172 FERC ¶ 61,249
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

North Carolina Eastern Municipal Power Agency Docket No. EL20-15-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued September 17, 2020)

1. On December 23, 2019, North Carolina Eastern Municipal Power Agency (NCEMPA)[1] filed a petition for declaratory order (Petition), pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,[2] requesting that the Commission interpret the Fifth Restated Full Requirements Power Purchase Agreement (FRPPA) between NCEMPA and Duke Energy Progress, LLC (Duke) so as to permit NCEMPA and its municipal members to utilize battery storage technology on their systems. NCEMPA also requests an exemption, pursuant to section 381.108 of the Commission's regulations,[3] from the filing fee associated with a petition for a declaratory order.[4] In this order, we grant NCEMPA's Petition, as discussed below. We also grant NCEMPA an exemption of the filing fee, as discussed below.

I. Background

A. The FRPPA

2. Since August 1, 2015, Duke has supplied NCEMPA with its full requirements of energy and capacity under the FRPPA.[5] As relevant for the purposes of this proceeding,

[1] NCEMPA is a joint agency whose members are 32 cities and towns located in eastern North Carolina, each of which owns and operates its municipal electric distribution system. NCEMPA Petition at 4.

[2] 18 C.F.R. § 385.207 (2020).

[3] *Id.* § 381.108.

[4] *Id.* § 381.302.

[5] NCEMPA Petition at 5; Duke Protest at 6. Section 3.1 of the FRPPA defines

Article 9 governs demand and energy-efficiency programs, and preserves NCEMPA's authority to pursue certain programs to reduce and/or modify demand or load, including through Demand-Side Management and Demand Response. Specifically, section 9.4 of the FRPPA describes the permissible practice of Demand-Side Management as follows:

> Demand-Side Management. Nothing in this Agreement is intended to preclude [NCEMPA] and/or its Members from instituting or promoting activities designed, in whole or in part, to manage or reduce the Members' demands and/or loads through Demand-Side Management programs. To the extent [NCEMPA] and/or its Members install load controlling devices, including, without limitation, those used on appliances such as air conditioners and water heaters, [Duke] shall have no responsibility and/or obligation relating to the Demand-Side Management programs and/or the activities relating to the foregoing.[6]

Section 1.47 of the FRPPA separately defines Demand-Side Management as:

> [E]nergy and load-shape modifying activities undertaken by [NCEMPA] and/or a Member that are designed to encourage consumers to modify patterns of electricity usage, including the timing and level of electricity demand. Demand-Side Management includes those activities engaged in by [NCEMPA] or its Members designed, in whole or in part, to control demand and which are typically characterized by centralized control or by supplying load signal information.[7]

3. Of further relevance here, section 9.5 of the FRPPA describes the permissible practice of Demand Response as follows:

> Demand Response. Nothing in this Agreement is intended to preclude [NCEMPA] and/or its Members from instituting or promoting activities designed, in whole or in part, to manage

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"Requirements Service" as "firm capacity and energy in the amounts required by [NCEMPA] to reliably serve the current and future electrical loads of its Members or such loads to the extent assumed by another entity." NCEMPA Petition, Attach. 1, FRPPA §§ 1.118, 3.1 (FRPPA).

[6] FRPPA § 9.4.

[7] *Id.* § 1.47.

> or reduce the Members' demands and/or load through the use or communication of pricing information to [NCEMPA]'s or its Members' customers, such as the use of real-time pricing rates; provided, however, [Duke] shall have no responsibility and/or obligation relating to the foregoing programs and/or activities.[8]

The FRPPA does not otherwise define Demand Response.

4. Additionally, Article 4 of the FRPPA governs certain Qualified Generation.[9] Specifically, section 4.1 states that Customer Generation[10] and Member Generation[11]

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[8] *Id.* § 9.5.

[9] The FRPPA defines Qualified Generation as "consist[ing] of Member Generation, Customer Generation, and NCEMPA Generation." *Id.* § 1.115. Member Generation, Customer Generation, and NCEMPA Generation are each defined below. *Infra* notes 10-12.

[10] Customer Generation is defined as

> [A]ny generating unit having a nameplate capacity rating of 95 kW or more that satisfies either of the following sets of criteria: (i) the unit is owned by a retail or wholesale customer of a Member, or a retail customer of a wholesale customer of a Member and is used to serve load at the site of the load; or (ii) the unit is owned by a Member and is installed at a customer location for the benefit of the customer. The load served by any generating unit meeting either set of criteria shall be excluded from [NCEMPA's] Hourly Demand.

Id. § 1.42.

[11] Member Generation is defined as:

> [A]ny generating unit (other than the Edenton Generators and Elizabeth City Generators) owned by a Member having a nameplate capacity of 95kW or more, that is used to serve load at the site of the load, such that the load served by the unit is thereby excluded from [NCEMPA's] Hourly Demand, except for any such generating unit owned by a Member that satisfies the criteria set forth in Section 1.27(ii) and therefore is classified as Customer Generation.

