UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators	Docket No. RM18-9-000
Distributed Energy Resources-Technical Considerations for the Bulk Power System	Docket No. AD18-10-000

Supplemental Comments of Sunrun Inc.

In its Notice of Proposed Rulemaking issued November 17, 2016 (2016 NOPR), the Federal Energy Regulatory Commission (Commission) proposed to exercise its authority under Section 206 of the Federal Power Act[1] to remove barriers to the participation of distributed energy resource (DER) aggregations in the capacity, energy, and ancillary service markets operated by regional transmission organizations (RTO) and independent system operators (ISO) (organized wholesale electric markets). Sunrun Inc. (Sunrun) commented on the 2016 NOPR.[2] Like other commenters that supported the inclusion of DER aggregations in organized wholesale electric markets, Sunrun did not comment on the Commission's jurisdiction to undertake the actions it proposed. Sunrun did not do so because it believed the Commission's jurisdiction over sales into the organized wholesale electric markets to be straightforward and inarguable.

[1] 16 U.S.C. § 824e.

[2] Comments of Sunrun, Inc., Docket No. RM16-23-000 (filed Feb. 23, 2017).

Nevertheless, in comments submitted in February 2017 and again, recently, in requests for rehearing of Order No. 841,[3] several parties contend that the Commission lacks authority over sales into the organized wholesale electric markets originating from resources on the distribution system. Some of these commenters present legal arguments focused on the fact that DERs interconnect at the distribution system level, while others refer more obliquely to jurisdictional concerns that purportedly should persuade the Commission to either abandon its proposal or allow states the opportunity to opt out.

The Commission has rightly focused the agenda for the April 2018 Technical Conference on technical and operational issues, not its own jurisdiction. We also expect that any post-Conference comments will focus on the technical and operational issues that are the subject of the Conference. Therefore, in an effort to address the jurisdictional arguments that have arisen in this proceeding in a way least likely to distract from the important subject matter of the conference, Sunrun respectfully submits the following comments.

I. Introduction

Sunrun is the largest dedicated residential solar, battery storage, and energy services company in the United States. Sunrun established the solar as a service model in 2007 and continues to lead the industry in providing clean energy to homeowners with little to no upfront cost and at a savings to traditional electricity. We design, install, finance, insure, monitor, and maintain solar panels, as well as complementary battery systems, on a resident's home, while families receive predictable pricing for 20 years or more. Existing DER markets in the United States have been driven by ratepayers' desire to assert control over their electric bills. These

[3] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018) (Order No. 841).

"prosumers" have privately financed an industry revolution that values low-cost, customer-based solutions to integrate renewable energy resources onto our grid.

II. The Commission Has Clear Authority to Regulate Sales from DER Aggregations into RTO/ISO markets

a. Sales from aggregated DERs into RTO/ISO markets are wholesale sales in interstate commerce

The Federal Power Act gives the Commission authority over sales of energy "at wholesale in interstate commerce."[4] When the aggregated output of DERs is sold into the organized wholesale electric markets, those sales are by definition "sales at wholesale." They are also sales "in interstate commerce" because the RTO/ISO markets operate regionally with buyers and sellers spread across multiple states.[5]

Because these sales lie within the Commission's jurisdiction, the Commission may remove barriers blocking them if the Commission finds those barriers to be "unjust, unreasonable, unduly discriminatory or preferential,"[6] as it proposed to do in the 2016 NOPR.[7] The absence of participation models and other market rules that would enable DER aggregations

[4] 16 U.S.C. § 824(b)(1).

[5] Sales into the markets operated by single-state ISOs (NYISO and CAISO) are sales in "interstate commerce" because those markets exchange energy regularly with out-of-state counterparties. Moreover, wholesale sales within a single state are also generally considered to be in "interstate commerce." *See Fed. Power Comm'n v. Southern Cal. Edison Co*., 376 U.S. 205 (1964).

[6] 16 U.S.C. § 824e.

[7] 2016 NOPR at P 14 ("Effective wholesale competition encourages entry and exit and promotes innovation, incentivizes the efficient operation of resources, and allocates risk appropriately between consumers and producers. Removing these barriers will enhance the competitiveness, and in turn the efficiency, of organized wholesale electric markets and thereby help to ensure just and reasonable and not unduly discriminatory or preferential rates for wholesale electric services.").

to participate in organized wholesale electric markets is exactly the kind of barrier the Commission may break down using its authority under Section 206 of the Federal Power Act. Doing so for DER aggregations would follow in the Commission's successful tradition of protecting consumers by expanding the scope of competition in organized wholesale markets.[8]

