

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators)))))	Docket No. RM16-23-000
Electric Storage Participation in Regions with Organized Wholesale Electric Markets))	Docket No. AD16-20-000

**REQUEST FOR REHEARING OF
AMERICAN MUNICIPAL POWER, INC.
THE AMERICAN PUBLIC POWER ASSOCIATION
AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

Pursuant to section 313 of the Federal Power Act (“FPA”)¹ and Rule 713 of the Commission’s Rules of Practice and Procedure,² American Municipal Power, Inc. (“AMP”), the American Public Power Association (“APPA”), and the National Rural Electric Cooperative Association (“NRECA”) hereby request rehearing of the Commission’s Final Rule issued on February 15, 2018 in the above-captioned proceeding.³

I. INTRODUCTION

AMP, APPA, and NRECA support the Commission’s efforts to reform wholesale market rules to facilitate greater participation by Electric Storage Resources (“ESRs”) in markets operated by Regional Transmission Organizations (“RTOs”) and Independent System Operators (“ISOs”). As explained in the APPA/NRECA comments on the Commission’s Notice of

¹ 16 U.S.C. § 825I.

² 18 C.F.R. § 385.713 (2017).

³ *Electric Storage Participation in Markets Operated by Regional Transmission Organization and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018) (“Order No. 841” or “Final Rule”). The Commission issued a errata notice for Order No. 841 on February 28, 2018.

Proposed Rulemaking (“NOPR”) in this proceeding,⁴ APPA’s and NRECA’s member utilities have invested in ESRs and distributed energy resource (“DER”) technologies, and where these resources can participate in centralized wholesale markets, public power and cooperative utilities and the consumers they serve may benefit if the market value of those resources can be recognized.⁵ AMP, APPA, and NRECA agree that RTO and ISO market rules should be structured to accommodate the physical and operational characteristics of ESRs and obtain the full array of benefits these resources can provide in such markets. Storage has the potential to provide significant benefits to the interstate transmission grid and wholesale electric customers—but also to local distribution systems and retail electric customers. This potential will be best realized through a regulatory framework that adheres to principles of cooperative federalism.

The Final Rule, however, does not follow such principles. To the contrary, the Final Rule suggests that ESRs located on a distribution system or behind a retail meter may circumvent restrictions under state or local law on retail customers directly purchasing from, or selling into, the wholesale market – actions that are beyond the Commission’s jurisdiction to authorize. The Commission should grant rehearing and unequivocally state that the Commission’s regulations for ESR participation in RTO/ISO wholesale markets are limited to the RTO’s or ISO’s wholesale market rules and do not authorize an ESR to violate state or local laws or regulations or contract rights governing retail electric service or the local distribution of electric energy.

⁴ *Electric Storage Participation in Markets Operated by Regional Transmission Organization and Independent System Operators*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,718 (2016) (“NOPR”).

⁵ *Comments of the American Public Power Association and the National Rural Electric Cooperative Association on Notice of Proposed Rulemaking*, filed in this proceeding on February 13, 2017 (“NOPR Comments”). AMP is a member of APPA. AMP’s member utilities have also invested in ESRs and DER technologies.

Further, the Commission should grant rehearing and specifically adopt a Relevant Electric Retail Regulatory Authority (“RERRA”) “opt-out/opt-in” mechanism, like the existing regulation for demand response bids in RTO and ISO markets, applicable to wholesale market participation by ESRs located on the distribution system or behind a retail meter. As APPA and NRECA argued in their NOPR Comments, this mechanism is needed to preserve state and local authority over retail electric service and local distribution service and to provide clear rules for the public: RTOs/ISOs, state/local regulators, distribution utilities, and wholesale market participants.

