ORDER DENYING REHEARING
AND GRANTING CLARIFICATION IN PART

(Issued April 17, 2018)

1. On December 1, 2017, the Commission issued an Order on Petition for Declaratory Order\(^1\) responding to Advanced Energy Economy’s (AEE) petition seeking certain declarations relating to the Commission’s jurisdiction over the participation of energy efficiency resources (EER) in wholesale electricity markets.


I. Background

A. Petition for Declaratory Order

3. On June 5, 2017, AEE filed a petition for declaratory order seeking the following declaratory rulings: (1) the Commission has exclusive jurisdiction under the Federal Power Act (FPA) to regulate the participation of “Wholesale EERs” (i.e., third-party EERs) in the wholesale electricity markets; (2) a relevant electric retail regulatory authority (RERRA) lacks the authority to bar, restrict, or otherwise condition the

\(^1\) Advanced Energy Economy, 161 FERC ¶ 61,245 (2017) (Declaratory Order).
participation of third-party EERs in wholesale electricity markets, unless the Commission expressly adopts rules or regulations giving RERRAs 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 their state or local area; (4) the use of the Regional Transmission Organization (RTO) or Independent System Operator (ISO) stakeholder process to give RERRAs such authority is improper; and (5) any such opt-out should only be applied prospectively and not to existing Wholesale EERs that have already cleared an auction. AEE also sought findings regarding the requirements that the Commission would impose on a future request that the Commission provide RERRAs with such authority.2

B. Declaratory Order

4. On December 1, 2017, the Commission issued an order granting in part and denying in part AEE’s petition. First, the Commission found that it has exclusive jurisdiction over the participation of EERs in wholesale markets.3 Second, the Commission found that a RERRA may not bar, restrict, or otherwise condition the participation of EERs in wholesale electricity markets unless the Commission expressly adopts rules or regulations giving RERRAs such authority.4 Finally, the Commission held that Order No. 719 does not provide for a RERRA to exercise an opt-out with respect to EERs.5 The Commission also found that, previously, it allowed the Kentucky Public Service Commission (Kentucky Commission) to bar or restrict the sale into the wholesale electricity markets of EERs originating in its state, and that the stakeholder process may be an appropriate forum to develop tariff rules implementing such an opt-out.6 The Commission declined to opine on requirements that it might impose in the future in the event that a RERRA requests authority to bar, restrict, or otherwise condition the sale of third-party EERs or other energy technologies into the wholesale electricity markets.7

3 Declaratory Order, 161 FERC ¶ 61,245 at PP 57, 59.
4 Id. PP 57, 61.
5 Id. PP 57, 65.
6 Id. PP 57, 66-71.
7 Id. PP 57, 72.
5. While the Commission rejected AEE’s argument that third-party EER providers do not have any nexus or connection with retail electric service, the Commission agreed with AEE that EERs’ connection to retail electric service does not dictate the jurisdictional authority of RERRAs regarding EERs’ wholesale market participation. Specifically, the Commission found that it has jurisdiction over the participation of EERs in organized wholesale markets as a practice directly affecting wholesale markets, rates, and prices, similar to the Commission’s basis for jurisdiction over participation of and compensation for demand response in organized wholesale markets. The Commission explained that 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. The Commission reiterated its prior finding that, to the extent possible, energy efficiency solutions should be able to compete on an equal footing with demand response, generation, and transmission solutions. The Commission therefore concluded that, 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].”

6. The Commission further found that, because it has exclusive jurisdiction to regulate the participation of EERs in wholesale markets, a RERRA may not bar, restrict, or otherwise condition the participation of EERs in wholesale markets unless the

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8 Id. P 59 (noting that PJM’s, MISO’s, and ISO-NE’s Open Access Transmission Tariffs define EERs as occurring on “retail” or “end-use customer” facilities).

9 Id. P 59.


11 Id. (citing Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 47).

12 Id. (citing 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)).

13 Id. (citing EPSA, 136 S. Ct. at 776).
Commission expressly gives RERRAs such authority.\textsuperscript{14} The Commission found that, as part and parcel of the participation of EERs in wholesale markets, the terms of eligibility of EERs’ participation in the wholesale market has a direct effect on wholesale rates. The Commission found that it 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.\textsuperscript{15} The Commission concluded that unilateral state action that directly prohibits or limits the participation of EERs in the wholesale markets directly affects which EERs are eligible for participation and “impermissibly intrudes upon the wholesale electricity market, a domain Congress reserved to [the Commission] alone.”\textsuperscript{16}

7. In addition, although the Commission granted RERRAs an opt-out from allowing resources to participate as wholesale demand response, the Commission stated that it was not obligated to do so.\textsuperscript{17} Therefore, the Commission found it has discretion to decide whether to grant states an opt-out from allowing participation of EERs in wholesale electricity markets.\textsuperscript{18} Responding to arguments that EER participation in wholesale markets increases costs for retail customers and affects utilities’ ability to forecast retail load, the Commission noted that it may regulate practices directly affecting wholesale rates, even if that regulation affects retail rates.\textsuperscript{19} The Commission recognized that RERRAs have a strong interest in maintaining and promoting retail energy efficiency programs, and that wholesale EER participation should not affect RERRAs’ ability to oversee how utilities operate those programs or how the costs of such programs are