No provision of the Federal Power Act limits the Commission's authority over wholesale sales of energy based on voltage at the point of interconnection. The fact that DERs interconnect on the distribution system – and in many cases behind the retail meter – is of no moment. The Commission explained recently in Order No. 841 that it possesses "exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets, including the wholesale market rules for participation of resources connected at or below distribution-level voltages."[9]

Despite the solid foundation underlying the Commission's authority over sales from DER aggregations into RTO/ISO markets, several commenters in this proceeding – and in requests for rehearing of Order No. 841 – claim that the Commission is overstepping. Nearly all of these commenters focus on the portion of Section 201(b) of the Federal Power Act that reserves to

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[8] *See, e.g.*, *Integration of Variable Energy Resources*, Order No. 764, FERC Stats. & Regs. ¶ 31,331, *order on reh'g*, Order No. 764-A, 141 FERC ¶ 61,232 (2012), *order on reh'g*, Order No. 764-B, 144 FERC ¶ 61,222 (2013); *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009)); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[9] Order No. 841 at P 35.

states the regulation of "facilities used in local distribution."[10] But those words in Section 201(b) do not limit the Commission's jurisdiction in the way these commenters claim. In allocating authority between the Commission and the states, Section 201(b) carefully distinguishes between authority to regulate *transactions* and authority to regulate *facilities*. The reservation of authority "over facilities used in local distribution" applies to the regulation of facilities as such, *i.e*. the planning and reliability of those facilities and their cost recovery in connection with retail sales. Where a wholesale sale involves the use of local distribution facilities, the state's authority to regulate the distribution facilities in no way limits the Commission's authority to regulate the transaction. The U.S. Court of Appeals for the D.C. Circuit has made this point unmistakably on several occasions, explaining that "all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used"[11] and that "when a local distribution facility is used in a wholesale transaction, FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction."[12]

b. Allowing DER aggregations to sell into RTO/ISO markets will not diminish state jurisdiction over distribution facilities

Harnessing the full economic value of DERs presents a great challenge for state regulators and the distribution utilities they regulate. Traditional utility regulation has been unidirectional and centered on the retail relationship between the distribution utility and its customers, each in well-understood roles. DERs change that. Sunrun believes that DERs create

[10] 16 U.S.C. § 824(b)(1).

[11] *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 696 (D.C. Cir. 2000).

[12] *Detroit Edison Co. v. FERC*, 334 F.3d 48, 51 (D.C. Cir. 2003); *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1282 (D.C. Cir. 2007) (holding that when FERC was "exerting jurisdiction over transactions" it "had no occasion to decide whether a facility as such should be classified as jurisdictional or not.").

tremendous value for electric consumers. But we acknowledge that the transition to a grid that captures the full economic potential of DERs poses challenging technical and regulatory questions, for which distribution utilities and state regulators will bear primary responsibility. Many of them are actively working to solve those challenges today.

To the extent that the opening of RTO/ISO markets to DER aggregations opens new use cases and furthers their growth, that growth will heighten both the opportunities and challenges facing state regulators. But new challenges should not be confused with a diminution in the states' regulatory authority. As the Supreme Court explained in *FERC v. Elec. Power Supply Ass'n*, the wholesale and retail markets are "not hermetically sealed from each other" and that "[w]hen FERC sets a wholesale rate, when it changes wholesale market rules, when it allocates electricity as between wholesale purchasers—in short, when it takes virtually any action respecting wholesale transactions—it has some effect, in either the short or the long term, on retail rates."[13] So too when FERC takes actions that allow DER aggregations to participate in the RTO/ISO markets, there will be consequences for the distribution systems through which utilities provide retail service. We believe those consequences will be overwhelmingly positive on balance, but in no case do they represent a narrowing of the scope of states' authority. Nor are these effects of any legal consequence for the exercise of the Commission's jurisdiction over wholesale sales in interstate commerce.[14]

c. Allowing states to opt out is unnecessary to preserve the Commission's jurisdiction, and would delay the important work of fostering federal/state cooperation

[13] *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 776 (2016).

[14] *Id*.

Numerous parties have asked the Commission to allow the Relevant Electric Retail Regulatory Authorities (RERRAs) to prohibit DERs from participating in organized wholesale electric markets. These parties note the Court's observation in *FERC v. Elec. Power Supply Ass'n* that the opt-out granted in Order No. 719 and carried through Order No. 745 "remove[d] any conceivable doubt" as to the order's compliance with the Federal Power Act's jurisdictional provisions.[15] But the context of that observation makes clear that the Court was saying only that the opt-out simplified the analysis required to dispose of the petitioners' "feverish idea" that Order No. 745 was a plot to "usurp" state retail rate authority.[16] The Court did not hold that the opt-out was necessary or that it had any bearing on the dispositive legal question before it: whether Order No. 745 governed a practice directly affecting wholesale rates. Thus, the Commission has held that it was not required to grant the opt-out in Order No. 745.[17] The Commission was likewise well within its authority when, in Order No. 841, it denied similar requests for an opt-out with respect to storage resources interconnected on the distribution system.[18]

As a matter of policy, an opt-out would be counter-productive in this context. The great potential of DERs, including behind-the-meter storage resources, is their versatility to provide value at both the retail-distribution and wholesale-transmission levels. To capture that potential, the Commission will need to encourage sustained cooperation between itself, the RTO/ISOs, and state regulators – as it has begun to do with this technical conference. An opt-out, where

[15] *Id*. at 780.

