

129 FERC ¶ 61,252
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Wholesale Competition in Regions with Organized
Electric Markets

Docket No. RM07-19-002

ORDER NO. 719-B

ORDER DENYING REHEARING AND PROVIDING CLARIFICATION

(Issued December 17, 2009)

1. In this order, the Commission addresses requests for clarification and rehearing of certain aspects of Order No. 719-A,¹ which affirmed in part and granted in part rehearing of the Final Rule on *Wholesale Competition in Regions with Organized Electric Markets*.² As discussed below, the Commission affirms its basic determinations in Order No. 719 and Order No. 719-A regarding demand response and pricing during periods of operating reserve shortages in organized markets, grants limited clarification, and denies rehearing.

I. Background

2. On October 17, 2008, the Commission issued a Final Rule in this proceeding that established reforms to improve the operation of organized wholesale electric power markets³ and amended the Commission's regulations under the Federal Power Act (FPA)

¹ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719-A, 74 FR 37776 (Jul. 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009) (Order No. 719-A).

² *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008) (Order No. 719 or Final Rule).

³ Organized market regions are areas of the country in which a regional transmission organization (RTO) or independent system operator (ISO) operates day-ahead and/or real-time energy markets. The following Commission-approved RTOs and ISOs have organized markets: PJM Interconnection, L.L.C. (PJM); New York Independent System Operator, Inc. (NYISO); Midwest Independent Transmission System

(continued...)

in the areas of: (1) demand response, including pricing during periods of operating reserve shortage; (2) long-term power contracting; (3) market-monitoring policies; and (4) the responsiveness of RTOs and ISOs to their customers and other stakeholders. The Commission stated that these reforms are intended to improve wholesale competition to protect consumers in several ways: by providing more power supply options, encouraging new entry and innovation, spurring deployment of new technologies, removing barriers to comparable treatment of demand response, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers. Order No. 719 became effective on December 29, 2008.

3. A number of entities sought rehearing of Order No. 719. In response, on July 16, 2009, the Commission issued Order No. 719-A, affirming in part its determinations in the Final Rule and granting rehearing and clarification in part regarding certain provisions of Order No. 719. Among other things, in Order No. 719-A, the Commission affirmed its determinations in the Final Rule regarding demand response and pricing during periods of operating reserve shortages in organized markets. The Commission also granted in part clarification and rehearing regarding aggregation of retail customers and revised its regulatory text. Order No. 719-A became effective on August 28, 2009.

II. Requests for Clarification and/or Rehearing

4. American Public Power Association (APPA), the National Rural Electric Cooperative Association (NRECA), the Transmission Access Policy Study Group (TAPS), and American Municipal Power, Inc. (AMP) (collectively, APPA Petitioners) filed a joint request for clarification, or in the alternative, a request for rehearing. NRECA filed a separate request for clarification, or in the alternative, a request for rehearing. New Hampshire Electric Cooperative (New Hampshire Coop) filed a request for clarification.

III. Discussion

A. Aggregation of Retail Customers

5. In Order No. 719, the Commission required RTOs and ISOs to amend their market rules as necessary to permit an aggregator of retail customers (ARC) to bid demand response on behalf of retail customers directly into the RTO's or ISO's organized wholesale markets, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. The Commission reasoned that allowing an ARC to act as an intermediary for many small retail loads that cannot

Operator, Inc. (Midwest ISO); ISO New England, Inc. (ISO New England); California Independent System Operator Corp. (CAISO); and Southwest Power Pool, Inc. (SPP).

individually participate in the organized markets would reduce a barrier to demand response participation in such markets.⁴ The Commission also stated that the ARC requirement applies only to RTOs and ISOs and does not require the relevant electric retail regulatory authority to make any showing or to take any action in compliance with the Final Rule.⁵

6. In Order No. 719-A, the Commission affirmed that the Final Rule's ARC requirement applies only to RTOs and ISOs.⁶ However, in response to comments that argued that the ARC requirement would significantly burden the relevant electric retail regulatory authorities of small systems,⁷ the Commission revised the ARC requirement by adopting a modified version of a proposal that APPA and TAPS submitted to alleviate this perceived burden. The Commission directed RTOs and ISOs to amend their market rules as necessary to accept bids from ARCs that aggregate the demand response of: (1) the customers of utilities that distributed more than 4 million MWh in the previous fiscal year,⁸ and (2) the customers of utilities that distributed 4 million MWh or less in the previous fiscal year, where the relevant electric retail regulatory authority permits

⁴ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 154.