\begin{flushright}
\textsuperscript{14} Id. P 61.
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\textsuperscript{15} Id. P 61 (citing EPSA, 136 S. Ct. at 784).
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\textsuperscript{16} Id. (citing Hughes v. Talen Energy Marketing LLC, 136 S. Ct. 1288, 1292 (2016) (Hughes)).
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\textsuperscript{17} Id. P 62 (citing 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)).
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\textsuperscript{18} Id.
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\textsuperscript{19} Id. (citing EPSA, 136 S. Ct. at 776 (“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.”)).
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allocated to retail customers. However, the Commission found that any incidental effects from EER participation on the retail markets is not substantial because, unlike demand response resources, EERs are not likely to present the same operational and day-to-day planning complexity that might otherwise interfere with a utility’s day-to-day operations. The Commission found that, to the extent PJM Interconnection, L.L.C. (PJM)’s add-back mechanism fails to ensure that a utility’s procurement obligation is unaffected, any such impacts should be addressed through PJM’s Open Access Transmission Tariff (Tariff) provisions and not through a broad prohibition on EER participation in wholesale markets.

8. The Commission also rejected 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. The Commission found that 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 double counting. The Commission further found that 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. The Commission also rejected arguments that AEE’s petition was a collateral attack on Order No. 719. The Commission agreed with AEE that the opt-out in Order No. 719 does not include energy efficiency because the Commission expressly stated that Order No. 719 was limited in scope to demand response resources.

9. Ultimately, the Commission determined that 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

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20 Id. P 63.

21 Id.

22 Id.

23 Id. P 64.

24 Id.

25 Id. P 65 (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 276 (“[T]he scope of this rule is limited to removing barriers to comparable treatment of demand response resources in the organized markets.”)).
Commission approved the integration of Kentucky Power Company (Kentucky Power) into PJM. The order explained that the Commission approved a settlement preserving the Kentucky Commission’s right to review any demand-side management programs that may be offered by PJM to Kentucky retail customers. Because the Commission approved this provision as a part of the settlement integrating Kentucky Power into PJM, the Declaratory Order found it appropriate to recognize that provision as a longstanding agreement that has been relied upon by the parties and was entered into prior to the clarification of jurisdiction over wholesale demand-side management both in EPSA and this proceeding.

10. The Commission found that, because it was previously unclear whether EER providers were permitted to aggregate the demand reductions of Kentucky customers and because some EERs originating in Kentucky had already cleared in PJM Reliability Pricing Model (RPM) auctions, any necessary market changes should be prospective and implemented in a manner that does not alter the results of any previously completed RPM auctions. Specifically, the order stated that “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.” The Commission explained that this approach is consistent with precedent concerning PJM’s demand response programs, and that 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.

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26 Id. PP 66-69 (citing New PJM Companies, 107 FERC ¶ 61,272 (2004)).

27 See EPSA, 136 S. Ct. at 773.

28 Declaratory Order, 161 FERC ¶ 61,245 at P 69 (citing Maritimes & Northeast Pipeline, L.L.C., 147 FERC ¶ 61,145, at P 13 (2014) (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)).

29 Id. P 70.

30 Id. (citing 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)).
11. Finally, the Commission agreed with AEE that tariff provisions alone cannot confer opt-out 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. The Commission found, however, that the stakeholder process may be an appropriate forum to develop proposed market rules necessary to implement such an opt-out. As to AEE’s request that the Commission opine on potential future requests for an opt-out, the Commission declined to establish broad standards for the Commission to apply for future proceedings where opt-outs for EERs or other energy technologies are requested.

C. **PJM’s February 16, 2018 Filing**

12. On February 16, 2018, pursuant to section 205 of the FPA, PJM filed proposed tariff provisions that provide a verification process to ensure that all EERs offered and cleared in PJM’s capacity market comply with any restrictions that may be imposed by a “RERRA authorized by the Commission to opt-out and restrict the sale of EERs into PJM’s market” (or “Authorized RERRA”). The proposed tariff provisions also grant relief for sellers of EERs that already cleared in a prior auction and are subsequently restricted from participation by an Authorized RERRA. These provisions would apply to the Third Incremental Auction for the 2018/2019 Delivery Year (3rd IA), incremental auctions relating to the 2019/2020 and 2020/2021 Delivery Years, the base residual auction for the 2021/2022 Delivery Year, and all subsequent auctions.

13. The Commission addresses PJM’s filing in an order issued concurrently with this order.

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31 Id. P 71.

32 Id.

33 Id. P 72.


35 See Docket No. ER18-870-000.

36 Id.

II. Requests for Rehearing of the Declaratory Order


A. Joint Parties’ Request for Rehearing

15. Joint Parties allege that the Commission found that any RERRA restrictions on EER wholesale market participation not authorized by the Commission are preempted under the FPA. Joint Parties argue that the sweep of the Commission’s ruling is potentially far-reaching, reserving Commission authority to overrule any state action the Commission deems to be a restriction – or even a “condition” – on the participation of retail electric customers as EERs in the organized wholesale markets. Joint Parties argue that the Commission does not provide a sufficient basis for its assertion of authority to disregard state and local restrictions on retail customer participation as EERs in wholesale markets.38