[16] *Id*. at 779.

[17] *Advanced Energy Economy*, 161 FERC ¶ 61,245, at P 62 (2017).

[18] Order No. 841 at P 35.

exercised, would cut that cooperation short and would limit the ability of DERs to maximize their potential by competing in both retail and wholesale markets.

Several parties requesting rehearing of Order No. 841 have observed that, in Paragraph 33 of Order No. 841, the Commission explained that a storage resource would only be deemed capable of injecting electric energy back to the grid if it "is contractually permitted to do so (e.g., per the interconnection agreement between an electric storage resource that is interconnected on a distribution system or behind-the-meter with the distribution utility to which it is interconnected." These parties contend that because the distribution utilities entering these interconnection agreements are under state jurisdiction, this provision is tantamount to granting states an opt-out as to whether distribution-connected storage resources may participate in organized wholesale electric markets. They describe this provision as in tension with the Commission's statement in Paragraph 35 of the order rejecting a request that it "allow states to decide whether electric storage resources in their state that are located behind a retail meter or on the distribution system are permitted to participate in the RTO/ISO markets." To resolve the tension, they ask the Commission to grant states an opt-out for distribution-connected storage resources.

We respectfully disagree that there is a tension between these two statements. The Commission chose its words carefully. The implication of Paragraph 33 is that whether a distribution-connected storage resource may inject energy back to the grid is an appropriate subject of an interconnection agreement between the distributed storage owner and its distribution utility. But nothing in Paragraph 33 implies that states may use their authority over distribution-level interconnection agreements to forbid sales into organized wholesale markets

from distributed storage resources that are otherwise permitted to inject energy back to the grid.[19] Nor does anything in Order No. 841 imply that states may use their authority over distribution system interconnection agreements as a pretext to enact a state-wide policy to block access to RTO/ISO markets from resources that are technically capable of participating in them.

II. Excluding Resources that Participate in State Programs from also Participating in RTO/ISO Markets Would Chill State Experimentation and Harm Consumers

For the reasons explained above, we believe the Commission's assertion of jurisdiction over sales from DER aggregations in RTO/ISO markets is valid and will not encroach on state authority. By far the greater intrusion on the freedom of state policymakers, in our view, would come from Paragraph 134 of the Commission's proposal, which stated:

> We also propose that it is appropriate for each RTO/ISO to limit the participation of resources in the organized wholesale electric markets through a distributed energy resource aggregator that are receiving compensation for the same services as part of another program. Since resources able to register as part of a distributed energy resources aggregation will be located on the distribution system, they may also be eligible to participate in retail compensation programs, such as net metering, or other wholesale programs, such as demand response programs. Therefore, to ensure that there is no duplication of compensation, we propose that distributed energy resources that are participating in one or more retail compensation programs such as net metering or another wholesale market participation program will not be eligible to participate in the organized wholesale electric markets as part of a distributed energy resource aggregation.[20]

[19] Not all injections of energy back to the grid are wholesale sales, and authority over the two should not be conflated. For example, injections that do not comprise net sales over the relevant netting period are not wholesale sales. *See* Order 841 at P 30 n.49; *Sun Edison LLC*, Declaratory Order, 129 FERC P 61,146 (2009); *MidAmerican Energy Co*., Order Denying Request for Declaratory Order, 94 FERC P 61,340 (2001). Likewise, even within RTO/ISO footprints, not all wholesale sales are sales into RTO/ISO markets, such as sales made pursuant to PURPA.

[20] 2016 NOPR at P 134.

