www.ferc.gov) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern time on April 12, 2021.

Dated: March 18, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–06105 Filed 3–24–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for electronic review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket Nos.	File date	Presenter or requester
Prohibited:		
1. P–178–000	3–5–2021	FERC Staff [1].
2. P–10853–000	3–5–2021	FERC Staff [2].
3. CP17–458–000	3–17–2021	FERC Staff [3].
Exempt:		
1. CP17–494–000	3–2–2021	State of Oregon, Governor Kate Brown.
2. ER21–1111–000	3–15–2021	South Carolina Senator Tom Davis.
3. ER20–2878–000	3–16–2021	U.S.Congress [4].

[1] Telephone Memorandum dated March 1, 2021 regarding call between Commission staff and Ted Sorenson, Kern & Tule Hydro.
[2] Email dated 3/2/21 regarding communication between Commission staff and Laura Cowan, Klein Schmidt Group.
[3] Email dated 03/08/2021 regarding communication between Commission staff and Mark Morris.
[4] U.S. Representatives Jim Costa, Josh Harder, and John Garamendi.

Dated: March 18, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–06104 Filed 3–24–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM21–14–000]

Participation of Aggregators of Retail Demand Response Customers in Markets Operated by Regional Transmission Organizations and Independent System Operators

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of inquiry.

SUMMARY: In this Notice of Inquiry, the Federal Energy Regulatory Commission seeks comment on whether to revise its regulations that require a Regional Transmission Organization or Independent System Operator not to accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, where the relevant electric retail

regulatory authority prohibits such customers' demand response to be bid into organized markets by an aggregator of retail customers.

DATES: Initial Comments are due June 23, 2021, and Reply Comments are due July 23, 2021.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways:

- Electronic Filing through *http://www.ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Those unable to file electronically may mail comments via the U.S. Postal Service to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426. Hand-delivered comments or comments sent via any other carrier should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.
- *Instructions:* For detailed instructions on submitting comments, see the Comment Procedures Section of this document.

FOR FURTHER INFORMATION CONTACT:

Joseph Baumann (Technical Information), Office of Energy Policy and Innovation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8373

Christopher Chaulk (Legal Information), Office of the General Counsel—Energy Markets, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6720

SUPPLEMENTARY INFORMATION:

1. In this Notice of Inquiry (NOI), the Federal Energy Regulatory Commission (Commission) seeks comment on whether to revise its regulations that require a Regional Transmission Organization (RTO) or Independent System Operator (ISO) (RTO/ISO) not to accept bids from an aggregator of retail customers (ARC) that aggregates the demand response of the customers of utilities that distributed more than four million megawatt-hours (MWh) in the previous fiscal year, where the relevant electric retail regulatory authority (RERRA) prohibits such customers' demand response to be bid into organized markets by an ARC (Demand Response Opt-Out).[1]

2. It has been over a decade since the Commission established the Demand Response Opt-Out in Order Nos. 719 and 719–A.[2] In that time, there have been significant legal, policy, and technological developments that may warrant reconsideration of the Demand Response Opt-Out. In light of those developments and the records compiled in various proceedings before the Commission, we seek comment on the potential impacts of removing the Demand Response Opt-Out from the Commission's regulations. We also seek comment on other changes relating to demand response since the Commission established the Demand Response Opt-Out.

I. Background

A. Final Rules on Demand Response Participation in Organized Wholesale Electric Markets

3. As relevant here, in Order Nos. 719 and 719–A the Commission directed each RTO/ISO to amend its market rules as necessary to: (1) Accept bids from ARCs [3] that aggregate the demand response of the customers of utilities that distributed more than four million MWh in the previous fiscal year; and (2) not accept bids from ARCs that aggregate the demand response of the customers of utilities that distributed more than four million MWh in the previous fiscal year, where the RERRA prohibits such customers' demand response to be bid into organized markets by an ARC (*i.e.,* the Demand Response Opt-Out).[4] The Commission used a four million MWh cut-off to distinguish small utilities, which the Commission addressed through additional regulations.[5] The Commission explained that the term RERRA meant the entity that establishes the retail electric prices and any retail competition policies for customers, such as the city council for a municipal utility, the governing board of a cooperative utility, or the state public utility commission.[6]

4. The Commission found that allowing an ARC to act as an intermediary for many small retail loads that cannot individually participate in the organized markets would improve the competitiveness of RTO/ISO markets to fulfill the Commission's statutory mandate to ensure supplies of electric energy at just, reasonable, and not unduly discriminatory or preferential rates.[7] The Commission explained that aggregating small retail customers into larger pools of resources would expand the amount of resources available to the market, increase competition, help reduce prices to consumers, and enhance reliability.[8] The Commission also stated that the proposal could encourage the development of demand response programs and thus provide retail customers more opportunities available through larger markets.[9] Moreover, the Commission noted that experiences with existing aggregation programs in some RTOs/ISOs showed that these programs had increased demand responsiveness in these regions.[10] The Commission stated that its intent was not to interfere with the operation of successful retail demand response programs, place an undue burden on state and local retail regulatory entities, or raise new jurisdictional concerns.[11] The Commission further found that this action properly balanced the Commission's goal of removing barriers to the development of demand response resources in the RTO/ISO markets with the interests and concerns of state and local regulatory authorities.[12]

5. Subsequently, in Order No. 745,[13] the Commission adopted revised regulations addressing compensation and cost allocation for demand response in RTO/ISO energy markets. On appeal, in *EPSA,* the United States Supreme Court upheld the Commission's jurisdiction over the participation of demand response resources in RTO/ISO markets.[14]

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[1] *See* 18 CFR 35.28(g)(1)(iii). The Commission is not seeking comment on the portion of this regulatory text requiring the RTO/ISO not to accept bids from an ARC that aggregates the demand response of the customers of utilities that distributed four million MWh or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an ARC (Small Utility Opt-In).