16. Joint Parties contend that the Commission stretched the “direct effect” principle too far when it found that “the terms of eligibility of EERs’ participation in the wholesale market” are within the Commission’s jurisdiction because such terms have “a direct effect on wholesale rates.”39 According to Joint Parties, there are a myriad of legal, regulatory, or contractual considerations that might limit a retail customer’s eligibility to participate, directly or indirectly, in the wholesale market as an EER, and while such limitations might ultimately have some effect on wholesale rates by affecting the level of EERs that can participate in the wholesale market, such effects are indirect and incidental.40 Joint Parties further argue that the Commission’s exclusive jurisdiction over the eligibility of EERs to participate in the wholesale markets cannot override legitimate state and local regulation of retail electric service. Joint Parties contend that, under the FPA, the Commission does not have authority to regulate retail electricity sales, and the Commission’s “affecting” jurisdiction cannot be used to circumvent this limit and allow the Commission to “specify] terms of sale at retail—which is a job for the States alone.”41 Joint Parties state that the Commission recognizes in the Declaratory Order that

38 Joint Parties Rehearing Request at 7.

39 Id. at 8.

40 Id. at 8-9 (citing Allco Fin., Ltd. v. Klee, 861 F.3d 82, 101 (2nd Cir. 2017) (Allco)).

41 Id. at 9 (citing EPSA, 136 S. Ct. at 775 (footnote omitted)).
EERs are directly related to electric service to retail customers. Joint Parties contend RERRAs have authority over the terms and conditions of retail service, which may include the rights and obligations of a retail customer with respect to energy efficiency load reductions.

17. Joint Parties argue, in the demand response context, the Commission pointedly “did not challenge the role of States and others to decide the eligibility of retail customers to provide demand response.” Joint Parties contend that the Commission improperly changed course, claiming that its jurisdiction over the terms of EER participation in the organized wholesale markets ultimately makes it the Commission’s role to determine the eligibility of retail customers to participate in wholesale EER programs, regardless of any RERRA restrictions. Joint Parties state that, while the Commission cites EPSA for the proposition that its jurisdiction extends to deciding which resources are eligible to participate as wholesale EERs, the question of the Commission’s authority to override state or local restrictions on retail customer participation in wholesale markets was not before the United States Supreme Court in that case. Joint Parties argue that, in reviewing Order No. 745, the Court in EPSA considered whether the Commission had “authority to regulate wholesale market operators’ compensation of demand bids.”

18. Joint Parties assert the authority of states to “veto” retail customer participation under the opt-in/opt-out framework was one of the bases on which the Court rested its holding in EPSA that the Commission’s regulation of demand response compensation in wholesale capacity markets did not improperly intrude upon the states’ jurisdiction over retail sales. Joint Parties state that the Court observed that “[w]holesale demand response as implemented in the Rule is a program of cooperative federalism, in which the States retain the last word.” Joint Parties contend that, given the Court’s reliance on the right of states to bar, limit, or condition retail customer participation in wholesale markets,

42 Id. (quoting Declaratory Order, 161 FERC ¶ 61,245 at P 59 (“EERs that are bid into the PJM market are, by definition composed of retail customer actions that reduce load.”)).

43 Id. at 10.

44 Id. (citing Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 49).

45 Id. (citing EPSA, 136 S. Ct. at 773).

46 Id. at 11 (citing EPSA, 136 S. Ct. at 779-80 (emphasis added)).
EPSA does not support the Commission’s broad assertion of jurisdiction here to override state authority.47

19. Joint Parties argue that the Commission’s regulations adopted in Order Nos. 719 and 719-A do not grant or delegate any authority to RERRAs, that those regulations by their terms are directed only at RTOs/ISOs, and they condition the obligation of an RTO or ISO to accept demand response bids from aggregators of retail customers on the opt-in/opt-out decisions of the RERRA.48 Joint Parties contend that the RERRA acts under state and local law, not under a grant or delegation of regulatory authority by the Commission.49 Thus, Joint Parties argue that, while the Commission may exercise jurisdiction over “the terms of transactions occurring in the organized wholesale markets,” this authority does not bestow upon the Commission the power to authorize a retail customer to violate existing state laws or regulations or contract rights.

20. Joint Parties assert that the Commission does not have authority over energy efficiency participation in wholesale electricity markets unless and until the energy efficiency measure becomes a resource or product at wholesale, just as the Commission does not have authority under sections 205 or 206 of the FPA51 over electric markets where there are no wholesale sales or transmission in interstate commerce (e.g., ERCOT, Hawaii),52 and the Commission does not have FPA section 203 authority over electric transmission facilities until they are energized.54 Joint Parties argue that until the energy

47 Id.

48 Id. at 12 (citing 18 C.F.R. § 35.28(g)(1)(iii)(2017)).

49 Id.

50 Id. (citing EPSA, 136 S. Ct. at 784).


52 Id. at 13 (citing American Elec. Power Serv. Corp., 117 FERC ¶ 61,359, at P 16 (2006)).


54 Id. (citing New York Transco, LLC, 151 FERC ¶ 61,005, at P 16, aff’d on reh’g, 153 FERC ¶ 61,259 (2015)).
efficiency measure becomes a resource or product at wholesale, the energy efficiency load reduction remains a component of retail service subject to state jurisdiction.\textsuperscript{55}