Finally, in addition to confining the scope of Order No. 841 to wholesale market rules and adopting the RERRA mechanism, the Commission should grant rehearing and take two further actions to avoid having conflicting regulatory requirements for an ESR that is also a DER as defined in the Commission’s NOPR. First, in light of the Commission’s decision to institute a separate rulemaking in Docket No. RM18-9-000 and to hold a technical conference to obtain further information on DER aggregations before acting on the DER aggregation proposals in the NOPR, the Commission should grant rehearing and specify that ESRs located on a distribution system or behind a retail meter will be subject to any final rule issued in Docket No. RM18-9-000. Second, the Commission should grant rehearing and provide that the RTO and ISO tariff revisions made pursuant to the Final Rule in the instant docket will not become effective as to such ESRs until the effectiveness of the DER aggregation tariff revisions made pursuant to any final rule in Docket No. RM18-9-000. This procedure will enable an orderly consideration and implementation of tariff revisions governing distributed storage resources.

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

In accordance with Rule 713(c)(2),⁶ the following is a statement of issues and errors with citations to representative precedent:

1. The Commission erred by not declaring that its jurisdiction over “wholesale market rules for participation of resources connected at or below distribution-level voltages” and over “the criteria for participation in those markets” does not alter or override state and local restrictions on participation in wholesale markets by ESRs on a distribution system or behind a retail meter.⁷
2. The Commission erred by not adopting a regulation requiring RTOs and ISOs to defer to determinations by RERRAs concerning the wholesale market participation of ESRs located on a distribution system or behind a retail meter.⁸
3. The Commission erred in failing to preserve state and local authority over retail matters.⁹
4. The Commission erred by not declaring that wholesale market participation by ESRs located on a distribution system or behind a retail meter will be subject to the final rule in Docket No. RM18-9-000 and that RTO and ISO tariff revisions governing participation of such resources in wholesale markets will not become effective until the tariff revisions required by the final rule in Docket No. RM18-9-000 become effective.

III. REQUEST FOR REHEARING

A. The Commission Should Grant Rehearing To Declare that the Final Rule is Limited to Establishing Rules for ESRs To Participate in the RTO/ISO Markets and Does Not Override State and Local Restrictions on Participation in Wholesale Markets by ESRs Located on a Distribution System or Behind a Retail Meter.

In comments on the NOPR, APPA and NRECA cautioned that “[w]holesale market rules and Commission policy must not undercut the ability of state and local authorities to regulate existing and future electric storage projects and other distributed energy resources, interconnected at the distribution level or behind a customer meter, that provide retail- or

⁶ 18 C.F.R. § 385.713(c)(2)(2017).

⁷ Order No. 841 at PP 29, 35; *FERC v. Elec. Power Supply Ass’n.*, 136 S. Ct. 760, 773, 779-80 (2016) (“*EPSA*”); *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008) (Order No. 719), *order on reh’g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 49 (2009) (Order No. 719-A), *order on reh’g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

⁸ *Motor Vehicle Manufacturer’s Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1989); *see also KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1056 (2006); Order No. 719-A at P 49; 18 C.F.R. § 35.28(g)(1)(iii) (2017).

⁹ Order No. 719-A at P 49.

distribution-level services.”¹⁰ APPA and NRECA urged the Commission to confine its final rule to the organized wholesale markets and reject any requests to expand the scope of the rule beyond that limited scope.¹¹

In many respects, Order No. 841 appears to acknowledge the demarcation between the matters within the Commission’s jurisdiction and matters reserved to state and local authority. The following determinations indicate that the Commission has appropriately limited the Final Rule to participation of ESRs in wholesale markets operated by RTOs and ISOs without purporting to authorize ESRs located on the distribution system or behind a retail meter to circumvent existing state laws, regulations, tariffs, or contract requirements that may limit such wholesale market participation:

- The Final Rule’s regulatory text and compliance requirements apply only to Commission-approved RTOs and ISOs.
- The Final Rule defines ESR to mean “a resource capable of receiving electric energy from the grid and storing it for later injection of electric energy back to the grid”¹² and finds “that an electric storage resource that injects electric energy back to the grid for purposes of participating in an RTO/ISO market engages in a sale of electric energy at wholesale in interstate commerce.”¹³
- The Commission declined to “broaden its definition of an electric storage resource to apply to behind-the-meter resources that do not inject electricity into

¹⁰ APPA/NRECA NOPR Comments at 3.