⁵ *Id.* P 155.

⁶ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 56 (noting that the “[notice of proposed rulemaking] specifically stated that those entities directly affected by this proceeding are the six RTOs and ISOs, namely CAISO, NYISO, PJM, SPP, Midwest ISO, and ISO New England”). *Wholesale Competition in Regions with Organized Electric Markets*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,628 (2008) (NOPR).

⁷ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 27-31.

⁸ The Commission stated that it is reasonable to use a 4 million megawatt-hour (MWh) cutoff for purposes of distinguishing small utilities. *Id.* P 51, 59. The Regulatory Flexibility Act definition of “small entity” refers to the definition provided in the Small Business Act, which defines a “small business concern” as a business that is independently owned and operated and that is not dominant in its field of operation. *See* 5 U.S.C. 601(3), citing to Section 3 of the Small Business Act, 15 U.S.C. 632. The Small Business Size Standards component of the North American Industry Classification system defines a small utility as one that, including its affiliates, is primarily engaged in the generation, transmission, or distribution of electric energy for sale, and whose total electric output for the preceding fiscal year did not exceed 4 million MWh. 13 C.F.R. § 121.202 (Sector 22, Utilities, North American Industry Classification System (NAICS)) (2004).

such customers' demand response to be bid into organized markets by an ARC. RTOs and ISOs may not accept bids from ARCs that aggregate the demand response of: (1) the customers of utilities that distributed more than 4 million MWh 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 ARC, or (2) the customers of utilities that distributed 4 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.⁹

1. Demand Response by Individual Retail Customers and by ARCs

a. Request for Clarification/Rehearing

7. APPA Petitioners state that they generally support Order No. 719-A's small system provision, but assert that the regulatory text contains certain ambiguities and inconsistencies that raise concerns that the small system provision will be misinterpreted and misapplied.¹⁰ Accordingly, APPA Petitioners request that the Commission clarify the regulatory language to prevent any confusion and uncertainty, and to reduce unintended barriers to the participation of retail demand response in RTO and ISO markets. For instance, APPA Petitioners ask the Commission to remedy an alleged internal inconsistency in the regulatory text to ensure that demand response by an individual retail customer is treated the same as demand response by an ARC. APPA Petitioners state that Order Nos. 719 and 719-A suggest an intent to treat an individual retail customer the same as an aggregator of multiple retail customers.¹¹ There is no suggestion to apply a different standard to determine when an individual retail customer may bid its own demand response into the RTO and ISO markets and when an ARC may do so. However, according to APPA Petitioners, Order No. 719-A created a potential for inconsistency or confusion by inserting small system language in the regulatory text that applies to ARCs¹² without a parallel language in the regulatory text that applies to ancillary services.¹³ To remedy this inconsistency, APPA Petitioners propose that the

⁹ *Id.*; 18 C.F.R. § 35.28(g)(1)(iii).

¹⁰ APPA Petitioners at 2.

¹¹ *Id.* at 15.

¹² 18 C.F.R. § 35.28(g)(1)(iii).

¹³ *Id.* 35.28(g)(1)(i)(A).

Commission add a definition of an ARC in section in 35.28(b)(9)¹⁴ and add small system language to the regulatory text that applies to ancillary services.¹⁵

8. According to APPA Petitioners, the new definition would clarify that the term “ARC” includes both individual retail customers and entities that aggregate the demand response of multiple retail customers. They add that adopting the proposed revisions in 35.28(g)(1)(i)(A) would ensure that a single, consistent set of rules applies to retail customers bidding their demand response into organized markets, either individually or through an ARC. APPA Petitioners ask that if the Commission does not modify the regulatory text, it should clarify in the preamble that: (1) individual retail customers that bid their own demand response are subject to the same provisions as ARCs as to when an RTO or ISO may accept their bids; and (2) the more specific language of section

¹⁴ APPA Petitioners propose to define an ARC this way: “Aggregator of retail customers means an entity that aggregates demand response bids (which are mostly from retail loads). An individual retail customer that bids its own demand response into a Commission approved independent system operator’s or regional transmission organization’s organized markets shall be considered an aggregator of retail customers.” APPA Petitioners at 13.

