.”⁹⁶

⁹² PJM Utilities Answer at 4-5.

⁹³ *Id.* at 5.

⁹⁴ *Id.* at 6.

⁹⁵ Midwest TDUs Answer at 5.

⁹⁶ *Id.* at 7 (citing *EPISA*, 136 S.Ct. 760).

F. OMS Answer

45. OMS reaffirms its request that the Commission dismiss AEE's Petition and apply the opt-out provision featured in Order No. 719 to third-party EERs. Further, OMS argues that AEE's answer, similar to its Petition, simplifies a complex policy issue with jurisdictional impacts.⁹⁷

46. According to OMS, AEE's Petition and answer fail to consider possible national impacts of the Petition including: differences between jurisdictions with retail competition and vertically integrated regulatory structures, state and local energy efficiency programs, and regional capacity market constructs.⁹⁸ OMS adds that AEE's failure to consider national impacts highlights that the use of a declaratory order to address specific issues within a single RTO is not appropriate.⁹⁹ OMS asserts that approximately 90% of the load in MISO is in vertically integrated jurisdictions, and those entities mainly meet their capacity needs through long-term planning processes, which include self-supply, bilateral contracting, and competitively-bid energy efficiency programs. OMS argues that the competition AEE touts does not take place in a wholesale capacity market in MISO, but occurs during the development of utility programs at the retail level through competitive bidding processes and other mechanisms.¹⁰⁰

47. In response to AEE's assertion that its Petition only targets third-party EERs created outside utility energy efficiency programs, OMS argues that it is precisely those third-party EERs in vertically integrated states that risk degrading successful state-regulated energy efficiency programs or the ability of RERRAs to regulate energy efficiency programs.¹⁰¹ OMS further states that the "add back" provisions discussed in AEE's answer apply only to PJM and do not remedy the forecasting concerns in a one-year prompt auction like the one utilized in MISO. Finally, OMS disagrees with AEE's argument that the opt-out provisions for demand response under Order No. 719 should not apply to third-party EERs. OMS underscores the problems created by shifting load, via energy efficiency or demand response programs created outside of utility or RERRA

⁹⁷ OMS Answer at 2.

⁹⁸ *Id.* at 3.

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Id.* at 5-6.

oversight, without the knowledge or ability to incorporate those changes into utility planning and forecasting.¹⁰²

G. EMC Answer

48. EMC supports AEE's Petition, but requests that the Commission apply the declaratory order to all EERs in Commission-jurisdictional markets rather than a subset of them.¹⁰³ EMC argues that a RERRA's authority cannot extend to EERs, even when EERs arise from altering retail electric consumption, considering the U.S. Supreme Court's ruling that wholesale demand response falls under the Commission's authority.¹⁰⁴ EMC argues that EERs directly affect wholesale rates and vice versa, therefore, EERs should fall under the jurisdiction of the Commission and not a specific RERRA. Further, EMC proposes that allowing RERRAs to regulate EERs subverts the purpose of the FPA.¹⁰⁵ EMC asserts that the Kentucky statute barring retail electric customers from participating in PJM's markets infringes on the Commission's jurisdiction. EMC argues that failure to clarify the Commission's jurisdictional role opens the door to unlimited local-level tinkering in wholesale markets.¹⁰⁶

49. EMC counters several of protestors' claims regarding the impacts of EERs on utility planning and forecasting. EMC contends that charges that EERs harm utility planning conflate a RERRA or utility's responsibility to plan and forecast with the authority over the "thing" that is being forecast. As such, EMC argues that protestors' arguments would stretch RERRAs' authorities infinitely. EMC also notes that consumers implement energy efficiency measures for several reasons and are under no obligation to report them to their utility or RERRA.¹⁰⁷ On protestors' arguments that EERs interfere with RPM participation, EMC argues that protestors misstate how the RPM functions: PJM is responsible for all RPM-related load forecasting and purchases capacity on an

¹⁰² *Id.* at 7.

¹⁰³ EMC Answer at 7.

¹⁰⁴ *Id.* at 9 (citing *EPISA*, 136 S.Ct. at 775).

¹⁰⁵ *Id.* at 10-11.

¹⁰⁶ *Id.* at 12-13.