[2] *Wholesale Competition in Regions with Organized Electric Markets,* Order No. 719, 125 FERC ¶ 61,071 (2008), *order on reh'g,* Order No. 719–A, 128 FERC ¶ 61,059, *order on reh'g,* Order No. 719–B, 129 FERC ¶ 61,252 (2009).

[3] The Commission stated that it would ''use the phrase 'aggregator of retail customers,' or ARC, to refer to an entity that aggregates demand response bids (which are mostly from retail loads).'' *Id.* P 3 n.3.

[4] Order No. 719–A, 128 FERC ¶ 61,059 at P 60; *see* Order No. 719, 125 FERC ¶ 61,071 at P 154.

[5] Order No. 719–A, 128 FERC ¶ 61,059 at PP 59–60.

[6] Order No. 719, 125 FERC ¶ 61,071 at P 158.

[7] *Id.* P 1.

[8] *Id.* P 154.

[9] *Id.*

[10] *Id.*

[11] *Id.* P 155.

[12] *Id.* P 156.

[13] *Demand Response Compensation in Organized Wholesale Energy Markets,* Order No. 745, 134 FERC ¶ 61,187, *order on reh'g and 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) (*EPSA*).

[14] *EPSA,* 136 S. Ct. at 773–82.

B. Participation in RTO/ISO Markets of Other Resources Located on the Distribution System or Behind a Retail Meter

6. Since *EPSA,* the Commission and the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) have addressed the Commission's jurisdiction over the participation in RTO/ISO markets of other types of demand-side resources and resources located on the distribution system or behind a retail customer meter. In those proceedings, the Commission has declined requests for states or RERRAs to determine the eligibility of these resources to participate in RTO/ISO markets.

1. Energy Efficiency Resources

7. In *Advanced Energy Economy,* the Commission determined that it has exclusive jurisdiction to regulate the participation of energy efficiency resources in RTO/ISO markets as a practice directly affecting wholesale markets, rates, and prices.[15] Consequently, the Commission found that a RERRA may not bar, restrict, or otherwise condition the participation of energy efficiency resources in RTO/ISO markets unless the Commission expressly gives RERRAs such authority.[16] The Commission further found that any incidental effects on the retail markets from energy efficiency resource participation in wholesale markets are not substantial, including the effects on a load-serving entity's day-to-day operations.[17] The Commission also found that the potential for increasing competition faced by retail utility programs or concerns with double counting are not sufficient justifications for barring certain types of resources from the market.[18]

8. On rehearing, the Commission found that a provision directly restricting retail customers' participation in organized wholesale markets, even if contained in the terms of retail service, nonetheless intrudes on the Commission's jurisdiction over those markets and prevents the Commission from carrying out its statutory authority to ensure that wholesale electricity markets produce just and reasonable rates.[19] The Commission also disagreed that RERRAs have the authority to prevent energy efficiency resources from participating in RTO/ISO markets because of RERRAs' concerns about such participation, such as the potential impacts on retail load forecasting.[20] The Commission reasoned that, even if a RERRA seeks legitimate ends, it still may not seek to achieve such ends through regulatory means that intrude upon the Commission's authority over wholesale rates.[21]

2. Electric Storage Resources

9. In Order No. 841,[22] the Commission adopted regulations to remove barriers to the participation of electric storage resources in RTO/ISO markets. The Commission denied a request that the Commission 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 RTO/ISO markets.[23]

10. In Order No. 841–A, the Commission found that the FPA and relevant precedent did not legally compel the Commission to adopt an opt-out with respect to participation in RTO/ISO markets by electric storage resources interconnected on a distribution system or located behind a retail meter.[24] The Commission also maintained that the Court's jurisdictional conclusion in *EPSA* did not rest upon the fact that states were granted the Demand Response Opt-Out.[25] The Commission disagreed that states could dictate whether resources are allowed to participate in RTO/ISO markets through conditions on the receipt of retail service. While acknowledging that states can include conditions in their own retail programs that prohibit any participating resources from also selling into RTO/ISO markets, the Commission found that a condition broadly prohibiting all retail customers from participating in RTO/ISO markets, even if contained in the terms of retail service, is aimed *directly* at RTO/ISO markets and would intrude on the Commission's jurisdiction over those markets.[26]

11. The Commission declined to exercise its discretion to grant an opt-out, finding that the benefits of allowing electric storage resources broader access to wholesale markets outweighed any policy considerations in favor of an opt-out.[27] The Commission explained that it considered effects on the distribution system in reaching this decision.[28]