¹⁵ APPA Petitioners propose to revise section 35.28(g)(1)(i)(A) by deleting “unless not permitted by the laws or regulations of the relevant electric retail regulatory authority” and inserting “subject to subsection (iii)”:

Every Commission-approved independent system operator or regional transmission organization that operates organized markets based on competitive bidding for energy imbalance, spinning reserves, supplemental reserves, reactive power and voltage control, or regulation and frequency response ancillary services (or its functional equivalent in the Commission-approved independent system operator’s or regional transmission organization’s tariff) must accept bids from demand response resources in these markets for that product on a basis comparable to any other resources, if the demand response resource meets the necessary technical requirements under the tariff, and submits a bid under the Commission-approved independent system operator’s or regional transmission organization’s bidding rules at or below the market-clearing price, **subject to subsection (iii)**.

Id.

35.28(g)(1)(iii), with its alternative language for small systems is intended to cover individual retail customers, as well as aggregators of multiple retail customers.¹⁶

b. Commission Determination

9. We find that APPA Petitioners' request for modification of the regulatory text to define "ARC" and add small system language to section 35.28(g)(1)(i)(A) is outside the scope of a rehearing.¹⁷ This regulation requires that demand response be allowed to bid into competitive markets to provide ancillary services. APPA Petitioners seek revisions to the regulatory text on issues that were never raised in their initial comments. At APPA's own request, on rehearing of Order No. 719, the Commission added the small system language to the section of the regulatory text that addresses ARCs. No commenter, including APPA, sought rehearing of Order No. 719 with regard to the language of the regulatory text governing ancillary services. A request for rehearing is not the appropriate venue to bring up issues in the first instance.¹⁸ Therefore, we will dismiss APPA Petitioners' request for rehearing on this issue.

10. However, if the Commission were to consider APPA Petitioners' rehearing request, we would deny it because the revisions to the regulatory text are not necessary. First, regarding the definition of an ARC, Order No. 719 defined an ARC broadly by stating that it "refer[s] to an entity that aggregates demand response bids."¹⁹ It also noted that "[a]n ARC can bid demand response either on behalf of only one retail customer or multiple retail customers," and "[a]n individual customer may serve as an ARC on behalf of itself and others."²⁰ Additionally, Order No. 719 stated that an ARC's demand response bid must meet the same requirements as a demand response bid of a load-

¹⁶ *Id.* at 16.

¹⁷ Because APPA Petitioners seek changes to the regulatory text that would represent a changed ruling on the Commission's part, we construe its filing as a request for rehearing, and not a motion for clarification. 18 C.F.R. § 385.713 (2009).

¹⁸ The Commission has held that a request for rehearing of new issues is outside the proper scope of a rehearing. *PJM Interconnection, LLC*, 126 FERC ¶ 61,030, at P 15 & n.10 (2009) (noting that "raising issues for the first time on rehearing is disruptive to the administrative process and denies parties the opportunity to respond"); *see also Enron Energy Services Inc. v. Sellers of Energy*, 122 FERC ¶ 61,015, at P 64 (2008); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113, at P 188 (2006).

¹⁹ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at n.3.

²⁰ *Id.* P 158.

serving entity or any other entity.²¹ The Commission also reiterated in Order No. 719-A that retail customers can participate in wholesale demand response programs either individually or through an ARC.²² Given such a definition and clarifications, we do not find that a specific definition of an ARC in the regulatory text is necessary to make clear that an individual customer may act as an ARC.

11. Second, we do not find that section 35.28(g)(1)(A) of the regulatory text is inconsistent with section 35.28(g)(1)(iii), as APPA Petitioners assert. The regulatory text regarding ARCs (in section 35.28(g)(1)(iii)) states that “[e]ach Commission approved independent system operator and regional transmission organization must accept bids from an aggregator of retail customers that aggregates *the demand response* of . . .” certain customers. The phrase “the demand response” does not distinguish among demand response bids, including those for energy, capacity, and ancillary services. Therefore, to the extent necessary, we provide limited clarification that the requirements under section 35.28(g)(i)(iii) apply to all demand response bids, including bids for ancillary service products. For this reason, we find that APPA Petitioners’ proposed revision to section 35.28(g)(1)(A) is unnecessary.