¹⁰⁷ *Id.* at 15.

LSE's behalf. Accordingly, EMC notes, protestors' charges of LSEs overestimating their load and acquiring more capacity than actually necessary is inaccurate.¹⁰⁸

50. EMC counters protestors' arguments that EERs raise capacity prices by reaffirming the Supreme Court's finding that EERs are under the jurisdiction of the Commission and that, by operation of PJM's markets, an LSE opting out of EERs would not help it avoid increased costs. EMC states that, even if a RERRA bars EERs within its jurisdiction from participating in PJM's markets, the LSE would still bear its pro-rata share of energy efficiency costs incurred by the remainder of PJM.¹⁰⁹

51. On protestors' charges that non-utility EER programs may undermine utility EER programs, EMC argues that while this may be true, it is of no consequence. EMC asserts that that argument attempts to establish that RERRAs may claim wholesale revenue from cost-effective non-utility EER programs to subsidize less cost-effective ones. As such, EMC states that it is another attempt by RERRAs to impede on the Commission's jurisdiction by revising Commission-approved cost allocation mechanisms.¹¹⁰

52. Regarding protestors' arguments that the Commission should grant RERRAs opt-out power for EERs, similar to demand response in Order No. 719-A, EMC argues that EERs and demand response resources are not similarly situated. EMC notes that the U.S. Supreme Court did not rely on the opt-out provisions when finding that the Commission has jurisdiction over demand response resources.¹¹¹ Additionally, EMC argues that offering opt-out power would conflict with the Commission's requirement to ensure just and reasonable rates, unduly discriminates against EERs in affected jurisdictions, and undermines the principles of cooperative federalism embodied within the FPA.¹¹²

53. EMC argues that preventing wholesale EERs from participating in wholesale markets may result in unbalanced supply and demand, require unnecessary purchases of capacity, and foster a mismatch between load and capacity requirements, all of which are unreasonable.¹¹³ EMC also argues that granting an opt-out, and thus allowing RERRAs

¹⁰⁸ *Id.* at 16.

¹⁰⁹ *Id.* at 16-17.

¹¹⁰ *Id.* at 17.

¹¹¹ *Id.* at 18-19.

¹¹² *Id.* at 20.

¹¹³ *Id.* at 21.

to discriminate against EERs by treating them differently under Commission-approved Open Access Transmission Tariffs, contradicts the point of Open Access Transmission Tariffs themselves.¹¹⁴ Finally, EMC asserts granting RERRAs opt-out authority over EERs undermines the FPA by permitting states to dictate the terms of Commission-jurisdictional wholesale markets while abandoning decades of precedent devoted to establishing “bright line” jurisdictional boundaries.¹¹⁵

V. Discussion

A. Procedural Matters

54. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the timely unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

55. Pursuant to Rule 214(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2017), the Commission will grant the late-filed motions to intervene given the parties’ interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

56. Rule 213 (a)(2), 18 C.F.R. § 385.213 (a)(2)(2017), prohibits answers to protests and answers to answers unless otherwise ordered by the decisional authority. We accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

57. For the reasons discussed below, we grant in part and deny in part the Petition. We find that the Commission has exclusive jurisdiction over the participation of EERs in wholesale markets; that RERRAs may not bar, restrict, or otherwise condition the participation of EERs in wholesale electricity markets unless the Commission expressly gives RERRAs such authority; and that Order No. 719 does not provide for a RERRA to exercise an opt-out and bar or restrict the sale into the wholesale electricity markets of EERs originating in their state or local area. However, we also find that the Commission previously has allowed the Kentucky Commission to bar or restrict the sale into the wholesale electricity markets of EERs originating in its state. Finally, we decline to opine on requirements the Commission would impose in the future in the event that a RERRA requests the Commission to adopt a rule, regulation, or policy giving RERRAs

¹¹⁴ *Id.* at 22.

¹¹⁵ *Id.* at 24.

authority to opt out and bar, restrict, or otherwise condition the sale of third-party EERs or other energy technologies into the wholesale electricity markets.