Id. § 1.87.

may be used to serve load at the site of such generation so as to exclude that load from NCEMPA's hourly demand and NCEMPA Generation[12] may be connected directly to the electric distribution system of a member such that the output of such generation is thereby excluded from the hourly demand. Sections 4.1.1 and 4.1.2 set forth the notice requirements that NCEMPA must provide to Duke when NCEMPA plans to install Member or Customer Generation and certain operation and safety protocols, respectively. Additionally, section 4.1.4 of the FRPPA also places a limitation on Qualified Generation capacity, such that its aggregate nameplate capacity (in megawatts (MW)) at any one time shall not exceed 1.75% of the Combined System Capacity.[13] Section 4.1.5 also limits the financing activities of NCEMPA, and section 4.1.6 permits NCEMPA to install "a total of thirty-eight (38) MW of NCEMPA Generation."[14]

B. NCEMPA's Petition

5. NCEMPA explains that the dispute that is the subject of its Petition arises from a disagreement between NCEMPA and Duke regarding the rights of NCEMPA and its members to utilize battery storage technology under the FRPPA.[15] NCEMPA requests that the Commission issue an order declaring and confirming the rights of NCEMPA and its members regarding use of battery storage technology.

6. NCEMPA states that as the economic and operational viability of battery storage technology improved, NCEMPA and some of its members began to consider the potential benefits of using battery storage devices on their own distribution systems. NCEMPA explains that its principal anticipated use of battery storage technology involves: (1) charging a battery storage device during off-peak periods using available energy supplies (including but not limited to energy purchases under the FRPPA); and (2) discharging the battery storage device during expected peak load periods to reduce the coincident peak

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[12] NCEMPA Generation is defined as:

> [A]ny generating unit owned by [NCEMPA] having a nameplate capacity rating of 95 kW or more (but not more than 6,000 kW) that is connected directly to the electric distribution system of a Member, such that the output of such unit is thereby excluded from [NCEMPA's] Hourly Demand.

Id. § 1.99.

[13] *Id.* § 4.1.4.

[14] *Id.* §§ 4.1.5, 4.1.6.

[15] NCEMPA Petition at 1.

hour demands of a NCEMPA member during those periods.[16] NCEMPA clarifies that, as contemplated, NCEMPA or its members would use any energy discharged by battery storage devices within their respective distribution system and would not inject any energy into the Duke transmission grid.[17] NCEMPA explains that it concluded that using battery storage technology in this manner is authorized by the FRPPA provisions that expressly allow NCEMPA and its members to manage or reduce the members' demands and/or loads through Demand Response and Demand-Side Management.[18]

7. NCEMPA states that the question presented is "whether the FRPPA authorizes NCEMPA and its members to use battery storage technology to reduce or manage their hourly demands and/or loads under that agreement."[19] NCEMPA maintains that FRPPA section 9.5, which expressly permits NCEMPA to engage in "Demand Response," allows it and its members to use battery storage technology to manage or reduce their hourly demands and/or loads.[20] NCEMPA asserts that the use of battery storage technology for this purpose also falls within the express terms of the FRPPA that authorize NCEMPA and its members' use of "Demand-Side Management" activities.[21]

8. NCEMPA argues that the plain language of sections 9.5 and 9.4 support its interpretation.[22] First, NCEMPA asserts that the use of battery storage technology is a permitted form of Demand Response under the FRPPA. NCEMPA explains that although the FRPPA does not define "Demand Response," the use of battery storage technology being considered by NCEMPA and its members would enable NCEMPA to "manage or reduce . . . the demands and/or load" that are experienced during hours when the battery storage device is discharged and thus, is clearly encompassed by FRPPA section 9.5.[23] Furthermore, NCEMPA explains that the management or reduction of a NCEMPA member's demands and/or load through the use of battery storage technology would be facilitated by the pricing structure of the FRPPA and by the communication of

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[16] *Id.* at 1-2, 6.

[17] *Id.* at 6.

[18] *Id.* at 6-7.

[19] *Id.* at 8.

[20] *Id.*

[21] *Id.* (citing FRPPA §§ 1.47, 9.4).

[22] *Id.* at 9.