As many commenters have explained, the Commission's remedy for the problem it identified is unreasonably overbroad. If the Commission is concerned that DER aggregations may be overcompensated in some situations, it should tailor its action to that objective. A prophylactic rule that renders DER aggregations ineligible to participate in organized wholesale electric markets if they "participat[e] in one or more retail compensation programs" would compromise the effectiveness of the rule as a whole, without any evidence that the problem the Commission identified is likely to arise.[21]

The Commission's proposed approach to participation in both retail and wholesale programs is also inconsistent with its precedent.[22] Notably, in *Advanced Energy Economy*,[23] the Commission considered overlapping state and federal energy efficiency programs and rejected exactly the type of overbroad, prophylactic approach it proposed in Paragraph 134 of the 2016 NOPR. Parties in that proceeding argued that concerns over double counting should persuade the Commission to allow states to prevent energy efficiency resources within their territories from participating in the PJM market. The Commission rejected the argument for two reasons. First, the Commission observed that PJM had developed measurement and verification procedures that would prevent double counting of efficiency gains. Second, the Commission stated that "concerns with PJM's Measurement and Verification procedures are not sufficient

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[21] *Id.*

[22] *See New York State Pub. Serv. Comm'n et. al. v. New York Indep. Sys. Operator*, Order Granting Complaint in Part and Denying in Part, 158 FERC ¶ 61,137 (2017) (condoning participation in both retail and wholesale demand response programs); *California Independent System Operator*, 155 FERC ¶ 61,229 (2016) (accepting CAISO Tariff, section 4.17.3(e), which allows resources enrolled in net metering programs to participate in wholesale markets if the net metering program expressly permits such participation).

[23] *Advanced Energy Economy*, Order on Petition for Declaratory Order, 161 FERC ¶ 61,245 at P 64.

justifications for barring certain types of resources from the market." In short, the Commission concluded that a mere concern over a risk of double counting was an insufficient basis to prevent participation in both state and federal programs. That logic is even stronger in this context where DERs can provide independent and distinct sources of value at both the retail and wholesale levels.

III. An Overbroad Rule Based on "Double Compensation" Will Invite Needless Dispute and Is Poorly Tailored to the Commission's Objectives

We urge the Commission not only to eliminate the proposed prohibition against participation in both retail and wholesale programs, but also to re-examine the wisdom of an overarching rule to prevent "double compensation" for the "same services" without the benefit of the facts of a particular case. Whether two actions constitute the "same service" is an abstract question not well-suited to general formula, especially in a rapidly evolving area of state policy. We are concerned that, if the Commission chooses to embody this concept in a general rule, it will lead to needless disputes and chill state programs. Instead, we recommend that the Commission rebuttably presume that, when new state programs leave DERs technically and contractually free to participate in organized wholesale electric markets, they do so to capture distinct and incremental values to the state. The Commission may then consider whether this presumption is overcome when presented with the facts of a particular case.

A presumption in favor of state programs makes sense because states generally have no incentive to extend ratepayer or taxpayer funds to procure services from DERs that duplicate what the same DER provides to the wholesale market. It is far more likely that, where states create programs that leave DERs technically and contractually free to sell into the RTO/ISO markets, the states do so to achieve distribution-system level benefits that are distinct from and

incremental to the benefit obtained by the RTO/ISO through the wholesale service. Just as states would generally have little interest in procuring a service that is identical to the one procured in the wholesale market, they also will be unlikely to have an incentive to be unduly restrictive with respect to DERs participating in both retail and wholesale programs. That is because, when market participants are forced to choose between retail and wholesale programs, there will be less supply in the retail program, and costs to retail ratepayers will rise.

This point was illustrated in *New York State Public Service Commission*.[24] That case concerned the application of buyer side mitigation measures to resources enrolled in retail demand response programs. New York's program allowed participants also to provide services in the NYISO market because it viewed the distribution-system benefits created by its retail program as distinct from the system-wide resource adequacy benefits procured through the NYISO installed capacity market. New York also understood that if demand response resources had to choose between retail and wholesale programs, supply would be restricted in the retail program and the cost of obtaining the distribution-system benefits would rise.[25] The Commission concluded that the payments demand response resources "receive from the retail-level demand response programs are actually for providing services that are separate and distinct from the payments [they] receive for participating in NYISO's ICAP market. While the wholesale- and the retail-level demand response programs may complement each other, they serve different purposes, provide different benefits, and compensate distinctly different

[24] 158 FERC ¶ 61,137 (2017).

[25] *Id*. at P 5.

services."[26] This case illustrates how superficially similar retail and wholesale programs can yield distinct benefits. It also shows the benefits to the Commission that come from resolving these questions in light of a developed record and the facts of a particular case.

IV. Conclusion

The Commission has clear authority to remove barriers to the participation of DER aggregations in organized wholesale electric markets. The Commission should reject jurisdictional arguments intended to persuade the Commission to hold back from exercising its authority by letting states opt out.

By far the greater threat to the freedom of state policymakers to create new programs that maximize the value of DERs is the Commission's overbroad proposed prohibition on simultaneous participation in retail programs and wholesale markets. The Commission should rescind that proposal, and address allegations of double compensation only when presented with the facts of a particular case.

Respectfully submitted,

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[26] *Id*. at P 33. The Commission explained that "over 75 percent of ConEd's networks peak at times that differ from the statewide peak load, with some networks peaking mid-day and others peaking in the late evening." *Id*.