The Commission disagreed that its decision not to exercise its discretion and adopt an opt-out in Order No. 841 was an unexplained departure from the Demand Response Opt-Out adopted in Order No. 719. The Commission stated that Order No. 719 expressly provided that the Demand Response Opt-Out only applies to demand response resources; that the resources at issue in Order No. 841 differed significantly from the demand response resources at issue in Order No. 719, *i.e.,* that unlike demand response resources, electric storage resources are capable of engaging in sales for resale of electricity; and that, unlike in the case of demand response resources, RERRAs and distribution utilities do not have a longstanding history of managing and regulating programs for electric storage resources within their boundaries.[29]

12. In *NARUC,* the D.C. Circuit upheld the Commission's decision in Order Nos. 841 and 841–A not to provide a RERRA opt-out with respect to the RTO/ISO market participation of electric storage resources located behind a retail meter or on the distribution system.[30] The D.C. Circuit concluded that the Commission's prohibition of state-imposed participation bans directly affected wholesale rates because Order No. 841 solely targeted the manner in which an electric storage resource may participate in RTO/ISO markets.[31] The court then found that Order No. 841 did not directly regulate states' distribution systems and did not '' 'usurp[ ] state power.' '' [32] Furthermore, the D.C. Circuit explained, the Commission's statement in Order No. 841–A that states may not block RTO/ISO market participation '' 'through conditions on the receipt of

[15] 161 FERC ¶ 61,245, at PP 60–61 (2017) (AEE Declaratory Order), *order on reh'g,* 163 FERC ¶ 61,030 (2018) (AEE Rehearing Order).

[16] *Id.* P 61.

[17] *Id.* P 63.

[18] *Id.* P 64.

[19] AEE Rehearing Order, 163 FERC ¶ 61,030 at P 37 (citing *Oneok, Inc.* v. *Learjet, Inc.,* 135 S. Ct. 1591, 1600 (2015) (finding that the proper test for determining whether a state action is preempted is ''whether the challenged measures are 'aimed directly at interstate purchasers and wholesalers for resale' or not'') (*Oneok*) (quoting *N. Natural Gas Co.* v. *State Corp. Comm'n of Kan.,* 372 U.S. 84, 94 (1963)); *Nantahala Power & Light Co.* v. *Thornburg,* 476 U.S. 953, 970 (1986) (finding that ''a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate'')).

[20] *Id.* P 38.

[21] *Id.* (citing *Hughes* v. *Talen Energy Mktg., LLC,* 136 S. Ct. 1288, 1298 (2016)).

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

[23] *Id.* P 35.

[24] Order No. 841–A, 167 FERC ¶ 61,154 at P 32.

[25] *Id.* P 40.

[26] *Id.* P 41 (emphasis in original).

[27] *Id.* P 56.

[28] *Id.*

[29] *Id.* PP 50–52.

[30] 964 F.3d at 1186–89.

[31] *Id.* at 1186.

[32] *Id.* at 1187; *id.* at 1188 (quoting *EPSA,* 136 S. Ct. at 777).

retail service,' '' or impose any '' 'condition[ ] aimed *directly* at the RTO/ISO markets, even if contained in the terms of retail service,' '' was simply a restatement of the well-established principles of federal preemption.[33]

13. The D.C. Circuit next concluded that the Commission's decision not to adopt a state opt-out was adequately explained.[34] The D.C. Circuit explained that the Commission addressed concerns that states may bear additional administrative burdens associated with enabling the participation of energy storage resources in RTO/ISO markets, but the Commission decided that such negative effects were outweighed by the benefits of the final rule.[35] The D.C. Circuit further noted that, in not adopting the opt-out, the Commission was ''acutely aware'' of the Demand Response Opt-Out in Order No. 719.[36] The court stated that the Supreme Court described the Demand Response Opt-Out in *EPSA* as ''cooperative federalism,'' demonstrating the Commission's ''recognition of the linkage between wholesale and retail markets and the [s]tates' role in overseeing retail sales.'' [37] The D.C. Circuit also agreed with the Commission that *EPSA* did not condition its holdings on the existence of the Demand Response Opt-Out.[38]

3. Distributed Energy Resource Aggregations

14. Subsequently, in Order No. 2222,[39] the Commission adopted regulations to remove barriers to the participation of distributed energy resource aggregations in RTO/ISO markets. The Commission declined to include a mechanism for all RERRAs to prohibit all distributed energy resources from participating in RTO/ISO markets through distributed energy resource aggregations (*i.e.,* an opt-out).[40] The Commission stated that the final rule '' 'addresses—and addresses only—transactions occurring on the wholesale market.'' [41] The Commission thus found that the FPA and relevant precedent does not legally compel the Commission to adopt an opt-out with respect to participation in RTO/ISO markets by all resources interconnected on a distribution system or located behind a retail meter.[42] The Commission found that the benefits of allowing distributed energy resource aggregators broader access to the RTO/ISO market outweigh the policy considerations in favor of an opt-out.[43] The Commission explained that it was not persuaded that concerns about potential effects on the distribution system justify adopting an opt-out that could substantially limit that participation.[44]

15. The Commission also explained that because demand response falls under the definition of distributed energy resource, an aggregator of demand response could participate as a distributed energy resource aggregator in RTO/ISO markets.[45] However, the Commission clarified that the final rule did not affect existing demand response rules.[46] The Commission explained that the final rule did not affect the ability of RERRAs to prohibit retail customers' demand response from being bid into RTO/ISO markets by aggregators, consistent with the Demand Response Opt-Out established in Order No. 719.[47]