[23] *Id.* at 9.

price-related information, as contemplated by FRPPA section 9.5.[24] NCEMPA asserts that the importance NCEMPA placed on having this ability is readily apparent from the terms of FRPPA section 18.1, which obligate Duke to furnish the real-time load signal to NCEMPA that may be shared with NCEMPA's members.[25] NCEMPA states that its use of the real-time load signal from Duke has allowed NCEMPA to forecast the coincident peak hours for each month and to communicate the signal to its members for the same purpose. Further, NCEMPA asserts that this permitted practice has allowed NCEMPA and its members to reduce their demands and/or load during peak hours in order to reduce the monthly capacity charges that NCEMPA incurs under the FRPPA.[26]

9. Second, NCEMPA asserts that its contemplated use of battery storage technology is permitted by the FRPPA provisions governing Demand-Side Management, insofar as a reduction in a NCEMPA member's electrical needs during expected peak hours comes about through retail consumer participation in a battery storage program instituted or promoted by NCEMPA or a NCEMPA member.[27] NCEMPA explains that its conclusion that FRPPA section 9.4 applies to consumer-level use of battery storage technology is reinforced by reference to the FRPPA's definition of "Demand-Side Management," as defined above. Specifically, NCEMPA asserts that the use of consumer-level Demand-Side Management to manage or reduce NCEMPA loads would be considered an "energy and load-shape modifying activit[y]," the effect of which is to "modify the consumer's pattern of electricity usage, including the timing and level of electricity demand," as authorized by section 9.4 of the FRPPA and as expressly contemplated by the first sentence of FRPPA section 1.47.[28] NCEMPA asserts that the conclusion that the FRPPA at a minimum authorizes consumer-level use of battery storage technology is further reinforced by the second sentence of section 1.47 because whether the use of battery storage technology is viewed as "reducing" load or merely "time-shifting" the appearance

[24] *Id.* at 9-10. NCEMPA explains in more detail that the FRPPA pricing structure charges NCEMPA a share of Duke's demand-related costs based on the aggregate loads of NCEMPA's members during Duke's monthly system peak-load hours (i.e., during "coincident peak" hours). NCEMPA states that the FRPPA requires Duke to provide NCEMPA a real-time load signal that allows NCEMPA to forecast when the peak-load periods that matter for pricing purposes are likely to occur. NCEMPA concludes that by predicting the coincident peak hours, NCEMPA is able to take steps to manage or reduce the loads and/or demands of its members during those hours. *Id.* at 10.

[25] *Id.* (quoting FRPPA § 18.1).

[26] *Id.* at 10-11.

[27] *Id.* at 11.

[28] *Id.* at 12 (quoting FRPPA §§ 1.47, 9.4).

of load, the effect in either case is to "control demand," as authorized by FRPPA section 1.47.[29] Finally, NCEMPA asserts that its deployment of battery storage technology in real time will be facilitated by the provision of "load signal information," which also accords with the description of authorized activities in the second sentence of FRPPA section 1.47.[30] NCEMPA concludes that, at a minimum, the use of battery storage technology at the retail consumer level is expressly authorized by the unambiguous provisions of the FRPPA that govern Demand-Side Management activities.

10. Based on the above analysis, NCEMPA requests that the Commission confirm NCEMPA and its members' right to manage or reduce their demands and/or loads during coincident peak hours through the use of battery storage technology.[31] NCEMPA asserts that such relief may be granted summarily based on the express language of the FRPPA, without the need for consideration of extrinsic evidence or other extra-contractual factors.[32] NCEMPA also urges the Commission to act promptly in granting the requested relief as the pendency of the dispute between NCEMPA and Duke over the use of battery storage technology under the FRPPA may reasonably be expected to affect NCEMPA members' decision-making, as well as that of their larger retail customers, about the use of battery storage technology.[33]

11. Lastly, NCEMPA petitions the Commission for a determination that NCEMPA is exempt from assessment of the filing fee associated with a petition for declaratory order under section 381.302(a) of the Commission's regulations.[34] NCEMPA asserts that it is eligible for an exemption under section 381.108 of the Commission's regulations, which states that "[s]tates, municipalities, and anyone who is engaged in the official business of the Federal Government are exempt from the fees required by this part and may file a petition for exemption in lieu of the applicable fee."[35] NCEMPA asserts that it is a joint agency organized and existing under Chapter 159B of the General Statutes of North Carolina and is in good standing with the North Carolina Secretary of State; thus, NCEMPA asserts that it is an extension of the State of North Carolina and therefore

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[29] *Id.* at 12-13.

[30] *Id.* at 13.

[31] *Id.* at 20.

[32] *Id.*

[33] *Id.* at 21.

[34] *Id.* at 25 (citing 18 C.F.R. § 381.302(a) (2020)).

[35] 18 C.F.R. § 381.108(a) (2020).

eligible for the exemption.[36] NCEMPA also explains that as a "public body" under North Carolina law, NCEMPA is entitled to the same exemption from fees as the Commission would grant to any other public body or instrumentality of the State of North Carolina.[37]

II. Notice and Responsive Pleadings

12. Notice of the Petition was published in the *Federal Register*, 85 Fed. Reg. 306 (Jan. 3, 2020), with interventions and comments due on or before January 22, 2020.[38] Duke submitted a timely motion to intervene and protest. North Carolina Electric Membership Corporation (NCEMC) submitted a timely motion to intervene on January 23, 2020, and filed comments out-of-time on February 4, 2020. NCEMPA submitted an answer to Duke's Protest on February 28, 2020.[39] Duke submitted an answer to NCEMPA's Answer on March 16, 2020. NCEMPA submitted an answer to Duke's Answer on April 10, 2020.