58. As a preliminary matter, we are not persuaded that AEE's Petition is premature. Although the proposed tariff revisions that provided the impetus for this Petition may be currently pending in PJM stakeholder proceedings, we agree with AEE that the novel issues of federal and state jurisdiction presented here warrant Commission guidance.¹¹⁶ We note that PJM also urges the Commission to provide guidance in response to the Petition.

59. Turning to the requested declarations, first, we affirm that, under the FPA, the Commission has exclusive jurisdiction over the participation of EERs in wholesale markets. We do not adopt AEE's distinction between utilities that bid their own retail energy efficiency programs into the wholesale market and third-party EER providers that aggregate the expected demand reductions from energy efficiency products and monetize the value in the same wholesale market. We do not find persuasive AEE's argument that certain types of EER providers do not have any nexus or connection with retail electric service. Under PJM's Open Access Transmission Tariff, EERs are defined as projects that are "designed to achieve a continuous . . . reduction in electric energy consumption at the *End-Use Customer's retail site . . .*"¹¹⁷ Hence, EERs that are bid into the PJM market are, by definition, composed of retail customer actions that reduce load.¹¹⁸ We do, however, agree with AEE that EERs' connection to retail electric service does not dictate the jurisdictional authority of RERRAs regarding EERs' wholesale market participation.¹¹⁹

60. Section 205 of the FPA tasks the Commission with ensuring that all rates and charges for or "in connection with" the transmission or sale for resale of electric energy

¹¹⁶ See 18 C.F.R. § 385.207(a)(2); *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,061, at P 92 (2007) ("Providing general guidance on policy issues is precisely the function of this Commission in ruling on a petition for declaratory order.").

¹¹⁷ MISO's and ISO-NE's Open Access Transmission Tariffs also define EERs as occurring on "retail" or "end-use customer" facilities, respectively. See MISO Tariff, Attachment UU (EERs Measurement & Verification Procedures); ISO-NE Transmission, Markets and Services Tariff, I.2 Rules of Construction; Definitions.

¹¹⁸ Moreover, with respect to demand response, the Commission has not previously made such a distinction between utility demand response programs and ARCs. See Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 155.

¹¹⁹ See AEE November 17, 2017 Answer at 2-4, Docket No. ER18-17-000.

in interstate commerce, and rules and regulations “affecting or pertaining to” such rates or charges are just and reasonable.¹²⁰ Like compensation for demand response, the Commission has jurisdiction over the participation of EERs in organized wholesale markets as a practice directly affecting wholesale markets, rates, and prices.¹²¹ Specifically, this direct effect occurs when energy efficiency is offered directly into the wholesale capacity market, causing a reduction in demand and an increase in supply of capacity, thereby resulting in a lower wholesale capacity price.¹²² As the Commission recognized in requiring and approving the participation of EERs in the RPM, to the extent possible, energy efficiency solutions should be able to compete on an equal footing with demand response, generation, and transmission solutions.¹²³ Thus, as with compensation for demand response as a practice affecting rates, the Commission’s stated purpose in regulating the participation of EERs in wholesale markets is “all about, and only about, improving the wholesale market[s].”¹²⁴

61. Second, because we have exclusive jurisdiction to regulate the participation of EERs in wholesale markets, we also find that a RERRA may not bar, restrict, or otherwise condition the participation of EERs in wholesale markets unless the Commission expressly gives RERRAs such authority. As part and parcel of the participation of EERs in wholesale markets, we find that the terms of eligibility of EERs’ 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.¹²⁵ A unilateral state action that directly prohibits or limits the participation of EERs in the wholesale markets directly impacts which EERs are eligible for participation and

¹²⁰ 16 U.S.C. 824d (2012).

¹²¹ See *EPSA*, 136 S.Ct. at 775; Order No. 719-A, FERC Stats. & Regs. ¶ 31,292; *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats & Regs. ¶ 31,322, at P 112; *EPSA*, 136 S.Ct. at 775.

¹²² See Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 47.

¹²³ *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 130 (2009); *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at P 202 (2007).

¹²⁴ See *EPSA*, 136 S.Ct. at 776 (citing *Oneok, Inc.*, 135 S.Ct. 1591, 1599 (2015) (considering “the *target* at which [a] law *aims*” in determining whether a State is properly regulating retail or, instead, improperly regulating wholesale sales)).

¹²⁵ See *EPSA*, 136 S.Ct. at 784.