¹¹ *Id.* at 4.

¹² Order No. 841 at P 29.

¹³ *Id.* at P 30.

the grid” and ruled that such resources may participate in wholesale markets as demand response resources.¹⁴

- In order to qualify as an ESR, the resource must be “contractually permitted” to inject electric energy back onto the grid, for example, “per the interconnection agreement between an [ESR] that is interconnected on a distribution system or behind-the-meter with a distribution utility to which it is interconnected.”¹⁵ The Commission’s adoption of this requirement appears to acknowledge that the distribution utility (and implicitly, the RERRA) may bar a storage resource located on the distribution system or behind-the-meter from participating in the wholesale markets of an RTO or ISO.
- The Commission explained that, where the host distribution utility is unable or unwilling to net out any energy purchases associated with a resource using the participation model for electric storage resources’ wholesale charging activities from the host customer’s retail bill, the RTO/ISO would be prevented from charging that resource wholesale rates for the charging energy for which it is already paying retail rates.¹⁶
- The Commission emphasized the “ongoing, vital role of the states” regarding ESRs, including responsibility for “retail services and matters related to the distribution system.”¹⁷

¹⁴ *Id.* at P 32. Demand response resources may participate in wholesale markets pursuant to the Commission’s existing regulations governing demand response aggregations, which respect state and local jurisdiction by forbidding an RTO or ISO from accepting bids from a demand response aggregator when not permitted by the RERRA. *See* 18 C.F.R. § 35.28(g)(1)(iii) (2017).

¹⁵ Order No. 841 at P 33.

¹⁶ *Id.* at P 326.

¹⁷ *Id.* at P 36.

- The Commission clarified that “nothing in this Final Rule is intended to affect or implicate the responsibilities of distribution utilities to maintain the safety and the reliability of the distribution system or their use of electric storage resources on their systems.”¹⁸
- The Commission has determined that further information is needed before taking final action on matters associated with aggregation of DERs, and has established a technical conference in another proceeding which includes a panel to “provide an opportunity for state and local regulators to provide their perspectives and concerns about the operational effects that DER participation in the wholesale market could have on facilities they regulate.”¹⁹

AMP, APPA, and NRECA appreciate the Commission’s explicit statements restricting the Final Rule to participation of ESRs in wholesale markets. Taken together, these portions of Order No. 841, particularly the recognition that an electric storage resource must be contractually authorized to inject energy back into the grid, suggest that the Commission intends to respect and not override state or local laws or regulations that may restrict wholesale market participation by storage resources located on a distribution system or behind a retail meter.

In other respects, however, the Final Rule could be interpreted as overriding such state or local laws or regulations. The Final Rule states that the definition of an ESR includes resources located on a distribution system or behind a retail meter.²⁰ The Final Rule also states that the Commission has “exclusive jurisdiction over the wholesale markets and *the criteria for*

¹⁸ *Id.*

¹⁹ *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket Nos. RM18-9-000, *et al.*, Notice of Technical Conference issued February 15, 2018, Attachment at page 2.