A. Comments and Protest

13. NCEMC states that it has its own power purchase agreement with Duke, which contains similar terms and conditions to the FRPPA.[40] NCEMC does not take a position on the Petition, but requests that the Commission limit its order to the FRPPA and the facts adduced in this proceeding.[41]

14. Duke protests NCEMPA's interpretation of the FRPPA, arguing that NCEMPA's proposed use of battery storage technology distorts or masks the accurate measurement of

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[36] NCEMPA Petition at 25. According to NCEMPA, section 159B-9(a) of the General Statutes of North Carolina provides that a joint agency properly registered with the North Carolina Secretary of State "shall constitute a public body and body corporate and politic" of the State. *Id.* (quoting N.C. Gen. Stat. § 159B-9(a)).

[37] NCEMPA Petition at 25.

[38] The comment deadline was subsequently extended by one week to January 29, 2020. *N.C. E. Muni. Power Agency*, Docket No. EL20-15-000, Notice of Extension of Time (issued Jan. 8, 2020).

[39] NCEMPA submitted an errata on March 2, 2020 to include an exhibit that was inadvertently excluded from its Answer.

[40] NCEMC Comments at 1.

[41] *Id.* at 2.

NCEMPA's metered coincident peak billing demand and violates the plain meaning of clear contractual provisions.[42] First, Duke argues that the FRPPA must be read in context, recognizing that the FRPPA is a full requirements contract, which Duke asserts creates unique demands within the universe of Commission jurisdictional services.[43] Duke notes that full requirements service requires Duke to treat NCEMPA's load as if it was Duke's native load, and as such, Duke must plan its system around NCEMPA's load.

15. Next, Duke argues that NCEMPA's requested interpretation of the FRPPA is contrary to the letter and spirit of the FRPPA. According to Duke, the FRPPA clearly spells out (1) what metered coincident peak billing demand reduction activities NCEMPA can engage in, (2) what resources it can utilize for this purpose, and (3) the limited extent to which NCEMPA can reduce its metered coincident peak billing demand; Duke argues that the use of battery storage technology is not included among them.[44] Duke focuses on Article 4 and states that NCEMPA can only use certain categories and quantities of distributed generation to self-serve its load; all of NCEMPA's remaining requirements must be purchased from Duke, for which NCEMPA must pay Duke's fixed costs.[45]

16. In response to NCEMPA's arguments that battery storage technology fits within either sections 9.4 or 9.5 of the FRPPA, Duke argues that such an interpretation would violate well-settled principles of contract interpretation.[46] Specifically, Duke references the plain meaning of the terms,[47] *ejusdem generis*,[48] and the need to interpret the contract

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[42] Duke Protest at 2.

[43] *Id.* at 13-14.

[44] *Id.* at 2-3, 14.

[45] *Id.* at 14.

[46] *Id.* at 16-26.

[47] *Id.* at 16.

[48] *Id.* at 19 n.40. *Ejusdem generis* provides that where general terms or phrases follow specific terms, the general terms are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific terms. *See Entergy Servs., Inc. v. FERC*, 568 F.3d 978, 984 (D.C. Cir. 2009) (noting that *ejusdem generis* means "general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words").

as an integrated whole and not interpret the contract so as to be in conflict with itself.[49] Duke argues that, at the time of the FRPPA's negotiation, the parties contemplated that Demand Response and Demand-Side Management would require a true reduction in consumption or actual shifting of consumption from on-peak to off-peak hours.[50]

17. Additionally, Duke argues that, even if the Commission were to find the FRPPA ambiguous and examine extrinsic evidence, NCEMPA's interpretation is still unsupported. Relying on an affidavit from its lead negotiator during the FRPPA's formation, Duke argues that it agreed to allow NCEMPA to continue reducing the measurement of its metered coincident peak billing demand, but only by using generation located on the distribution system, as a continuation of NCEMPA's historical practice, and within certain defined limits, as expressly enumerated and mutually agreed upon in the FRPPA.[51] Duke asserts that the use of self-supplied real power to reduce NCEMPA's metered coincident peak billing demand, as NCEMPA proposes to do with its use of battery storage technology, is explicitly contemplated by the FRPPA to be accomplished only through using distributed generation resources, with express limits on the amounts of distributed generation resources to be used in such a manner. Duke argues further that Demand Response and Demand-Side Management, as those terms are used in the FRPPA, involves customers reducing (or managing) consumption, such that the reduction in consumption by customers actually reduces the loads or demands on the electrical system or changing the loads or demands from on-peak to off-peak period.[52] In short, Duke argues that neither it nor NCEMPA ever intended or considered battery storage technology to be included within the FRPPA.[53]

[49] Duke Protest at 20.

[50] *Id.* at 3.

[51] *Id.* at 26 (citing Duke Protest, Ex. A, Affidavit of Harold L. James at 14-16 (James Aff.)).