“impermissibly intrudes upon the wholesale electricity market, a domain Congress reserved to [the Commission] alone.”¹²⁶

62. Although in Order No. 719 and Order No. 745, the Commission granted RERRAs an opt-out from allowing resources to participate as wholesale demand response, we find that the Commission was not obligated to do so.¹²⁷ We find that the Commission similarly has discretion to decide whether to grant states an opt-out from allowing participation of EERs in wholesale electricity markets. As to arguments that EER participation in wholesale markets increases costs for retail customers and affects utilities’ ability to forecast retail load, we note that the Commission may regulate practices directly affecting wholesale rates, even if that regulation affects retail rates.¹²⁸

63. We recognize that RERRAs have a strong interest in maintaining and promoting retail energy efficiency programs, and wholesale EER participation should not affect RERRAs’ ability to oversee how utilities operate those programs or how the costs of such programs are allocated to retail customers. While the Commission may regulate the participation of EERs in wholesale markets even if such regulation substantially affects the quantity or terms of retail sales, we find that any incidental effects from EER participation on the retail markets are not substantial. Unlike demand response resources, EERs are not likely to present the same operational and day-to-day planning complexity that might otherwise interfere with an LSE’s day-to-day operations. Even if PJM’s add-back mechanism failed to ensure that an LSE’s procurement obligation was unaffected, we agree with AEE that any such impacts should be addressed through PJM’s tariff provisions and not through a broad prohibition on EER participation in wholesale markets.

64. We also reject arguments regarding the potential for double counting of EERs in wholesale markets and retail energy efficiency programs or third-party EERs siphoning off financially valuable energy efficiency projects from utilities’ programs. PJM’s Measurement and Verification requirement for EER providers to demonstrate that they have the legal authority to claim the demand associated with the EER mitigates the potential for the same product to be used in a retail program and participate in the

¹²⁶ *Hughes v. Talen Energy Marketing LLC*, 136 S.Ct. 1288, 1292 (2016).

¹²⁷ *See EPSA*, 136 S.Ct. at 776 (“Although claiming the ability to negate such state decisions, the Commission chose not to do so in recognition of the linkage between wholesale and retail markets and the States’ role in overseeing retail sales. ... The veto power thus *granted* to the states...”) (emphasis added).

¹²⁸ *See id.* (“Yet a FERC regulation does not run afoul of §824(b)’s proscription just because it affects—even substantially—the quantity or terms of retail sales.”).

wholesale markets, resulting in double counting.¹²⁹ Moreover, the potential for increasing competition faced by retail utility programs or concerns with PJM's Measurement and Verification procedures are not sufficient justifications for barring certain types of resources from the market.

65. Third, we affirm that the opt-out provided for in Order No. 719 does not include energy efficiency. In Order No. 719, the Commission stated that “[e]nergy efficiency and distributed generation are valuable resources . . . however, the scope of this rule is limited to removing barriers to comparable treatment of demand response resources in the organized markets.”¹³⁰ Because the Commission expressly stated that Order No. 719 was limited in scope to demand response resources, the rule did not provide for a RERRA to exercise an opt-out and bar or restrict the sale into the wholesale electricity markets of EERs. We, therefore, reject arguments that the Petition is a collateral attack on Order No. 719.

66. Notwithstanding the foregoing, the Kentucky Commission may bar or restrict its retail customers from participating as suppliers in PJM's capacity market due to the fact that the Commission accepted such condition at the time the Kentucky Commission approved the integration of Kentucky Power into PJM.

67. In 2004, the Kentucky Commission granted Kentucky Power conditional authority to transfer functional control of its transmission assets to PJM “subject to FERC accepting, without additions or modifications, an offer of full settlement, consisting of this Order and the attached Stipulation...”¹³¹ That Stipulation provided, among other things:

any PJM-offered *demand side response or load interruption programs* will be made available to Kentucky Power for its retail customers at Kentucky Power's election. No such program will be made available by PJM directly to a retail customer of Kentucky Power. . . . Any such programs would

¹²⁹ See EE Post-Installation Measurement & Verification Report Template, PJM, at 1 (Apr. 4, 2012), <http://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/ee-post-installation-mv-report-template.ashx?la=en>.