²⁰ Order No. 841 at P 29.

participation in those markets, including the wholesale market rules for participation of resources connected at or below distribution-level voltages.”²¹ The Commission’s assertion of exclusive authority over the “criteria for participation” in wholesale markets by ESRs on a distribution system or behind-the-meter raises the question of state and local authorities’ say in allowing such participation, particularly since the Final Rule specifically *rejects* a request to “allow states to decide whether [ESRs] in their state that are located behind a retail meter or on the distribution system are permitted to participate in the RTO/ISO markets through the electric storage resource participation model.”²² It is unclear whether this last phrase in that sentence—“through the electric storage resource participation model”—simply means that states cannot decide the reach of the “participation model” for the ESRs they authorize to participate in a wholesale market, or whether the Commission is attempting to forbid states from deciding under state law whether ESRs on a distribution system or behind a retail meter may participate in wholesale markets in the first place. The latter would be an unprecedented federal intrusion into the authority of states to regulate retail electric service, an unprecedented expansion of federal authority over facilities for the local distribution of electric energy, and would violate FPA section 201(b), which expressly excludes these matters from Commission jurisdiction.²³

This assertion of jurisdiction by the Commission over wholesale market rules for ESRs connected at or below distribution-level voltages (particularly as to the criteria for wholesale market participation), together with the Commission’s refusal to allow states the ability to decide whether to permit ESRs in their state that are located behind a retail meter or on the distribution system to participate in wholesale markets through the ESR participation model, implies that the

²¹ *Id.*, n. 55, citing *EPSA; Advanced Energy Economy*, 161 FERC ¶ 61,245 at PP 59-60 (“*AEE*”) (emphasis added).

²² *Id.* at P 35.

²³ 16 U.S.C. § 824(b).

Commission is overriding state laws or tariff requirements that limit or prevent participation in wholesale markets by ESRs on a distribution system or behind a retail meter. Order No. 841 does not support such a broad assertion of Commission authority, and the Commission should grant rehearing to correct this fundamental error.

The Commission does not have authority to disregard or override state and local restrictions on the participation of distribution-level and behind-the-meter ESRs in wholesale markets. FPA Section 201(b) reserves for the states regulation of retail service;²⁴ the Commission may not “specif[y] terms of sale at retail – which is a job for the States alone.”²⁵ Section 201(b) also specifically excludes local distribution facilities from the Commission’s jurisdiction.²⁶ And while the Commission is correct that certain resources connected at the distribution level may participate in the wholesale markets,²⁷ the Commission has indicated that “the vast majority of small generator interconnections will be with state jurisdictional facilities,”²⁸ and that such interconnections will be governed by state law.²⁹ To the extent that Order No. 841 suggests that an electric storage resource taking RERRA-regulated retail service from a distribution utility may disregard retail service terms and conditions that may limit direct participation in the wholesale market, the Commission exceeded its authority.

²⁴ 16 U.S.C. § 824(b)(1).

²⁵ *EPSA*, 136 S.Ct. at 775 (footnote omitted). As to public power and cooperative utilities, the Commission lacks authority to compel entities exempt from the Commission’s rate jurisdiction under FPA Section 201(f) to allow retail behind-the-meter ESRs to participate in wholesale markets.

²⁶ *Id.*

²⁷ Order No. 841 at P 35.

²⁸ See *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 at P 105 (2005), *order on reh’g*, Order No. 2006-B, FERC Stats. & Regs. ¶ 31,221 (2006).

²⁹ Order No. 2006-A at P 105. The Commission treats certain distribution level interconnections as jurisdictional where the purpose of the interconnection is to make wholesale sales and the distribution facilities to which the resource is interconnecting are already subject to the utility’s OATT. *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103, at PP 803-809 (2003), *order on reh’g*, Order No. 2003-A, 106 FERC ¶ 61,220 at PP 710, 730 (2004), *order on reh’g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh’g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff’d National Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

The Commission asserts jurisdiction over ESRs' participation in the wholesale markets because "an ESR that injects electric energy back to the grid for purposes of participating in an RTO/ISO market"³⁰ is engaged in a sale of electric energy at wholesale in interstate commerce.³¹ Accepting, *arguendo*, that an injection of energy from a storage resource back to the grid is a wholesale sale, there can be no such sale in the first place if an ESR that is behind-the-meter or on the distribution system does not have the right to make direct sales into the wholesale markets, as Order No. 841 appears at least implicitly to acknowledge.³² Similarly, the Commission's assertion of jurisdiction over ESR wholesale market participation based on the purchase of charging energy as a wholesale sale *to* the ESR presupposes that the ESR may bypass the load-serving entity/distribution company and purchase directly from the wholesale market.³³