[52] *Id.* at 28-29 (citing James Aff. at 17-18).

[53] *Id.* at 30.

18. Lastly, Duke argues that NCEMPA's interpretation would be inconsistent with the Commission's definition of demand response as developed through Order No. 745.[54] Duke states that the Commission has defined demand response as "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy."[55] Duke then argues that the FRPPA's description of Demand Response is entirely consistent with the Commission's definition and thus, the FRPPA cannot be interpreted as permitting taking energy off the system, storing it, and then later injecting it back onto the system as these actions do not use "real-time pricing rates" or "encourage consumers to modify patterns of electricity usage."[56]

B. NCEMPA's First Answer

19. In its first Answer to Duke's Protest, NCEMPA contends that Duke advances a reading of the FRPPA provisions that is internally inconsistent, dependent on crafted terms that do not appear in the FRPPA, imports terminology from prior Commission orders inapplicable to this case's circumstances, and seeks to draw support from parole evidence that ought not to be considered, given the FRPPA's unambiguous language.[57]

20. NCEMPA distinguishes its "plain language" analysis from Duke's "plain meaning" analysis and argues that a "plain language" interpretation relies on the express terms of a contract and avoids the need for extrinsic evidence, which can be subjective and inconclusive.[58] NCEMPA argues the Duke's "plain meaning" interpretation disregards clear language in pertinent provisions. In support of this argument, NCEMPA highlights the introductory phrase in both sections 9.4 and 9.5 which states, "Nothing in this Agreement is intended to preclude [NCEMPA] and/or its Members from instituting or promoting activities designed, in whole or in part," and is followed by language

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[54] *Id.* at 32-33 (citing *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187, *order on reh'g & clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh'g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *rev'd & remanded sub nom. FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016)).

[55] *Id.* at 33 (quoting Order No. 745, 134 FERC ¶ 61,187 at P 2 n.3).

[56] *Id.* at 34 (quoting FRPPA §§ 9.4, 9.5).

[57] NCEMPA February 28 Answer at 3.

[58] *Id.* at 6.

referencing Demand-Side Management or Demand Response activities in sections 9.4 and 9.5, respectively.[59] The introductory phrase's purpose, NCEMPA contends, was to ensure that the rights conferred by these sections to NCEMPA would not be vulnerable to a claim that NCEMPA's engagement in Demand Response or Demand-Side Management is impermissible because it conflicts with another provision of the FRPPA.[60] NCEMPA argues that this language preserves NCEMPA's rights to engage in Demand-Side Management or Demand Response activities against claims of conflict with other provisions of the FRPPA.

21. NCEMPA asserts that Duke's "plain meaning" interpretation relies on Duke's own views regarding what the express terms were meant to accomplish and, as such, Duke's claims about what the FRPPA's terms were meant to accomplish depend on extrinsic evidence regarding the parties' respective goals in the FRPPA negotiations.[61] NCEMPA states that Duke's position can be distilled into three distinct assertions, each of which NCEMPA addresses in turn.

22. First, NCEMPA asserts that its contemplated use of battery storage technology does not violate the "all requirements" nature of the FRPPA. Specifically, NCEMPA disagrees with Duke's argument that there is specific cap on the use of Demand Response or Demand-Side Management in the FRPPA or that the use of Demand Response or Demand-Side Management is limited to specific methods of technology by the FRPPA.[62] Additionally, NCEMPA disagrees with Duke's contention that NCEMPA's use of battery storage technology would allow NCEMPA to execute an end-run around its contractual obligation to pay its load-ratio share of Duke's fixed system demand costs, as this argument does not recognize that NCEMPA's proposed use of battery storage technology would reduce its load ratio share of system fixed costs by reducing the actual demands that NCEMPA imposes on the Duke system during peak load periods.[63]

23. Second, NCEMPA asserts that its use of battery storage technology would not impermissibly mask or distort the accurate measurement of metered coincident peak billing demand.[64] As an initial matter, NCEMPA notes that the term "metered coincident

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[59] *Id.*

[60] *Id.* at 19-20.

[61] *Id.* at 5.

[62] *Id.* at 6.

[63] *Id.* at 8.

[64] *Id.* at 6-9.

peak billing demand" not only does not appear in the FRPPA, but also that Duke never defines "metered coincident peak billing demand," instead attempting to apply the term in a variety of ways in its Protest.[65] As a result, NCEMPA argues, the validity of Duke's "plain meaning" argument is undermined. NCEMPA highlights its perceived importance of this term in an example. NCEMPA notes that because Demand Response and Demand-Side Management are not subject to numerical caps of permissible reductions, in contrast to the limits set forth in section 4.1.4 of the FRPPA on Member Generation and Qualified Generation, the use of even those forms of Demand Response and Demand-Side Management that Duke would not find objectionable would not "reduce" NCEMPA's "metered coincident peak billing demand."[66] NCEMPA concludes that although Duke argues that some reductions in coincident peak demand are permissible while others should be seen as masking true demand, the FRPPA makes no such distinction with respect to NCEMPA's use of Demand Response and Demand-Side Management and thus any arguments by Duke that such limits exist are baseless.