21. Joint Parties further argue that the Commission’s reliance on Hughes is misplaced. Joint Parties assert that the Hughes case involved a Maryland program under which load serving entities in the state were obligated to enter into contracts-for-differences with generating resources selling capacity into the PJM markets, and the Court found the Maryland program “set[] an interstate wholesale rate,” thereby invading the Commission’s exclusive jurisdiction over interstate wholesale sales.\textsuperscript{56} Joint Parties assert that here, in contrast, state requirements that might restrict or limit retail customer participation in wholesale markets as an EER do not set a wholesale rate and the Commission’s position is that EER participation in the wholesale markets is only a practice affecting rates.\textsuperscript{57}

22. Joint Parties argue that the Commission’s assertion of federal preemption is not supported by other precedent, under either a field preemption or conflict preemption theory.\textsuperscript{58} Joint Parties assert that, in assessing whether state action is barred under field preemption, the Supreme Court has stressed the importance of “considering the target at which the state law aims” and regulations aimed at retail sales and service are not preempted because they have an effect on rates in the wholesale markets.\textsuperscript{59} Joint Parties assert that conflict preemption should not be applied where a state law’s impacts on matters within federal control are “an incident of efforts to achieve a proper states purpose.”\textsuperscript{60} Joint Parties contend that, in the context of energy efficiency, state and local restrictions on wholesale market participation by retail customers are likely to be intended to achieve legitimate state purposes, such as ensuring reliable and reasonably-priced retail power. Thus, Joint Parties assert that, even if state restrictions on retail customer participation in the wholesale markets could be an obstacle to development of

\textsuperscript{55} Id. at 13-14.

\textsuperscript{56} Id. at 14 (citing Hughes, 136 S. Ct. at 1294-95).

\textsuperscript{57} Id.

\textsuperscript{58} Id. at 15.

\textsuperscript{59} Id. at 15-16 (citing Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599 (2015) (Oneok)).

\textsuperscript{60} Id. at 17 (citing Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan., 489 U.S. 493, 516 (1989)).
EERs in the wholesale markets, such effects would be incidental to state and local efforts to achieve proper purposes, and a conflict preemption finding would not be supported.  

23. Joint Parties argue that, even assuming arguendo that certain state and local laws or regulations could conceivably intrude on federal jurisdiction over EER participation in wholesale markets, the Commission’s preemption finding in the Declaratory Order is overly broad. Joint Parties contend that the Commission’s claim to exclusive authority over the terms of eligibility to participate in the wholesale electric markets “does not reflect any limiting principle, and, left uncorrected, could create significant legal uncertainty concerning states’ ability to regulate energy efficiency programs, effectively nullifying the FPA’s preservation of state jurisdiction over retail sales in this context.”

24. Joint Parties further argue that the Commission did not provide a reasoned basis for declining to extend the Order No. 719 opt-in/opt-out rules to EERs. Joint Parties state that the Commission appears to accept the proposition that participation of retail customers, whether directly or indirectly, as EERs in the wholesale market, raises similar, if not identical, concerns and considerations as demand response. Joint Parties note that the Commission also agrees “that RERRAs have a strong interest in maintaining and promoting retail energy efficiency programs.” Joint Parties contend that, to the extent the Commission purports to justify its departure from the opt-in/opt-out approach by claiming that there will be no substantial effect on retail markets from EER participation in wholesale markets, the Commission cited no record evidence for this observation and AEE contended only legal and policy issues were involved in this declaratory proceeding.

61 Id.

62 Id. at 17-18. Joint Parties state, for instance, the Commission’s assertion of exclusive federal authority over issues relating to “eligibility” to access the wholesale market would allow it to direct states to allow retail access. Id. at 18, n.80.

63 Id. at 18-19.

64 Id. at 19 (citing Declaratory Order, 161 FERC ¶ 61,245 at P 53).

65 Id. at 21-22.
25. Joint Parties state that they appreciate that the Commission suggested it would consider requests by RERRAs to opt-out from allowing participation of EERs in wholesale markets, and permitted the use of an RTO/ISO stakeholder process to develop tariff provisions implementing a RERRA’s opt-in/opt-out authority.\textsuperscript{66} Joint Parties note that it is possible that stakeholders, including RERRAs, and RTOs/ISOs could agree on tariff provisions that reasonably accommodate a RERRA’s “opt-in/opt-out” authority for Commission review.\textsuperscript{67} However, Joint Parties contend the framework adopted in the Declaratory Order fosters legal uncertainty and increases regulatory burdens by requiring stakeholders to negotiate RTO/ISO market rules to implement authority purportedly given to RERRAs by the Commission. Joint Parties assert that RERRAs should not be made to bargain for their rights in the RTO/ISO stakeholder process, particularly since entities that object to legitimate state and local regulation that could restrict retail customer participation in the wholesale markets will doubtless seize on the Commission’s jurisdictional assertions and make any stakeholder compromise implementing an opt-out less likely.\textsuperscript{68} Joint Parties argue that RTOs/ISOs should not be placed in the position of having to interpret state law and evaluate and assess the concerns of state and local regulators about the effects that the participation of their retail customers in wholesale EERs could have on retail service in their states and regions.\textsuperscript{69}