The Commission cites *EPSA* for the proposition that it "has exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets,"³⁴ but that case does not support Commission authority to override state and local limits on wholesale market participation by retail behind-the-meter or distribution-connected ESRs. The question of the Commission's authority to override state or local restrictions on retail customer participation in wholesale markets was not before the Supreme Court in that case. Reviewing Order No. 745,³⁵

³⁰ Order No. 841 at P 30.

³¹ *Id.*

³² *See id.* at PP 33, 326. As the Commission acknowledged, not all injections of electric energy back to the grid trigger the Commission's jurisdiction. *Id.*, n.49. An ESR may be a net consumer of energy over a specified netting period. For behind-the-meter ESRs, netting periods may be set by the states and it will be difficult, if not impossible to distinguish wholesale versus retail energy under the circumstances. *See Sun Edison LLC*, 129 FERC ¶ 61,146 (2009), *reh'g granted on other grounds*, 131 FERC ¶ 61, 213 (2010); *MidAmerican Energy Co.*, 94 FERC ¶ 61,340 (2001). The Final Rule cites this precedent at P 30 n.49.

³³ *Id.* at P 294.

³⁴ Order No. 841 at P 35.

³⁵ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322, *order on reh'g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011).

the Court in *EPSA* considered whether the Commission had “authority to regulate wholesale market operators’ compensation of demand response bids.”³⁶ The case was about federal authority to regulate wholesale demand-response resource compensation, not state authority over demand-response resource participation. Moreover, the Court treated the RERRA opt-in/opt-out rules for RTOs and ISOs under Order Nos. 719 and 719-A as an established part of the overall regulatory framework for demand response participation.³⁷ Those rules were not at issue in the case. The Court had no reason to address and did not address the scope of the Commission’s authority to determine which demand response resources are eligible to participate in the wholesale market in the first place, let alone suggest that the Commission may override retail service terms and conditions that might restrict or condition such eligibility. The authority of states to “veto” retail customer participation under the opt-in/opt-out framework was, in fact, one of the reasons for the Court to hold that the Commission’s regulation of demand response compensation in wholesale capacity markets did not improperly intrude upon the states’ jurisdiction over retail sales.³⁸ Given the Court’s reliance on the right of states to bar such participation by retail customers in wholesale markets, *EPSA* does not support the Commission’s authority to override such state and local restrictions in the context of ESRs.

In the same manner that the Commission in Order No. 719-A “did not challenge the role of States and others to decide the eligibility of retail customers to provide demand response,”³⁹ the Commission here should acknowledge and not undermine the role of state and local regulators to establish terms for retail and distribution-level ESRs to participate in wholesale markets.

³⁶ *EPSA*, 136 S.Ct. at 773.

³⁷ *See id.* at 771, 772, 779-80.

³⁸ *See EPSA*, 136 S.Ct. at 779-80.

³⁹ Order No. 719-A at P 49.

The Commission should grant rehearing and declare that Order No. 841 is limited to RTO/ISO wholesale market rules, and nothing in Order No. 841 overrides state laws or tariff requirements which might prohibit or limit an ESR interconnected with the distribution system or behind a retail meter from directly accessing the wholesale market. This declaration is consistent not only with precedent, but with the Commission's statements in Order No. 841 that correctly recognize such state and local limitations and the "ongoing, vital role of the states."⁴⁰

In addition, in order to remedy what could be interpreted as inconsistent statements in Order No. 841 regarding the scope of the Final Rule, the Commission should specifically state as follows:

1. The Final Rule does not change or override any existing rules for ESR interconnections (under state or local law or the Commission's regulations), require arrangements giving ESRs access to RTO or ISO wholesale markets, or create any new right to physical access to such wholesale markets;
2. The Final Rule does not authorize or require RTOs/ISOs to allow ESRs to bypass a retail utility or distribution utility to purchase or sell at wholesale;
3. The Final Rule does not override any requirement of retail or local distribution service under state/local law, and does not authorize ESRs to violate state or local laws, regulations, or contracts; and
4. The Final Rule does not impose obligations on the operation of facilities for local distribution or modify the rates, terms, and conditions of local distribution service or of retail service.