16. In Order No. 2222–A, issued concurrently with this NOI, the Commission sets aside in part the conclusion that the participation of demand response in distributed energy resource aggregations is subject to the opt-out requirements of Order Nos. 719 and 719–A.[48] The Commission declines to extend this opt-out to demand response resources that participate in heterogeneous distributed energy resource aggregations—*i.e.,* those that are made up of different types of resources including demand response as opposed to those made up entirely of demand response. The Commission finds that the Demand Response Opt-Out will continue to apply to aggregations made up *solely* of resources that participate as demand response resources, consistent with the Commission's regulations.[49] The Commission finds that heterogeneous distributed energy resource aggregations that include demand response resources do not fall squarely within the Demand Response Opt-Out, as set forth in the Commission's regulations, because they are not solely aggregations of retail customers.[50] The Commission finds that extending the opt-out to demand response resources in heterogeneous distributed energy resource aggregations would undermine the potential of Order No. 2222 to break down barriers to competition, interfering with the Commission's responsibility to ensure that wholesale rates are just and reasonable.[51] The Commission also states that applying the Demand Response Opt-Out to aggregations that contain a combination of demand response and other types of distributed energy resources could prevent distributed energy resource aggregators from incorporating the complementary capabilities of existing and future demand response technologies.[52]

C. Voltus v. MISO Complaint

17. On October 20, 2020, Voltus, Inc. (Voltus) filed a complaint arguing that the Demand Response Opt-Out provisions in Midcontinent Independent System Operator, Inc.'s (MISO) tariff are inconsistent with the jurisdictional provisions of the FPA and are not just and reasonable.[53] Voltus also requested that the Commission issue a notice of proposed rulemaking to repeal the Demand Response Opt-Out.[54]

II. Discussion

18. In this proceeding, we seek to examine whether changing circumstances warrant revising the Commission's regulations providing for the Demand Response Opt-Out

[33] *Id.* at 1187 (quoting Order No. 841–A, 167 FERC ¶ 61,154 at P 41) (emphasis in original).

[34] *Id.* at 1189.

[35] *Id.* at 1190.

[36] *Id.*

[37] *Id.* at 1189–90 (quoting *EPSA,* 136 S. Ct. at 779–80) (internal quotation marks omitted).

[38] *Id.*

[39] *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators,* Order No. 2222, 85 FR 67094 (Oct. 21, 2020), 172 FERC ¶ 61,247 (2020), *corrected,* 85 FR 68450 (Oct. 29, 2020), *order on reh'g,* Order No. 2222–A, 174 FERC ¶ 61,197 (2021).

[40] *Id.* P 56.

[41] *Id.* P 58 (quoting *EPSA,* 136 S. Ct. at 776).

[42] *Id.*

[43] *Id.* P 60.

[44] *Id.* In Order No. 2222, the Commission recognized the potentially greater burden on small utility systems, and exercised its discretion to include an opt-in mechanism for small utilities similar to that provided in Order No. 719–A. *See id.* P 64.

[45] *Id.* P 118.

[46] *Id.*

[47] *Id.* P 59 (citing Order No. 719, 125 FERC ¶ 61,071 at PP 154–55).

[48] Order No. 2222–A, 174 FERC ¶ 61,197 at P 22.

[49] *Id.*

[50] *Id.* P 23 n.70 (citing 18 CFR 35.28(g)(1)(iii) (expressly limiting the application of the Order No. 719 opt-out to ''an aggregator of retail customers that aggregates the demand response of the customers of utilities''); 18 CFR 35.28(b)(10), (g)(12) (requiring RTOs/ISOs to establish market rules applicable to entities that aggregate one or more resources located on the distribution system, any subsystem thereof or behind a customer meter); Order No. 2222, 172 FERC ¶ 61,247 at P 114 (finding that distributed energy resources may include, but are not limited to, resources that are in front of and behind the customer meter, electric storage resources, intermittent generation, distributed generation, demand response, energy efficiency, thermal storage, and electric vehicles and their supply equipment)).

[51] *Id.* P 23; *see also id.* (concluding that extending the Order No. 719 opt-out to demand response resources that seek to participate in heterogeneous distributed energy resource aggregations would undermine the ability of such aggregations to take advantage of different resources' operational attributes and complementary capabilities).

[52] *Id.* P 26.

[53] Voltus, Complaint, Docket No. EL21–12–000, at 1 (filed Oct. 20, 2020); *see* MISO, FERC Electric Tariff, Module C, 38.6.A.iii.1(a) (34.0.0).

[54] Complaint at 2. The Complaint is pending.

established in Order Nos. 719 and 719–A, and more specifically, whether RTO/ISO markets would significantly benefit from the increased participation of aggregated demand response resources that are currently barred by RERRAs exercising the Demand Response Opt-Out.