24. Third, NCEMPA asserts that neither section 9.4 nor 9.5 of the FRPPA supports Duke's argument that Demand Response and Demand-Side Management activities are permitted only if they reduce retail customers' consumption of energy, which Duke claims battery storage technology use does not.[67] NCEMPA argues that nothing in sections 9.4 or 9.5 supports this assertion and that the word "consumption" does not appear in sections 9.4 or 9.5, or in section 1.47, which defines Demand-Side Management.[68] As evidence for this claim, NCEMPA notes that FRPPA section 9.3 expressly requires a change in consumption in connection with the Energy Efficiency Measures outlined therein. NCEMPA cites to this requirement as evidence that it can be reasonably assumed that similar language would have appeared in sections 9.4 or 9.5 of the FRPPA had the parties intended for reductions in retail customers' consumption also to be a requirement for certain Demand Response or Demand-Side Management activities to be permissible.[69]

25. NCEMPA also disagrees with Duke's assertion that the list of activities in FRPPA section 9.4 specifies that Demand-Side Management tools must manage or reduce a retail customer's load to be permissible under the FRPPA.[70] NCEMPA asserts that when the

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[65] *Id.* at 9.

[66] *Id.* at 11.

[67] *Id.* at 6-13.

[68] *Id.* at 14.

[69] *Id.*

[70] *Id.* at 17.

list of activities is considered in the context of the rest of section 9.4, it was not intended to specify certain permissible types of Demand-Side Management. NCEMPA argues that the list of example Demand-Side Management activities instead was intended expressly to disclaim responsibility on Duke's part for operating load controlling devices that NCEMPA or a member may install as part of a Demand-Side Management program, since load-controlling devices are typically located on the premises of retail customers.[71] In short, NCEMPA argues that the two-item list is clearly illustrative and the surrounding language in section 9.4 of the FRPPA clarifies that the two-item list was not intended to be interpreted as exhaustive.[72]

26. Lastly, NCEMPA asserts that the application of Duke's "plain meaning" interpretation would lead to absurd results. NCEMPA states that Duke argues that NCEMPA's proposed use of battery storage technology masks its metered coincident peak billing demand rather than produces actual reductions in retail consumption.[73] NCEMPA argues that Duke's logic would render impossible the use of any battery storage device, regardless of size, that reduces NCEMPA's meter demand when discharged. This would include, NCEMPA states, consumer-scale battery storage devices and arrangements in which energy would be withdrawn from electric vehicle batteries as they are connected to charging devices.[74] Effectively, NCEMPA argues, Duke's interpretation of sections 9.4 and 9.5 of the FRPPA would prohibit individual homeowner use of battery storage technology or, in the alternative, if a homeowner were to use battery storage technology, Duke's position would allow Duke to add back artificially the resulting demand reduction to the actual metered demand of the applicable NCEMPA member.[75]

27. NCEMPA requests that the Commission disregard the extrinsic evidence introduced in Duke's Protest, but requests that if the Commission considers extrinsic evidence, then it also consider the affidavit that NCEMPA submitted with its Answer.[76] With regard to Duke's extrinsic evidence, NCEMPA disputes Duke's argument that the historic or customary use of certain demand-side activities would prohibit NCEMPA from using new technologies. NCEMPA asserts that Duke characterizes the FRPPA provisions in ways

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[71] *Id.* at 17-18.

[72] *Id.* at 19.

[73] *Id.* at 21.

[74] *Id.*

[75] *Id.* at 22.

[76] *Id.* at 23

that are not supported by either the history of the negotiations or the language of the FRPPA.[77] NCEMPA explains its view that there is no basis for Duke's suggestion that the FRPPA authorizes only certain Demand Response and Demand-Side Management activities but not others. NCEMPA asserts that since the technology of Demand Response and Demand-Side Management is constantly changing, NCEMPA "would not have agreed to limit its [Demand Response] or [Demand-Side Management] activities to those known or widely engaged in at the time."[78]

C. Duke's Answer

28. Duke reiterates that NCEMPA's interpretation runs afoul of Commission precedent requiring that a contract be read as a whole, giving meaning to all provisions of the contract.[79] Duke argues that the first step in contract interpretation is whether the intent of the parties is expressed by the clear terms of the FRPPA.[80] Duke further argues that NCEMPA's preferred interpretation of Demand Response and Demand-Side Management would create an internal conflict within the FRPPA and render other provisions meaningless.[81] Duke asserts that sections 9.4 and 9.5 require that end-use customers reduce their loads, whereas NCEMPA is proposing to reduce its own load on the Duke system.[82] Additionally, Duke argues that NCEMPA's Answer ignores the nature of full requirements service.[83] Lastly Duke argues that NCEMPA mischaracterizes Duke's use of the phrase "metered coincident peak billing demand" in its Answer.[84] Duke contends that this term is self-explanatory and defines the term to mean "the value of [NCEMPA's] metered demand used for billing purposes."[85]

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[77] NCEMPA February 28 Answer, Ex. 1, Affidavit of Roy L. Jones at 5-6.