⁴⁰ Order No. 841 at P 36.

B. The Commission Should Grant Rehearing and Adopt Regulations Allowing the Relevant Electric Retail Regulatory Authority To Decide Whether ESRs Located Behind a Retail Meter or on the Distribution System May Participate in RTO/ISO Markets

In addition to declaring that the Final Rule is limited to wholesale market rules and preserves existing state and local authority over retail electric service and local distribution facilities and service, the Commission should grant rehearing and adopt explicit rules under which RTOs and ISOs must respect the decisions of RERRAs concerning the wholesale market participation of ESRs located on a distribution system or behind a retail meter. The Commission’s NOPR suggested that such an approach would be appropriate for DERs.⁴¹ In their comments on the NOPR, APPA and NRECA asked the Commission to specifically adopt RERRA “opt-in/opt-out” provisions for distribution-level ESRs, because these ESRs also constituted DERs under the NOPR’s proposed definitions.⁴² The Final Rule does not acknowledge or respond to APPA and NRECA’s request. Indeed, it never specifically mentions the RERRA proposal or explain why it is not being adopted.⁴³ The Commission erred by failing to address the APPA/NRECA proposal altogether in the Final Rule⁴⁴ and the Commission should grant this request on rehearing.

⁴¹ See NOPR at P 157 & n.238 (proposing that market participation agreements between distribution utilities and DER aggregators include an attestation that the DER aggregation “is compliant with the tariffs and operating procedures of the distribution utilities and the rules and regulations of any other regulatory authority”).

⁴² See APPA/NRECA NOPR Comments at 21-22.

⁴³ The Commission perhaps ignored APPA and NRECA’s request for a RERRA opt-in/opt-out framework for ESRs on the distribution system or behind-the-meter because the APPA/NRECA Comments discussed the RERRA mechanism in detail in addressing the NOPR’s DER aggregation proposal. However, APPA and NRECA stated that the NOPR’s proposal for ESRs located on a distribution system as opposed to the interstate grid present additional jurisdictional and operational issues that would be addressed in the DER aggregation portion of the APPA/NRECA comments because “it overlaps with important jurisdictional issues related to participation by aggregations of distributed energy resources in organized wholesale electric markets.” *Id.* at 12.

⁴⁴ See, e.g., *Motor Vehicle Manufacturer’s Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (stating that an agency acts arbitrarily and capriciously when it fails to “consider an important aspect of the problem”); see also *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d at 1056 (explaining that “unless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned”) (internal alterations, quotes and citation omitted).

As noted earlier, in Order No. 841, the Commission rejected requests to allow states to decide whether ESRs in their state that are located behind a retail meter or on the distribution system are eligible to participate in RTO/ISO markets through the ESR participation model.⁴⁵ The Commission's only explanations for rejecting this cooperative federalism approach are that (1) the Commission has 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;⁴⁶ and (2) "numerous resources connected to the distribution system participate in RTO/ISO markets today."⁴⁷ Neither is sufficient, as discussed above. In the same manner that the Commission recognized in Order No. 719-A that demand response is subject to the confluence of state and federal jurisdiction and made clear that nothing in the Final Rule "authorizes a retail customer to violate existing State laws or regulations or contract rights", the Commission in Order No. 841 should have adhered to and preserved state and local jurisdiction.⁴⁸

Arguably the need for state authority over retail matters to be preserved is even stronger in this instance than with respect to demand response participation in Order Nos. 719 and 719-A. The Commission acknowledges in the Final Rule that the states have an "ongoing, vital role" with respect to development and operation of ESRs, including ". . . matters related to the distribution system, including design, operations, power quality, reliability and system costs."⁴⁹

⁴⁵ Order No. 841 at P 35.