19. Over a decade ago, the Commission required RTOs/ISOs to amend their market rules as necessary to permit ARCs to bid demand response on behalf of retail customers directly into RTO/ISO markets, subject to the Demand Response Opt-Out. The Commission found that permitting ARC participation in RTO/ISO markets would increase competition, help reduce prices to consumers, and enhance reliability.[55] In support of its decision, the Commission stated that its intent was not to interfere with the operation of successful retail demand response programs, place an undue burden on state and local retail regulatory entities, or raise new jurisdictional concerns.[56] The Commission found that its decision properly balanced the interests and concerns of state and local regulatory authorities with the Commission's goal of removing barriers to the development of demand response resources in RTO/ISO markets.[57]

20. Since the issuance of Order No. 719, there have been significant legal, policy, and technological developments that may warrant reconsideration of the Demand Response Opt-Out. The Commission has subsequently issued rules relating to other types of demand-side resources and resources located on the distribution system or behind a retail customer meter. In those proceedings, the Commission has consistently declined to adopt a mechanism similar to the Demand Response Opt-Out.[58] In so doing, the Commission has explained that the benefits of allowing electric storage resources and distributed energy resource aggregations broader access to RTO/ISO markets outweighed any policy considerations in favor of an opt-out.[59] Further, there have been significant improvements in the technology that ARCs offer to retail customers, including instant communication of dispatches, real-time visibility and control of load curtailment, immediate settlement of dispatch performance, and automated financial transactions between markets and customers, in part due to the proliferation of broadband, high-speed wireless communication.[60] More broadly, the adoption of emerging consumer technologies, such as smart thermostats, electric water heaters and smart meters, now allows for load to be managed through geographically-targeted demand reductions, load building and system balancing.[61] Through the use of state-of-the-art sensors and controls, grid-interactive efficient buildings[62] can reduce 10–20% of commercial building peak load.[63]

21. Accordingly, we are exploring whether to revise the Commission's regulations to remove the Demand Response Opt-Out, recognizing that the Commission, when it established the Demand Response Opt-Out, balanced the interests and concerns of state and local regulatory authorities with the Commission's goal of removing barriers to demand response resource participation in RTO/ISO markets. Circumstances may have changed in the years since the issuance of Order Nos. 719 and 719–A, such that the balance reflected in those orders adopting the Demand Response Opt-Out may have shifted and the RTO/ISO market rules reflecting the Demand Response Opt-Out may no longer be just and reasonable. For example, we note that, in its complaint, Voltus alleges that the Demand Response Opt-Out has become a barrier to competition. Specifically, Voltus argues that the Demand Response Opt-Out: (1) Makes gatekeepers of utilities that lack the correct incentives to maximize the contribution of demand response to market value; (2) disconnects customers and market prices; (3) blocks innovation; and (4) results in a costly patchwork of program requirements and incentives.[64] Voltus also alleges that the absence of demand response competition contributes to threats to reliability in MISO.[65] Through the questions below, we seek information to help us examine the potential costs/burdens and benefits, both quantitative and qualitative, of removing the Demand Response Opt-Out, as well as other changes relating to demand response since the Commission issued Order Nos. 719 and 719–A. We are not seeking comment on the Small Utility Opt-In.

22. We invite interested persons to submit comments on the following questions, and we encourage commenters to provide specific examples and refer to recent, relevant studies or data, as necessary. Commenters need not answer every question below.

A. Questions Regarding Changed Circumstances Relevant to the Demand Response Opt-Out Since Issuance of Order Nos. 719 and 719–A

23. First, we seek comment on whether and how circumstances have changed since the Commission established the Demand Response Opt-Out in Order Nos. 719 and 719–A.

(Q1) To what extent have the type and capabilities of demand response technologies and aggregations available to parties seeking to participate in RTO/ISO markets changed since 2009?[66]

(Q2) To what extent have advances in communications, controls, and information technology created new demand response capabilities available to parties seeking to participate in RTO/ISO markets since 2009?

(a) For example, what impact, if any, has broader deployment of advanced metering infrastructure (AMI) had on the availability and utilization of demand response for aggregators seeking to participate in RTO/ISO markets?

(b) Has experience with RTO/ISO deployment of demand response resources demonstrated any system-

[55] Order No. 719, 125 FERC ¶ 61,071 at P 154; Order No. 719–A, 128 FERC ¶ 61,059 at P 65.

[56] Order No. 719, 125 FERC ¶ 61,071 at P 155; Order No. 719–A, 128 FERC ¶ 61,059 at PP 49, 54, 56–57, 67.

[57] Order No. 719, 125 FERC ¶ 61,071 at P 156.

[58] *E.g.,* AEE Declaratory Order, 161 FERC ¶ 61,245 at P 57 (finding that RERRAs may not bar the participation of energy efficiency resources in wholesale markets unless the Commission gives RERRAs such authority, and declining to opine on the requirements the Commission would impose in the event that a RERRA requests such authority).

[59] Order No. 841–A, 167 FERC ¶ 61,154 at P 56; Order No. 2222, 172 FERC ¶ 61,247 at P 60.

[60] *See* Voltus, Complaint, Exhibit B (Testimony of Gregg Dixon) at 4–7.

[61] The Brattle Group, *The National Potential for Load Flexibility* 1 (June 2019), *https://brattlefiles.blob.core.windows.net/files/16639_national_potential_for_load_flexibility_-_final.pdf.*

[62] Grid-interactive efficient buildings are energy efficient buildings with smart technologies characterized by the active use of distributed energy resources to optimize energy use for grid services, occupant needs and preferences, and cost reductions in a continuous and integrated way. U.S. Department of Energy, *Grid-interactive Efficient Buildings* 20 (April 2019), *https://www.energy.gov/sites/prod/files/2019/04/f61/bto-geb_overview-4.15.19.pdf.*

[63] *Id.* at 10–11.