[78] *Id.* at 6.

[79] Duke Answer at 2.

[80] *Id.* at 3.

[81] *Id.* at 4-9.

[82] *Id.* at 5-7.

[83] *Id.* at 9-12.

[84] *Id.* at 13-15.

[85] *Id.* at 13.

D. NCEMPA's Second Answer

29. NCEMPA filed a second answer to Duke's Answer to respond to what it asserts are new contentions and misstatements. First, NCEMPA argues that it is not required to provide a real-time load signal to end-use customers, as Duke alleges, but rather the load signal only needs to be provided to its members, which is its current practice.[86] Second, NCEMPA argues that allowing it to use battery storage technology as Demand Response or Demand-Side Management would not end in the absurd result of the uncapped use of self-supplied generation by NCEMPA, as Duke alleges. Third, NCEMPA argues that the Commission should reject Duke's reliance on generic ratemaking principles and decisions because the question presented here is answered by the language of the FRPPA.[87] Lastly, NCEMPA argues that Duke's explanation of the term "metered coincident peak billing demand" fails to clarify the meaning of that term in relation to the express terms of the FRPPA.[88]

III. Discussion

A. Procedural Matters

30. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

31. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2020), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept NCEMPA's and Duke's Answers because they have provided information that assisted us in our decision-making process, and we also accept the late-filed comments submitted by NCEMC.

B. Substantive Matters

32. We find that the FRPPA permits NCEMPA to use battery storage technology as either Demand-Side Management or Demand Response, and therefore, we grant NCEMPA's Petition.

33. First, with regard to the use of battery storage technology as Demand-Side Management, we note that section 9.4 provides: "[*n*]*othing in this Agreement* is intended

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[86] NCEMPA April 10 Answer at 2-7.

[87] *Id.* at 9-10.

[88] *Id.* at 12-13.

to preclude [NCEMPA] and/or its Members from instituting or promoting activities designed, in whole or in part, *to manage or reduce* the Members' *demands and/or loads through Demand-Side Management programs*."[89] The term "Demand-Side Management" is further defined in section 1.47 as "energy and load-shape modifying activities . . . designed to encourage consumers to modify patterns of electricity usage, including the timing and level of electricity demand."[90] Thus, when read together, the FRPPA places no limitation on activities designed to manage or reduce NCEMPA's or its Members' demands and/or loads through energy and load-shape modifying activities. We find that NCEMPA's proposed use of battery storage technology to modify the timing of the peak may be considered such an activity. Battery storage technology by its very nature does not generate electricity, but rather withdraws energy at one point in time and discharges energy at a later point. Thus, when used as NCEMPA proposes, battery storage technology is inherently a load-shape modifying device, designed not to reduce a customer's overall load but to shift the incidence of such load, i.e., to manage the customer's demands.

34. Furthermore, we note that section 9.4 of the FRPPA does not limit the kinds of technology that may be used as Demand-Side Management.[91] Rather, the language of section 9.4 appears to be drafted so as to capture a broad range of technologies, including those existing, nascent, and even those that do not yet exist, all of which are capable of providing Demand-Side Management products and services.[92] We find that a range of storage technologies may generally fit within this definition, including battery storage technology when used as NCEMPA proposes to do so here. As discussed above, battery storage technology does not independently generate energy, but rather charges and discharges in different time intervals. Similar to other demand-side management activities, such as pre-cooling buildings overnight or midday to avoid withdrawing energy to provide air conditioning during afternoon peak load conditions, NCEMPA's proposed use of battery storage technology simply determines *when* energy is consumed.

35. Because we find that the FRPPA permits the use of battery storage technology as Demand-Side Management under section 9.4, we need not address whether battery storage technology may also be used as Demand Response. Nevertheless, because the language of section 9.5, relating to Demand Response, is similar to that of section 9.4, relating to Demand-Side Management, we similarly find that the FRPPA permits the use

[89] FRPPA § 9.4 (emphasis added).

[90] *Id.* § 1.47.

[91] *Id.* § 9.4.

[92] Indeed, we note that, as originally drafted, the term of the FRPPA covers approximately a 29-year period.

of battery storage technology as Demand Response. Specifically, the FRPPA provides "[*n*]*othing in this Agreement is intended to preclude* [*NCEMPA*] *and/or its Members* from instituting or promoting activities designed, in whole or in part, to *manage or reduce the Members' demands and/or load* through the use or communication of pricing information to [NCEMPA's] or its Members' customers, such as the use of real-time pricing rates . . . ."[93] Unlike Demand-Side Management, Demand Response is not further defined in the FRPPA. Thus, the question of whether battery storage technology may be used as Demand Response requires that the technology be capable of managing or reducing demands and/or loads through the use or communication of pricing information.