⁴⁶ *Id.* (citations omitted).

⁴⁷ *Id.* (citations omitted).

⁴⁸ The arbitrariness of the Commission's failure to specifically extend the RERRA opt-in/opt-out framework to ESRs is illustrated by the fact that an ESR may still choose to participate in wholesale markets as demand response, *see* Order No. 841 at P 56, in which case it would be subject to the RERRA opt-in/out rules. *See* 18 C.F.R. 35.28(g)(1)(iii) (2017). The Commission has offered no justification for why it would be appropriate for the applicability of state authority to turn on the wholesale participation model selected by a particular storage resource.

⁴⁹ Order No. 841 at 36.

Because ESRs can inject energy into the grid, unlike demand response, there is arguably an even greater need for preservation of the states' authority over rules for participation in order to “maintain the safety and the reliability of the distribution system or their use of [ESRs] on their systems.”⁵⁰

Accordingly, AMP, APPA, and NRECA request that the Commission grant rehearing and add the following language, which is adapted from the RERRA provision for demand response at 18 C.F.R. § 35.28(g)(1)(iii),⁵¹ to the regulatory text adopted in the Final Rule for ESRs in 18 C.F.R. § 35.28(g)(9):

(iii) Electric storage resources located on a distribution system or behind a retail meter. An independent system operator or regional transmission organization must not accept bids from an electric storage resource located on a distribution system or behind a retail meter of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, where the relevant electric retail regulatory authority prohibits such resources to bid into organized markets, or from an electric storage resource located on the distribution system or behind a retail meter of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such resources to bid into organized markets.

C. The Commission Should Clarify that the Outcome of Order No. 841 Remains Subject to the Outcome of the DER Aggregation Proceeding.

The NOPR proposed reforms to remove barriers to participation of ESRs and DER aggregations in RTO and ISO markets.⁵² For purposes of the NOPR, DERs were defined as “a source or sink of power that is located on the distribution system, any subsystem thereof, or behind a customer meter. These resources may include, but are not limited to, electric storage resources, distributed generation, thermal storage, and electric vehicles and their supply

⁵⁰ *Id.*

⁵¹ The demand response regulations at 18 C.F.R. § 35.28(g)(1)(iii) include the requirement that ISOs and RTOs must accept bids from certain demand response aggregators where permitted by the RERRA. Similar language is not necessary for ESRs given the requirement in the Final Rule that RTOs and ISOs must develop a participation model so that ESRs can participate in ISO/RTO markets.

⁵² See NOPR at PP 3-5.

equipment.”⁵³ Thus, ESRs are a form of DER. In Order No. 841, the Commission determined that it needs more information on DER aggregation before taking final action on the proposed DER aggregation reforms in the NOPR.⁵⁴ To that end, the Commission established a new proceeding, Docket No. RM18-9-000, and established a technical conference therein to address issues regarding DER aggregations in RTO/ISO markets.⁵⁵

Because some ESRs may be DERs, and a single ESR may constitute a DER aggregation, the outcome of the proceeding in Docket No. RM18-9-000 regarding DER aggregations should govern the wholesale market participation of distributed storage resources that are simultaneously ESRs and DERs.⁵⁶ Indeed, it is unclear how the Commission reasonably could adopt final rules governing wholesale market participation by distribution-connected and behind-the-meter ESRs while at the same time deferring consideration of multiple issues related to their participation in the organized wholesale markets. The Final Rule in this proceeding, for example, requires RTOs and ISOs to include in their tariffs a participation model for ESRs, “recognizing the physical and operational characteristics of ESRs . . .”⁵⁷ The February 15, 2018 Notice of Technical Conference in Docket No. RM18-9-000 includes panels to address, among other things, “bidding parameters or other potential mechanisms needed to represent the physical and operational characteristics of DER aggregations in RTO/ISO markets.”⁵⁸ Order No. 841 does not reconcile the decision to adopt rules for ESRs located behind a retail meter or on the distribution system to participate in RTO/ISO markets, with the simultaneous determination that

⁵³ NOPR at P 1, n. 2.