[64] Voltus, Complaint at 58–59.

[65] *Id.* at 64. We also acknowledge that parties in that proceeding opposed these arguments. For example, Organization of MISO States argues that Order No. 719 and MISO's tariff provisions implementing it remain just and reasonable. Organization of MISO States, Inc., Motion to Dismiss Complaint and Protest, Docket No. EL21–12–000, at 14 (filed Nov. 19, 2020); *see also* Midwest TDUs, Motion to Intervene, Protest, and Motion to Dismiss, Docket No. EL21–12–000, at 13 (filed Nov. 19, 2020) (arguing that Voltus does not demonstrate that MISO has concluded that its reliability is at risk unless states rescind their Order No. 719 Demand Response Opt-Out).

[66] In 2009, the Commission issued Order No. 719–A.

wide value or operational benefits that accrue, more efficiently and effectively, via RTO/ISO dispatch through aggregators than would be available otherwise?

(Q3) To what extent have changes in the resource mix since 2009 increased the need for aggregations of demand response in RTO/ISO markets, particularly demand response that can respond to operator instructions in real time? Have impacts of these trends been different in states that have adopted the Demand Response Opt-Out?

(Q4) The North American Electric Reliability Corporation (NERC) has stated that demand response provides transmission system operators with additional system-balancing tools to maintain bulk-power system reliability.[67] NERC has also stated that, as the resource mix changes, flexible resources that can be called upon on short notice, including demand response, are needed to ensure resource adequacy and meet ramping needs.[68] To what extent can demand response aggregations provide real-time balancing and essential grid services, such as frequency response and ramping capability, to support bulk-power system operations? Are third-party demand response aggregators equally able to provide real-time balancing and essential grid services, or are utility-operated programs better suited to provide them? Are transmission system operators better able to leverage these capabilities given developments in technology and infrastructure since 2009?

B. Questions Regarding Potential Benefits of Removing the Demand Response Opt-Out

24. We seek comment on the potential benefits of revising our regulations to remove the Demand Response Opt-Out. We also seek comment on reasons why the balance between the Commission's goal of removing barriers to the development of demand response resources in RTO/ISO markets and the interests and concerns of state and local regulatory authorities may have shifted such that the market rules reflecting the Demand Response Opt-Out may no longer be just and reasonable.

(Q5) What are the potential benefits of removing the Demand Response Opt-Out, including any benefits not considered by the Commission in Order Nos. 719 and 719–A, and considering any changed circumstances that may be relevant? Please note if such benefits were not previously highlighted in Order Nos. 719 and 719–A.[69] Please provide quantitative estimates, if possible. In addition, please describe the types of entities to which any benefits would accrue.

(Q6) What are the potential benefits of creating more consistency between the participation models for ARCs and distributed energy resource aggregators by removing the Demand Response Opt-Out? In light of market participation opportunities for energy efficiency resources, electric storage resources, and distributed energy resource aggregations, would eliminating the Demand Response Opt-Out established in Order Nos. 719 and 719–A enhance clarity for market participants and prevent disputes regarding the eligibility of resource aggregations to participate in wholesale markets?

(Q7) Is there any evidence to suggest that removing the Demand Response Opt-Out would result in additional demand response resources participating through aggregations in RTO/ISO markets? Similarly, is there any evidence to suggest that removing the Demand Response Opt-Out would result in additional demand response services or flexibility to address system needs? If so, are there ways to quantify these benefits to RTO/ISO markets? Do the benefits of permitting increased third-party demand response aggregations in RTO/ISO markets exceed those provided by utilities bidding demand response into such markets?

(Q8) Is there any other evidence to suggest that RTO/ISO market rules reflecting the Demand Response Opt-Out are no longer just and reasonable?

C. Questions Regarding Potential Resulting Burdens From Removing the Demand Response Opt-Out

25. We also seek comment on the potential resulting burdens from removing the Demand Response Opt-Out based on experience gained since 2009. In Order No. 719, the Commission described the various concerns commenters expressed about the Commission's proposed Demand Response Opt-Out. Commenters alleged that the proposed Demand Response Opt-Out would place the burden on local authorities to take action to disallow participation of ARCs in RTO/ISO markets. Another commenter argued that, under the Commission's proposal, ARCs would effectively be allowed to cherry-pick the best load response resources out of existing load-serving entity demand response programs, depriving those load-serving entities of important resources used to keep rates down for all consumers.[70] The Commission explained its decision to establish the Demand Response Opt-Out in part by stating that it did not seek to interfere with the operation of successful retail demand response programs or place an undue burden on state and local retail regulatory authorities.[71]

(Q9) To what extent has the Demand Response Opt-Out prevented interference with the operation of existing retail demand response programs, or avoided placing an undue burden on state and local retail regulatory entities, as noted in Order No. 719?

(Q10) What potential costs and burdens might result from removing the Demand Response Opt-Out, considering any of the changed circumstances explored above? Please note any burdens that were not previously mentioned in Order Nos. 719 and 719–A. Please provide quantitative estimates, if possible.