36. With this understanding in mind, we find that NCEMPA's proposed charging and discharging of battery storage devices in order to reduce its cost of procuring energy meets this definition. Notably, NCEMPA proposes to use battery storage technology to reduce only its own load during periods of when prices would be high due to high demand on the system.[94] Further, we note that NCEMPA explicitly proposes that the management or reduction of a NCEMPA member's load through the use of battery storage technology would be facilitated both by the underlying pricing structure of the FRPPA and by the communication of real-time price information, as contemplated by FRPPA section 9.5.[95] From a technical perspective, we find that this practice would be indistinguishable from other types of demand response, including Demand Response resources that partially or primarily shift the timing of consumption.[96] In that regard, we note that the Commission stated in Order No. 841, which was issued before the currently effective FRPPA was executed, that "this Final Rule does not preclude electric storage resources from continuing to participate in demand response programs."[97] Although the

[93] FRPPA § 9.5.

[94] NCEMPA Petition at 6. We also note that NCEMPA is not proposing to inject energy onto Duke's transmission system. *Id.*

[95] *Id.* at 9-10.

[96] *See Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745-A, 137 FERC ¶ 61,215, at P 66 (2011) ("From the perspective of the grid, the manner in which a customer is able to produce . . . a load reduction from its validly established baseline (whether by shifting production, using internal generation, consuming less electricity, or other means) does not change the effect or value of the reduction to the wholesale grid.").

[97] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 at P 56 (2018), *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,154 (2019), *aff'd sub nom. Nat'l Ass'n of Reg. Util. Comm'rs v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020).

Commission's Order No. 841 reforms are not directly applicable here, as the Final Rule applies only in regional transmission organization and independent system operator markets, the Commission's statement in Order No. 841 confirms that battery storage resources are capable of providing demand response service.

37. In adopting NCEMPA's reading of the FRPPA, we reject Duke's restrictive interpretation. In its analysis, Duke presumes that battery storage is a form of generation, rather than treating battery storage technology as a withdrawal of energy for later injection back onto the grid. For example, Duke asserts that NCEMPA can only use certain categories of distributed generation to self-serve its load and must purchase all of its remaining requirements from Duke.[98] But this argument ignores the fact that NCEMPA still would be purchasing its full energy requirements from Duke. The power used to charge the batteries would come from Duke's generation, and then that power would be discharged from the batteries to serve NCEMPA's customers. In this respect, NCEMPA would be buying energy from Duke during hours that NCEMPA would not otherwise be making such purchases. Duke further argues that adopting NCEMPA's interpretation would permit it to use any type of self-supply generation to reduce its requirements needs.[99] We disagree. The installation of generation is governed by Article 4 of the FRPPA, and contains certain limitations, but more importantly, battery storage technology is not inherently a form of generation, in that the addition of generation capacity would directly compete with Duke's generation, whereas NCEMPA's proposed batteries would purchase energy from Duke's generation for use at a later time. The fact that NCEMPA is buying power from Duke at one hour and then using that same power from Duke in another hour does not change the fact that NCEMPA is meeting its full requirements through Duke.

38. We also reject Duke's arguments that the plain language of the FRPPA requires an actual reduction in consumption. The plain language of neither section 9.4 nor section 9.5 refers to reductions in consumption. Although the parties could have included such a requirement, as demonstrated in section 9.3, where energy efficiency measures require actual reductions in consumption, sections 9.4 and 9.5 merely refer to reductions in "demands and/or loads." Further, although neither demand nor loads are defined in the FRPPA, section 1.77 of the agreement does define "Hourly Demand" as "the aggregate load of [NCEMPA's] Members . . . determined by summing the metered 60-minute demands of the Members."[100] Thus, we find that this reference to metered demands in sections 9.4 and 9.5, rather than actual consumption, supports the conclusion that a

[98] Duke Protest at 14.

[99] *Id.* at 18.

[100] FRPPA § 1.77.

reduction in "demands and/or loads" can be achieved through any means that reduces metered demand, and not only through a reduction in the total amount of energy consumed.

39. We grant NCEMPA's request for an exemption from the filing fee. As a joint agency organized and existing under the General Statutes of North Carolina, which establishes NCEMPA as "a public body and body corporate and politic"[101] of the State of North Carolina, we find that NCEMPA is exempt from the filing fee otherwise applicable under Commission regulations.[102]

The Commission orders:

(A) NCEMPA's Petition is hereby granted, as discussed in the body of this order.

(B) NCEMPA's request for an exemption from the filing fee is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[101] N.C. Gen. Stat. § 159B-3.

[102] *See* 18 C.F.R. § 381.302 (2020) (establishing the filing fee for a petition for declaratory order as $30,060); *id.* § 381.108 (establishing an exemption from the filing fees under Part 381 for "States, municipalities, and anyone who is engaged in the official business of the Federal Government").