⁵⁴ Order No. 841 at P 5.

⁵⁵ *Id.*

⁵⁶ Although the DER portion of NOPR addresses aggregation, a single ESR located on a distribution system could constitute an “DER aggregation” and, therefore, subject to the outcome of the proceeding initiated in Docket No. RM18-9-000.

⁵⁷ *Id.* at P 51.

⁵⁸ Notice of Technical Conference at 1-2.

further information is necessary regarding the aggregation of DERs (which may include ESRs) for participation in those same markets. Moreover, the Final Rule implicitly acknowledges the difficulties of incorporating distribution level and behind-the-meter ESRs,⁵⁹ but does not provide a reasonable resolution, nor does the Final Rule specifically indicate that the Commission intends to address these difficult technical and operational issues as part of the DER aggregation proceeding.

To avoid getting the cart before the horse, and to ensure consistency in requirements and treatment of distribution-level and behind-the-meter ESRs, the Commission should clarify that the wholesale market participation by ESRs located on a distribution system or behind a retail meter will be subject to any final rule in Docket No. RM18-9-000. Moreover, the Commission should provide that the RTO and ISO tariff revisions made in compliance with the Final Rule in the instant docket will not become effective as to ESRs located on a distribution system or behind a retail meter until the effective date of the RTO and ISO tariff revisions for DER aggregations made in compliance with any final rule in Docket No. RM18-9-000. This procedure will enable an orderly consideration and implementation of tariff revisions governing all distributed storage resources.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, AMP, APPA, and NRECA request that the Commission grant rehearing of Order No. 841 and modify the Final Rule as follows:

- A. State that the Final Rule is limited to establishing rules for ESRs' participation in the ISO/RTO organized wholesale markets and does not alter or override state or local

⁵⁹ See Order No. 841 at PP 322-28.

restrictions on participation in wholesale markets by ESRs located on a distribution system or behind a retail meter, and further state that:

1. The Final Rule does not change any existing rules for ESR interconnections (under state or local law or the Commission's regulations), or require arrangements giving ESRs access to RTO or ISO wholesale markets, or create any new right to physical access to such wholesale markets;
 2. The Final Rule does not authorize or require RTOs/ISOs to allow ESRs to bypass a retail utility or distribution utility to purchase or sell at wholesale;
 3. The Final Rule does not override any requirement of retail or local distribution service under state or local law and does not authorize ESRs to violate state or local laws, regulations, or contracts; and
 4. The Final Rule does not impose obligations on the operation of facilities for local distribution or modify the rates, terms, and/or conditions of local distribution service or of retail service.
- B. Reverse the decision to reject authority of state and local regulatory authorities to decide whether ESRs located behind a retail meter or on the distribution system are eligible to participate in RTO/ISO markets, and adopt the RERRA opt-in/opt-out mechanism by which the obligation of RTOs and ISOs to accept bids from ESRs located on a distribution system or behind a retail meter is subject to the decision of the RERRA to permit such participation.
- C. Provide that wholesale market participation by ESRs located on a distribution system or behind a retail meter will be subject to the final rule in Docket No. RM18-9-000 and the compliance dates and tariff-effectiveness dates in the final rule in Docket Nos. RM18-9-000.

Respectfully submitted,

/s/ Lisa G. McAlister

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2018, I have caused a copy of the foregoing to be served upon each person designated on the Official Service List for this proceeding.

/s/ Adrienne E. Clair