26. In sum, Joint Parties argue that the Commission should: (1) grant rehearing of the Declaratory Order and expressly state that the opt-in/opt-out process in Order Nos. 719 and 719-A applies to EERs, and (2) rescind the Declaratory Order and initiate a rulemaking to revise the Commission’s regulations to implement the Order Nos. 719 and 719-A opt-in/opt-out framework as to retail EER participation in wholesale markets.\textsuperscript{70} Joint Parties contend that the process adopted in Order Nos. 719 and 719-A accommodates state and local regulation of retail service, avoids imposing burdens on RERRAs associated with requesting an opt-out, and provides legal certainty without requiring RTO/ISOs to interpret state law. Joint Parties argue that this solution would accommodate the cooperative federalism structure of the FPA while acknowledging the direct link that EERs have to retail rates and service. Joint Parties state that the

\begin{itemize}
\item[\textsuperscript{66}] Id. at 22-23.
\item[\textsuperscript{67}] Id. at 23.
\item[\textsuperscript{68}] Id. at 23-24.
\item[\textsuperscript{69}] Id. at 24.
\item[\textsuperscript{70}] Id.
\end{itemize}
Commission could also allow additional time for discussion of these important issues by limiting its holding to the facts of the AEE Petition on which PJM requested guidance.\footnote{id.}

27. Joint Parties state that, if the Commission does not grant rehearing, it should clarify that its declarations only apply to EER participation in RTO/ISO centralized capacity markets. Joint Parties argue that this clarification would be beneficial because the Commission’s holdings are worded broadly and do not expressly mention that they are limited to RTO/ISO markets. Joint Parties argue that the Commission should also clarify that it does not have jurisdiction over wholesale energy efficiency in any given market until such a wholesale energy product exists. Joint Parties explain that, until such a time, the product is bundled with retail service and remains subject to a state’s exclusive jurisdiction over retail sales. Joint Parties state that this clarification would ensure that the Declaratory Order is limited to RTO/ISO markets where wholesale energy efficiency products exist and have been unbundled from retail service.\footnote{id. at 25.} Further, Joint Parties argue that the Commission should clarify that the declarations apply only to EERs, and not to any other technologies, because the Declaratory Order indicates that RERRAs may request an opt-out “for EERs or other energy technologies” which could lead to disputes over whether the Commission’s discussion of its jurisdiction is confined to EERs.\footnote{id. at 25-26 (citing Declaratory Order, 161 FERC ¶ 61,245 at PP 57, 72).}

\textbf{B. FirstEnergy’s Request for Rehearing}

28. FirstEnergy argues that the Commission in the Declaratory Order impermissibly takes away the authority of states to determine whether EERs may participate in the wholesale markets, and that the Declaratory Order is inconsistent with the Commission’s determination in Order No. 719 and the Court’s holding in \textit{EPSA}.\footnote{FirstEnergy Rehearing Request at 5-6.} FirstEnergy argues that, despite the overwhelming similarities between EERs and demand response resources upon which the Commission relies in the Declaratory Order, the Commission refused to provide RERRAs a similar veto in the Declaratory Order as it has consistently provided to states with respect to demand response, without providing a reasoned
FirstEnergy contends that the Commission’s failure to reach a similar conclusion with respect to EERs as it did for demand response resources, without proper justification, reflects an arbitrary and capricious decision that lacks substantial evidence, and does not represent reasoned decision-making.76

C. Midwest TDUs’ Request for Rehearing or Clarification

29. Midwest TDUs seek clarification, or in the alternative rehearing, that the Declaratory Order does not prejudge any future RTO-specific proceedings, particularly as they pertain to the Midcontinent Independent System Operator (MISO). Midwest TDUs are specifically concerned about the statements in the Declaratory Order that the effects on retail markets of EERs bid into wholesale markets are “not substantial.”77 According to Midwest TDUs, to apply such findings to future RTO-specific proceedings would be inconsistent with the Commission’s invitation of RTO-specific proposals; contrary to its decision to decline to establish broad standards to be applied in evaluating future RTO-specific requests for RERRA opt-out provisions; and would contradict the Commission’s determination that “the stakeholder process may be an appropriate forum to develop proposed market rules necessary to implement such an opt-out.”78 Midwest TDUs assert that the AEE Petition, its Answer, and the Declaratory Order focused on PJM and that the limited MISO-related information in the record does not support extending the findings to other RTOs. Midwest TDUs further assert that EER participation in MISO’s wholesale markets affects the cost of providing retail service and the allocation of those costs among retail customers, and can adversely impact short- and long-term planning by MISO load serving entities and their regulators.79

30. Midwest TDUs argue that the Declaratory Order could be read to assert that the Commission’s jurisdiction over the participation of EERs in wholesale markets enables it to preempt the terms and conditions established by a RERRA for retail customers to receive retail electric service. Midwest TDUs contend that the Commission should clarify, or in the alternative grant rehearing, that it did not intend to assert such broad

75 According to FirstEnergy, the Supreme Court specifically relied upon this “veto right” when it held that the Commission has jurisdiction with respect to demand response resources in *EPSA*. *Id.* at 2 (citing *EPSA*, 136 S. Ct. at 780).

76 *Id.* at 7.

77 *Id.* at 4 (citing Declaratory Order, 161 FERC ¶ 61,245 at PP 63-64).

78 *Id.* at 5.