¹³⁰ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 276.

¹³¹ Kentucky Power Integration Order, Case No. 2002-00475 at 10.

be subject to the applicable rules of the [Kentucky] Commission and Kentucky law.¹³²

The Kentucky Commission also stated, in the Kentucky Power Integration Order, that “Paragraph 4 of the Stipulation is consistent with existing state authority and preserves our right . . . to review any *demand-side management* programs that may be offered by PJM to Kentucky Power. No such program will be offered directly by PJM to Kentucky retail customers.”¹³³

68. Although none of the foregoing agreements explicitly reference EERs, the Kentucky Power Integration Order provided that no demand-side management programs will be offered directly by PJM to Kentucky retail customers. As defined under Kentucky law, “demand-side management” is a broad enough term to include energy efficiency.¹³⁴ Moreover, energy efficiency measures would also generally qualify as demand-side management under the industry’s common understanding of the term.¹³⁵

69. Also in 2004, the Commission approved a settlement that contained the Kentucky Power Stipulation and the Kentucky Power Integration Order.¹³⁶ Recognizing that the

¹³² *Id.* at Appendix A (Agreed Stipulation), at 3-4 (emphasis added).

¹³³ *Id.* at 9 (emphasis added).

¹³⁴ Section 278.285 of the Kentucky statutes grants the Kentucky Commission authority to “determine the reasonableness of demand-side management plans proposed by any utility under its jurisdiction.” The Kentucky statutes define “demand-side management” as “any conservation, load management, or other utility activity intended to influence the level or pattern of customer usage or demand, including home energy assistance programs.”

¹³⁵ For instance, EIA defines “demand-side management” to include actions associated with demand response and energy efficiency. *See* EIA Glossary, <https://www.eia.gov/tools/glossary/index.php?id=D> (defining demand-side management as “a utility action that reduces or curtails end-use equipment or processes. D[emand-side management] is often used in order to reduce customer load during peak demand and/or in times of supply constraint. D[emand-side management] includes programs that are focused, deep, and immediate such as the brief curtailment of energy-intensive processes used by a utility's most demanding industrial customers, and programs that are broad, shallow, and less immediate such as the promotion of energy-efficient equipment in residential and commercial sectors.”).

¹³⁶ *New PJM Companies*, 107 FERC ¶ 61,272. The Kentucky Commission subsequently issued similar orders authorizing integration into PJM of Duke Kentucky

Commission took that action in connection with Kentucky Power's integration into PJM, we find that it is appropriate at this time to allow this provision to remain in effect as a longstanding agreement relied upon by the parties and entered into prior to the clarification of jurisdiction over wholesale demand-side management in *EPISA* and this order.¹³⁷

70. Because it was previously unclear whether EER providers were permitted to aggregate the demand reductions of Kentucky customers and indeed, some EERs originating in Kentucky have cleared in RPM auctions, we find that any necessary market changes should be implemented in a manner that does not require changes to the results of completed RPM auctions. EERs that already cleared RPM auctions should be permitted to fulfill their capacity obligations in the Delivery Years for which they cleared, including participation in the incremental auctions associated with such Delivery Years, and receive compensation for that performance. This approach is consistent with Commission precedent concerning RERRAs' restrictions on participation of retail customers in PJM's demand response programs,¹³⁸ and it mitigates the potential assessment of penalties that may accrue to EERs originating in Kentucky due to being barred from participating in the capacity market.

71. We deny AEE's request for a declaration that the use of an RTO/ISO stakeholder process to develop tariff provisions implementing a RERRA's "opt in/opt out" authority is improper. We agree with AEE that PJM Open Access Transmission Tariff provisions alone cannot confer such authority on a RERRA and that only the Commission may decide whether to grant a RERRA an opt-out from allowing participation of EERs in wholesale markets. Nonetheless, we find that the stakeholder process may be an appropriate forum to develop proposed market rules necessary to implement such an opt-out that would impact PJM's markets, operations and planning.

and EKPC, which prevented retail customer participation in any "PJM Demand Response program," absent a tariff or contract filed with the Kentucky Commission. *See* Duke Kentucky Integration Order, Case No. 2002-0045 at 16-18; EKPC Integration Order, Case No. 2012-00169 at 17-18 & n.9.