(Q11) Are there any downsides to increased participation of aggregators of demand response in RTO/ISO markets from states currently exercising the Demand Response Opt-Out that may warrant the Commission's consideration? If so, please describe the potential downsides and the types of entities that would bear these burdens.

(Q12) Is there a significant difference between any costs and burdens from complying with Order No. 2222 and those that might result from removal of the Demand Response Opt-Out? If so, why would removal of the Demand Response Opt-Out create more costs and burdens?

III. Comment Procedures

26. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due June 23, 2021 and Reply Comments are due July 23, 2021. Comments must refer to Docket No. RM21–14–000 and must include the commenter's name, the

[67] North American Electric Reliability Corporation, *Essential Reliability Services Task Force Measures Framework Report* 63 (Nov. 2015), *https://www.nerc.com/comm/Other/essntlrlbltysrvcstskfrcDL/ERSTF%20Framework%20Report%20-%20Final.pdf.*

[68] North American Electric Reliability Corporation, *2020 State of Reliability* 49 (July 2020), *https://www.nerc.com/pa/RAPA/PA/Performance%20Analysis%20DL/NERC_SOR_2020.pdf.*

[69] *See supra* PP 4, 19.

[70] Order No. 719, 125 FERC ¶ 61,071 at PP 139, 141.

[71] *See supra* P 19.

organization they represent, if applicable, and their address.

27. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *http://www.ferc.gov.* The Commission accepts most standard word-processing formats. Documents created electronically using word-processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

28. Those unable to file electronically may mail comments via the U.S. Postal Service to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426. Hand-delivered comments or comments sent via any other carrier should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

29. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

IV. Document Availability

30. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19).

31. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

32. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

By direction of the Commission.

Commissioner Danly is concurring a separate statement attached.

Commissioner Christie is dissenting with a separate statement attached.

Issued: March 18, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

United States of America

Federal Energy Regulatory Commission

Participation of Aggregators of Retail Demand Response Customers in Markets Operated by Regional Transmission Organizations and Independent System Operators—Docket No. RM21–14–000

DANLY, Commissioner, *concurring:*

1. I disagree that we should eliminate the Commission's rule establishing states' rights to opt out of wholesale demand response aggregation programs.[1] The Commission, however, always has the discretion to issue a Notice of Inquiry (NOI) on any topic within its purview. I therefore concur in the issuance of the NOI but oppose the measures it anticipates.

2. It is my understanding that eighteen states have opted out [2] of the Commission's demand response aggregation mandate in Order No. 719.[3] Any Commission action to now revoke the states' authority to opt-out would thus do significant violence to the statutory and regulatory regimes these eighteen states have enacted, in addition to the harm it would cause to the long-established division between federal and state regulation of electricity.[4]

3. I invite these states and any other parties interested in preserving the traditional and current role of the states in exercising jurisdiction over retail electricity and distribution systems, including oversight over demand response programs, to respond to the NOI and provide appropriate record evidence.

4. Some of the most important evidence I would like to see submitted concerns whether wholesale demand response aggregation programs are providing reliability benefits commensurate with their costs. Before we force everyone to join them, we ought to see if they work. We often see statistics of the quantity of resources that participate or join wholesale demand response programs. We rarely see statistics that quantify the actual performance of these demand response resources during critical events.

5. Anecdotal evidence suggests their performance during times of strain may be poor, and perhaps terrible. Commission staff reviewed preliminary analyses in response to the 2020 California reliability crisis and observed that dispatched ''Proxy Demand Response'' in CAISO had 50% availability over the six days of the 2020 California reliability crisis, while dispatched ''Reliability Demand Response Resources'' had 71% availability.[5] The Commission staff further observed that ''while [Proxy Demand Response] has been regularly dispatched, its performance varies dramatically,'' and that for Reliability Demand Response Resources, ''[t]here are neither established performance metrics nor comparable historical data to evaluate'' its performance.[6] It would be an unacceptable failure of regulatory oversight if we do not have basic performance metrics for demand response given that these wholesale programs have been authorized for over a decade—and that customers have been paying for them all the while.

6. I welcome, indeed, encourage a searching inquiry into how much demand response actually contributes to reliability during critical reliability events. Ideally, comments would rest upon detailed analyses of whether demand response is worth both the costs a resource saves when it does not purchase energy (when demand responds to requests to reduce consumption) and the marginal price it receives in payment. Again, these seem like threshold questions before we upend eighteen separate states' regulatory regimes enacted to accommodate the opt-out we currently require but now may eliminate.

For these reasons, I respectfully concur.

James P. Danly,

Commissioner.

[1] *See* 18 CFR 35.28(g)(1)(iii) (2020).

[2] The states are Arkansas, Iowa, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, New Mexico, Oklahoma, South Dakota, and Wisconsin.

[3] *Wholesale Competition in Regions with Organized Electric Markets,* Order No. 719, 125 FERC ¶ 61,071 (2008), *order on reh'g,* Order No. 719–A, 128 FERC ¶ 61,059, *reh'g denied,* Order No. 719–B, 129 FERC ¶ 61,252 (2009).

[4] I discuss these jurisdictional issues in my dissent today to Order No. 2222–A. *See Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. and Indep. Sys. Operators,* Order No. 2222–A, 174 FERC ¶ 61,197 (2021) (Danly, Comm'r, dissenting).