79 *Id.* at 6-9.
preemption. Specifically, Midwest TDUs request the Commission clarify the following: (1) the Commission does not assert the authority to preempt the terms and conditions established by RERRAs for retail customers; (2) the Commission makes no findings about retail customers’ eligibility to bid EERs into wholesale markets, independently or via a third party, or whether contracts regarding EERs are subject to state or local law; and (3) the Commission does not authorize retail customers to violate existing laws or regulations or contract rights. Midwest TDUs assert that, although the Commission cites Hughes in the Declaratory Order, the Court’s preemption determination in that case was narrowly focused on a Maryland program which the Court found had “adjust[ed] an interstate wholesale rate,” thus “invad[ing] FERC’s regulatory turf.” They state that the courts have consistently ruled that the states have exclusive jurisdiction to set the terms and conditions of retail sales, which may include requirements on how the retail customers subject to the RERRA’s jurisdiction handle their retail load reduction characteristics.

31. Midwest TDUs assert that the Commission, at a minimum, should clarify that the Declaratory Order does not attempt to preempt “unilateral state action” that may impact EERs, and that Commission preemption assertions will be made within the context of examining individual state and federal laws. Midwest TDUs argue that any Commission assertion of preemption in the Declaratory Order cannot rest on field preemption because Congress has not created a federal regulatory scheme for EERs or retail load reductions that is so pervasive as to occupy the field. They further contend that, to the extent the Commission purports to assert conflict preemption, such a generic preemption of “unilateral state action” is premature without a particular state law addressing EERs before the Commission.

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80 Id. at 11.

81 Id. at 14.

82 Id. at 12 (citing Hughes, 136 S. Ct. at 1297).

83 Id. (citing EPSA, 136 S. Ct. at 775; S. Cal. Edison v. FERC, 603 F.3d 996, 1000-01 (D.C. Cir. 2010)).

84 Id. at 13.

85 Id. at 14-15.

86 Id.
III. Other Filings


IV. Discussion

A. Procedural Matters

33. Rule 713(b) of the Commission's Rules of Practice and Procedure provides that requests for rehearing must be filed not later than 30 days after issuance of a final order.\footnote{18 C.F.R. § 385.713(b) (2017).} Accordingly, we reject AEE’s late-filed request for clarification.

34. Rule 713(d) of the Commission's Rules of Practice and Procedure prohibits answers to a request for rehearing.\footnote{18 C.F.R. § 385.713(d)(1) (2017).} Accordingly, we reject the answers to the requests for rehearing and clarification.

B. Commission Determination

35. As discussed below, we deny the requests for rehearing and grant clarification in part and deny clarification in part.

36. We affirm our finding in the Declaratory Order that the Commission has exclusive jurisdiction over the participation of EERs in the organized wholesale electricity markets, including the terms of eligibility for the participation of such resources. We reject Joint Parties’ claim that the terms of eligibility for the participation of EERs in wholesale markets have only an incidental and indirect effect on wholesale rates. We find that the Commission’s authority to determine which resources are eligible to participate in the wholesale markets is a fundamental component of the regulation of the wholesale

\footnote{18 C.F.R. § 385.713(b) (2017).}

\footnote{18 C.F.R. § 385.713(d)(1) (2017).}
markets. We note that the Supreme Court has recognized that the Commission extensively regulates the structure and rules of wholesale auctions, in order to ensure that they produce just and reasonable results. As to Joint Parties’ assertions that the Commission’s claim of exclusive jurisdiction over the terms of eligibility to participate in the wholesale electric markets “has no obvious limiting principle” or would overrule any state action the Commission deems as affecting EERs, we reiterate that the findings in the Declaratory Order were limited to a “unilateral state action that directly prohibits or limits” the ability of EERs to participate in wholesale markets, thereby directly affecting wholesale rates. Therefore, we find Joint Parties’ contentions that the Commission’s assertion of jurisdiction in the Declaratory Order enables the Commission to direct states to allow retail access or “nullif[ies]. . .state jurisdiction over retail sales in this context” to be speculative and unsupported.

37. We do not agree with contentions that the Commission’s assertion of exclusive jurisdiction over the terms of eligibility of the participation of EERs would usurp the authority of RERRAs to regulate the retail entities subject to their jurisdiction. Our determinations here do not prevent states from regulating retail sales of electricity, even when such regulation incidentally affects areas within the Commission’s domain. However, we also disagree with Joint Parties that state and local restrictions on EER participation in wholesale markets is a valid exercise of state and local authority over retail electric service. A provision directly restricting retail customers’ participation in organized wholesale electricity markets, even if contained in the terms of retail service, nonetheless intrudes on the Commission’s jurisdiction over the wholesale markets. Such

89 We do not, however, address whether our conclusion is based on “field preemption” or “conflict preemption.” See Oneok, 135 S. Ct. at 1595 (explaining the differences between field and conflict preemption). Because we conclude that the question of which resources may participate in wholesale markets is fundamental to the regulation thereof, we need not specifically address whether Congress “occupied” the relevant field or whether a state law arrogating that authority to the state merely “stands as an obstacle” to the Commission’s responsibilities under the FPA. See id.