¹³⁷ *See Maritimes & Northeast Pipeline, L.L.C.*, 147 FERC ¶ 61,145, at P 13 (noting that the Commission has recognized that it may be equitable to allow a material deviation to remain in effect if it is part of a longstanding agreement relied on by the parties and entered into prior to the clarification of the standards governing non-conforming agreements).

¹³⁸ *See PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,238, at P 35 (2009), *on reh'g*, 131 FERC ¶ 61,069, at PP 47-52 (2010).

72. As for AEE's request that the Commission opine on potential future requests for an opt-out, we decline to establish broad standards for the Commission to apply for future proceedings where opt-outs for EERs or other energy technologies are requested. However, the Commission would act on any such submitted request in a manner consistent with the Commission's obligations to ensure that the rates, terms, and conditions of wholesale markets are just and reasonable and not unduly discriminatory or preferential.

The Commission orders:

AEE's Petition is hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission. Commissioner Glick is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix A

Motion to Intervene Only	Intervention, Comments and Protests¹³⁹
Allegheny Electric Cooperative, Inc.	American Municipal Power, Inc. and Public Power Association of New Jersey (AMP/PPANJ)*
American Electric Power Service Corporation	American Public Power Association and National Rural Electric Cooperative Association (APPA/NRECA)*
American Public Power Association	California Municipal Utilities Association (CMUA)*
Attorney General for the State of Connecticut	Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (California Cities)*
Buckeye Power, Inc.	Connecticut Office of Consumer Counsel (Connecticut Consumer Counsel)*
Cities of Santa Clara, California and Redding, California, and the M-S-R Public Power Agency	Edison Electric Institute*
Cooperative Energy	Electricity Consumers Resource Council (ELCON)
The Dayton Power and Light Company	Illinois Municipal Electric Agency (IMEA)*
Delaware Municipal Electric Corporation, Inc.	Indiana Utility Regulatory Commission (Indiana Commission)*
Direct Energy Business, LLC	Kansas Corporation Commission (Kansas Commission)*
Duke Energy Corporation	Kentucky Public Service Commission (Kentucky Commission)*
East Kentucky Power Cooperative	Midwest TDUs* ¹⁴⁰

¹³⁹ Protests denoted by an asterisk.

¹⁴⁰ Midwest TDUs consists of Great Lakes Utilities, Madison Gas & Electric Company, Missouri River Energy Services, Missouri Joint Municipal Electric Utility

(EKPC)	
Motion to Intervene Only	Intervention, Comments and Protests
Efficient Holdings, LLC	Organization of MISO States*
Electric Power Supply Association	PJM Interconnection, L.L.C. (PJM)
Enerwise Global Technologies, Inc.	PJM Utilities Coalition (PJM Utilities) ^{141*}
Entergy Services, Inc.	
Exelon Corporation (Exelon)	
FirstEnergy Service Company	
Independent Market Monitor for PJM (IMM)	
Kentucky Office of the Attorney General	
MISO Transmission Owners	
Modesto Irrigation District	
National Rural Electric Cooperative Association	
New York Association of Public Power	
New York Transmission Owners	
NRG Power Marketing LLC and GenOn Energy Management, LLC	
Old Dominion Electric Cooperative	
PJM Industrial Customer Coalition	
PJM Power Providers Group	
Public Citizen, Inc.	
Rockland Electric Company	
Southern Company Services, Inc.	
Southern Maryland Electric Cooperative, Inc.	
Virginia Electric and Power Company	
Wabash Valley Power Association, Inc.	

Commission, and WPPI Energy. Midwest TDUs filed an errata to its motion to intervene and protest.

¹⁴¹ The PJM Utilities Coalition includes the following parties: Kentucky Power; Buckeye Power, Inc.; Dayton Power and Light Company; Duke Energy Kentucky, Inc.; EKPC; and FirstEnergy Service Company. PJM Utilities Coalition filed a motion to dismiss and comments.

Notice of Intervention Only	
Connecticut Public Utilities Regulatory Authority	
Delaware Public Service Commission	
Illinois Commerce Commission (Illinois Commission)	
Maryland Public Service Commission	