[5] *See Preliminary Observations on the August 2020 California Heat Storm (AD21–3–000),* FERC, 15–16 (Dec. 17, 2020), *https://cms.ferc.gov/sites/default/files/2020-12/California%20Heat%20Storm%20Inquiry%20Presentation%2C%20December%2017%2C%202020%20--%20Script.pdf.*

[6] *Id.*

United States of America

Federal Energy Regulatory Commission

Participation of Aggregators of Retail Demand Response Customers in Markets Operated by Regional Transmission Organizations and Independent System Operators—Docket No. RM21–14–000

CHRISTIE, Commissioner, *dissenting:*

1. As Bob Dylan said, you don't need a weatherman to know which way the wind blows, and while styled as a Notice of Inquiry (NOI), it is apparent that this order's end game is to repeal or severely restrict the ''opt-out'' provisions of Order Nos. 719 and 719–A.[1]

2. Since those orders were issued, eighteen states have chosen to use the opt-out provision.[2] Presumably those states made those decisions for reasons that were consistent with their own public policy needs and preferences. FERC should respect those state policy decisions; however, because those states (and potentially others in the future) have exercised their own policy choices, the majority now seeks to block states from making such choices.

3. I therefore dissent for the same fundamental reasons expressed in my dissent today to Order No. 2222–A:[3] At a time when we hear many voices—including some on this Commission—demanding that FERC 'respect' state public policies in RTO/ISO capacity markets when it comes to the MOPR cases, this order goes in the exact opposite direction. We see in this NOI another example that for some, 'respecting' state public policies only applies when the states are doing what they want.

4. I further note, as I discussed today in my dissent to Order No. 2222–A, that combined with that order this one substantially raises the costs to states of participating in RTOs/ISOs.[4] Some states not in RTOs/ISOs may well choose to continue to stay out; those in RTOs/ISOs may well choose to reconsider their participation, if the cost of participation is to be blocked by FERC from exercising significant portions of their historic powers over the retail side of regulation.

For these reasons, I respectfully dissent.

Mark C. Christie,

Commissioner.

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[1] *See, e.g,* NOI at PP 2, 18, 20, 21, 24.

[2] *See Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators,* Order No. 2222, 85 FR 67094, 172 FERC ¶ 61,247, *on reh'g,* Order No. 2222–A, 174 FERC ¶ 61,197 (2021) (Danly, Comm'r, dissenting at n. 2).

[3] *See* Order No. 2222–A (Christie, Comm'r, dissenting).

[4] *Id.* at P 7. Technically speaking, states approve participation by state-regulated utilities in RTOs/ISOs.

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2021–0081; FRL–10022–00]

Eastern Research Group, Inc.; Transfer of Data (March 2021)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces that pesticide related information submitted to EPA's Office of Pesticide Programs (OPP) pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), including information that may have been claimed as Confidential Business Information (CBI) by the submitter, will be transferred to Eastern Research Group, Inc. in accordance with the CBI regulations. Eastern Research Group, Inc. has been awarded a contract to perform work for OPP, and access to this information will enable Eastern Research Group, Inc. to fulfill the obligations of the contract.

DATES: Eastern Research Group, Inc. will be given access to this information on or before March 30, 2021.

FOR FURTHER INFORMATION CONTACT: William Northern, Information Technology and Resources Management Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 305–6478 email address: *northern.william@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

This action applies to the public in general. As such, the Agency has not attempted to describe all the specific entities that may be affected by this action.

II. Contractor Requirements

Under these contract numbers, the contractor will perform the following:

Under Contract No. 68HERC21D0007. The Contractor shall prepare and deliver reports, including plans, evaluations, studies, analyses, and manuals in accordance with Attachment 1—Performance Work Statement. Each report shall cite the contract number, identify the U.S. Environmental Protection Agency as the sponsoring agency, and identify the name of the Contractor preparing the report.

This contract involves no subcontractors.

OPP has determined that the contract described in this notice involve work that is being conducted in connection with FIFRA, in that pesticide chemicals will be the subject of certain evaluations to be made under this contract. These evaluations may be used in subsequent regulatory decisions under FIFRA.

Some of this information may be entitled to confidential treatment. The information has been submitted to EPA under FIFRA sections 3, 4, 6, and 7 and under FFDCA sections 408 and 409.

In accordance with the requirements of 40 CFR 2.307(h)(3), the contract with Eastern Research Group, Inc. prohibits use of the information for any purpose not specified in these contract; prohibits disclosure of the information to a third party without prior written approval from the Agency; and requires that each official and employee of the contractor sign an agreement to protect the information from unauthorized release and to handle it in accordance with the *FIFRA Information Security Manual.* In addition, Eastern Research Group, Inc. is required to submit for EPA approval a security plan under which any CBI will be secured and protected against unauthorized release or compromise. No information will be provided to Eastern Research Group, Inc. until the requirements in this document have been fully satisfied. Records of information provided to Eastern Research Group, Inc. will be maintained by EPA Project Officers for this contract. All information supplied to Eastern Research Group, Inc. by EPA for use in connection with this contract will be returned to EPA when Eastern Research Group, Inc. has completed its work.

Authority: 7 U.S.C. 136 *et seq.;* 21 U.S.C. 301 *et seq.*

Dated: March 19, 2021.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2021–06173 Filed 3–24–21; 8:45 am]

BILLING CODE 6560–50–P