90 See Hughes, 136 S. Ct. at 1293-94; EPSA, 136 S. Ct. at 769.

91 See Declaratory Order, 161 FERC ¶ 61,245 at P 61 (citing Hughes, 136 S. Ct. at 1292).

92 See Joint Parties Rehearing Request at 17-18, 18 n.80.

93 See Hughes, 136 S. Ct. at 1298 (citing Oneok, 135 S. Ct. at 1599).
a restriction prevents the Commission from carrying out its statutory authority to ensure that wholesale electricity markets produce just and reasonable rates.\textsuperscript{94} Thus, we find that the effect on the wholesale rate from a RERRA restricting EERs’ participation in wholesale markets is direct and not merely incidental.\textsuperscript{95} The direct effect of such state or local laws is in stark contrast to the incidental effects at issue in Allco, cited by Joint Parties, which addressed Connecticut’s program to solicit proposals for renewable energy generation.\textsuperscript{96}

38. Petitioners contend that RERRAs have legitimate concerns about EERs participating in wholesale markets, including the potential impacts on retail load forecasting. They therefore assert that the Commission should determine that RERRAs have the authority to prevent resources from participating in wholesale electricity markets. We do not agree. As the Supreme Court found in Hughes, even if a RERRA seeks legitimate ends, it still may not seek to achieve such ends through regulatory means

\textsuperscript{94} See Oneok, 135 S. Ct. 1591, 1600 (finding that the proper test for determining whether a state action is preempted is “whether the challenged measures are ‘aimed directly at interstate purchasers and wholesalers for resale’ or not”) (quoting N. Natural Gas Co. v. State Corp. Comm’n of Kan., 372 U.S. 84, 94 (1963)); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 970 (finding that “a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate”).

\textsuperscript{95} Cf. Hughes, 136 S. Ct. at 1290 (finding that “[s]tates may regulate within their assigned domain even when their laws incidentally affect areas within FERC's domain”) (emphasis added).

\textsuperscript{96} In that case, Allco argued that contracts arising from Connecticut’s program would increase the supply of electricity available to Connecticut utilities, which would place downward pressure on the “avoided cost” that Allco’s Qualified Facilities would be able to receive under section 210 of the Public Utility Regulatory Policies Act, and that this pressure would have an effect on wholesale prices, thereby infringing upon the Commission's regulatory authority. The court found that such an effect is incidental and therefore Connecticut’s program did not infringe on the Commission’s jurisdiction. Allco, 861 F.3d at 101. Moreover, the court found that the contracts at issue were precisely the kind of traditional bilateral contracts outside the limited holding of Hughes and that Allco failed to support its contention that the program “compelled” utilities to enter into contracts with specified generators at specified rates. Id. at 99 (citing Hughes, 136 S. Ct. at 1299).
that intrude upon the Commission’s authority over wholesale rates. In this instance, we find that state or local restrictions on EERs’ wholesale market participation, even if contained in the terms of retail service, dictate which resources can participate in wholesale electricity markets, thereby directly affecting wholesale rates, and that they interfere with the Commission’s statutory obligation to ensure that wholesale electricity markets produce just and reasonable rates.

39. We further reject arguments that the Commission’s reliance on EPSA is misplaced. While EPSA did not focus on preemption, the Supreme Court nevertheless made instructive rulings on the boundaries between state and federal jurisdiction. For instance, the Supreme Court held in EPSA that Order No. 745 did not regulate retail sales in violation of section 824(b) of the FPA, finding that “[w]hen FERC regulates what takes place on the wholesale market, as part of carrying out its charge to improve how that market runs, then no matter the effect on retail rates, § 824(b) [of the FPA] imposes no bar.” The Supreme Court further found that a state’s attempt to oversee offers made in a wholesale auction would be preempted because “[t]he FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result.” Thus, by finding that RERRAs may not unilaterally and directly restrict EER participation in the wholesale markets, the Commission is not specifying any terms of sale at retail, as Joint Parties contend; rather, the Commission is exercising its authority under the FPA to regulate what takes place

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97 See Hughes, 136 S. Ct. at 1298 (“That Maryland was attempting to encourage construction of new in-state generation does not save its program. . . . States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC’s authority over interstate wholesale rates . . . .”).

98 See id. at 1299 (“Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures untethered to a generator’s wholesale market participation.”) (emphasis added); EPSA, 136 S. Ct. at 768 (“[FERC] instead undertakes to ensure ‘just and reasonable’ wholesale rates by enhancing competition—attempting ... ‘to break down regulatory and economic barriers that hinder a free market in wholesale electricity.’” ) (quoting Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 536 (2008)).

99 EPSA, 136 S. Ct. at 776.

100 Id. at 780 (quoted by Hughes, 136 S. Ct. at 1297).
in the wholesale market by deciding which resources are eligible to participate in that market.

40. We disagree that the Supreme Court’s jurisdictional holding in EPSA rested upon the authority of states to “veto” retail customer participation. While Joint Parties and FirstEnergy correctly quote the Supreme Court’s statement in EPSA that “[w]holesale demand response as implemented in the Rule is a program of cooperative federalism, in which the States retain the last word,” they place more weight on that sentence than it can bear. In context, the Supreme Court merely observed that the Commission’s “notable solicitude toward the States . . . removes any conceivable doubt” that Order No. 745 is consistent with the FPA. In light of the extensive discussion earlier in the EPSA decision regarding the basis for the Commission’s jurisdiction over demand response participation in the wholesale markets, including the Supreme Court’s findings that the “rules governing wholesale demand response programs meet [the standard of section 824(b) of the FPA] with room to spare” and address only transactions occurring on the wholesale market, concluding that such jurisdiction would not exist absent a RERRA opt-out reads too much into that sentence than is appropriate in the context of the decision.

41. In addition, the Supreme Court in EPSA describes an instructive “far-fetched example” of the Commission improperly regulating the retail markets. In that example, the Commission issues a regulation compelling every consumer to buy a certain amount of electricity in the retail market, such that the rule would necessarily determine the load purchased on the wholesale market too, thereby altering wholesale prices. The Supreme Court held that such a regulation would exceed the Commission’s jurisdiction over practices affecting wholesale rates because it would specify the terms of sale at retail. Just as the Commission would be improperly regulating the retail market in the Supreme Court’s example, the hypothetical state laws at issue in the instant case would improperly regulate the wholesale market by compelling every consumer

101 Joint Parties Rehearing Request at 11; FirstEnergy Rehearing Request at 5 (quoting EPSA, 136 S. Ct. at 779-80).

102 EPSA, 136 S. Ct. at 780.

103 Id. at 774 (emphasis added).

104 Id. at 776.

105 Id. at 775.

106 Id.
not to sell (or to only sell a certain amount of) EERs on the wholesale market, thereby seeking to specify the terms of sale at wholesale.

42. Having stated the foregoing, we grant Midwest TDUs’ requested clarifications to the extent that the Commission in the Declaratory Order: (1) did not assert the authority to preempt the terms and conditions established by RERRAs for retail customers to receive retail service; (2) did not purport to authorize retail customers to violate any state or local laws; and (3) made no findings as to whether contracts regarding EERs are subject to state or local law.

43. We agree with Joint Parties that the Commission’s regulations in Order Nos. 719 and 719-A do not grant or delegate any authority to RERRAs. However, we note that the Commission’s exclusive jurisdiction over the participation of demand response resources and EERs in the wholesale market does not preclude the Commission from taking into consideration states’ preferences and implementing or deferring to those preferences when the circumstances merit. Indeed, the Commission has done so in other instances.  

107 Further, we disagree with arguments that the Declaratory Order reflects an unjustified departure from the opt-in/opt-out approach applied in Order No. 719. As the Commission noted in the Declaratory Order, Order No. 719 applies to demand response resources; the rule expressly provides that it does not apply to EERs.  

44. Midwest TDUs also request clarification that the Commission’s statements regarding the effects of EERs on retail electric service are not intended to prejudge

107 See Order No. 719, FERC Stats. & Regs. ¶ 31,281 (requiring RTOs/ISOs to receive state utility approval of demand response participation); see also Cal. Indep. Sys. Operator Corp, 119 FERC ¶ 61,076, at P 558 (2007) (“As a general matter, it is our responsibility to ensure that a workable resource adequacy requirement exists in a market such as that operated by the [California Independent System Operator]. This does not mean that we must determine all the elements of such a program in the first instance. Rather, we can, in appropriate circumstances, defer to state and Local Regulatory Authorities to set those requirements[.]”); Nw. Wis. Elec. Co., 65 FERC ¶ 61,302, at 62,391 (1993) (deferring to state when service had distribution attributes and company demonstrated financial strain from compliance with Commission requirements); Consol. Edison Co. of N.Y., Inc., 15 FERC ¶ 61,174, at 61,405-06 (1981) (deferring to state when service at issue was delivery of power directly to buyer’s customers).

108 See Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 276 (“Energy 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.”).
any future RTO-specific proposal to limit EER participation in wholesale markets. We find such a clarification unnecessary as the Commission’s findings regarding the effects of EERs on retail service were appropriately based on the record in this proceeding. We note that the Commission did not find in the Declaratory Order that it would never implement such an opt-in/opt-out approach to EER participation in wholesale markets, but that the record in the instant proceeding does not support the implementation of such a rule. The Declaratory Order appropriately rejected several rationales for the need for a generic opt-in/opt-out approach for EERs, including the potential double counting of EERs in wholesale markets and retail energy efficiency programs, or third-party EERs siphoning financially valuable energy efficiency projects away from utilities’ programs.\(^{109}\) The Commission also found that other retail concerns could be addressed through means other than retail prohibitions on wholesale market participation. Joint Parties, FirstEnergy, and Midwest TDUs on rehearing have not supported their contention that the Commission should broadly defer to RERRAs’ direct restrictions on the wholesale market participation of EERs. As stated in the Declaratory Order, we will not predetermine any standards that the Commission would apply to any future requests for opt-out provisions and would instead assess any such proposals in the context of the facts presented in those particular cases.\(^{110}\)

45. We disagree with Joint Parties’ contention that the Declaratory Order fosters legal uncertainty and increases regulatory burdens by requiring stakeholders to negotiate RTO/ISO market rules to implement an opt-out.\(^{111}\) The Declaratory Order did not require any action on the part of RTO/ISOs and stakeholders, but merely found that an RTO/ISO stakeholder process might be an appropriate forum to develop tariff provisions implementing a restriction on EERs sanctioned by the Commission.

The Commission orders:

(A) The requests for rehearing are denied, as discussed in the body of this order.

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\(^{109}\) Aside from failing to persuade the Commission to implement a policy broadly deferring to RERRA restrictions on EER wholesale market participation, such arguments also fail to establish that the Commission is attempting to regulate retail service. See EPSA, 136 S. Ct. at 777-78 (finding that nothing in the FPA or the Supreme Court’s caselaw suggests that the Commission sets a rate for retail electricity merely by altering consumers’ incentives to purchase that product).

\(^{110}\) Declaratory Order, 161 FERC ¶ 61,245 at P 72.

\(^{111}\) See Joint Parties Rehearing Request at 23-24.
(B) The requests for clarification are granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.