2. Determining ARC Qualifications and Requirements

a. Request for Clarification/Rehearing

12. APPA Petitioners state that Order No. 719-A emphasized the role of relevant electric retail regulatory authorities to determine whether and how to permit ARCs to participate in wholesale demand response programs.²³ APPA Petitioners contend that the regulatory language must be clarified so that permission granted by the relevant electric retail regulatory authority is ARC-specific.²⁴ This would allow a relevant electric retail regulatory authority to determine an ARC’s qualifications and requirements.²⁵

13. According to APPA Petitioners, Order No. 719-A’s regulatory language creates an ambiguity that some may seek to use to restrict a relevant electric retail regulatory authority’s ability to determine and enforce qualifications regarding which ARCs may aggregate the demand response of retail customers subject to its jurisdiction and on what

²¹ *Id.*

²² *See, e.g.*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 68-69.

²³ *Id.* P 54, 68.

²⁴ APPA Petitioners at 18.

²⁵ *Id.* at 16-17.

terms. APPA Petitioners contend that Order No. 719-A permitted relevant electric retail regulatory authorities to limit which ARCs may aggregate retail customers' demand response, and under what terms, and that it also expressly recognized a retail regulator's continuing role in "addressing the complexity of allowing the sale of demand response into organized wholesale markets by retail customers subject to" that retail regulatory authority's jurisdiction.²⁶ They state that this language can only be given effect if the permission granted by relevant electric retail regulatory authorities to aggregate demand response is ARC-specific. Therefore, APPA Petitioners propose changes to section 35.28(g)(1)(iii) that they say will particularize the RTO's or ISO's obligations to accept ARC bids. APPA Petitioners argue that these changes will reduce barriers to demand response participation by facilitating the relevant electric retail regulatory authority's ability to establish and enforce qualifications for ARCs, which would be applied on an ARC-by-ARC basis:

. . . accept **a** bids from an aggregator of retail customers that aggregates the demand response of: (1) the customers of utilities . . . and (2) the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by **that** ~~an~~ aggregator of retail customers An independent system operator or regional transmission organization must not accept **a** bids from an aggregator of retail customers that aggregates the demand response of: (1) the customers . . . or (2) the customers of utilities that distributed 4 million megawatt-hours 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 **that** ~~an~~ aggregator of retail customers.

14. APPA Petitioners state that the proposed revisions are consistent with the Commission's intent not to place RTOs and ISOs in the position of interpreting local laws and ordinances.²⁷ According to APPA Petitioners, the RTO or ISO can implement the revised text simply by requiring the ARC to certify to the RTO or ISO that it is not prohibited from aggregating the demand response of retail customers of a large utility, or

²⁶ *Id.* (quoting Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 54, 68).

²⁷ *See* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 49 & n.78, P 158 & n.212; Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 50.

that it has been granted permission to aggregate the demand response of retail customers of a small utility.²⁸

15. If the Commission does not accept the proposed clarifications to the regulatory text, APPA Petitioners state that the Commission should make clear its intent to allow relevant electric retail regulatory authorities to determine which specific ARCs satisfy their qualifications and requirements to aggregate their retail customers' demand response. Thus, APPA Petitioners urge the Commission to clarify in the preamble that it is not restricting a relevant electric retail regulatory authority's authority to permit some ARCs from operating in their jurisdiction and not others.

b. Commission Determination

16. We do not agree with APPA Petitioners that Order No. 719-A's regulatory language restricts the relevant electric retail regulatory authority's ability to determine and enforce qualifications for ARCs. We have stated previously that neither the intent nor the effect of this proceeding is to undermine or require changes to existing retail aggregation programs, or to interfere with the relevant electric retail regulatory authority's role in determining the qualifications and requirements for ARCs within its jurisdiction.²⁹ We leave it to each relevant electric retail regulatory authority to set and enforce qualifications and requirements for aggregation of demand response within its jurisdiction.

17. APPA Petitioners' proposed revisions to the regulatory text, as we read them, would require retail regulatory authorities to implement qualifications for ARCs by considering each ARC individually. This is inconsistent with our goals, stated above, not to interfere with retail regulation or existing demand response programs. We therefore will not require an ARC-by-ARC determination of eligibility as the only method of implementing qualifications for ARCs. It is up to the individual relevant electric retail regulatory authority to determine the suitable method for qualifying ARCs within its jurisdiction.³⁰ Accordingly, we find that APPA Petitioner's proposed revision in this area is unnecessary, and we reject it.

²⁸ APPA Petitioners at 20.

²⁹ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 67-68.

³⁰ See, e.g., *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,238, at P 22 (2009) (recognizing that relevant electric retail regulatory authorities "retain substantial flexibility in establishing requirements for eligibility of retail customers to provide demand response"), *reh'g pending*.

3. Load-Serving Entities and Their Third-Party Designees

a. Request for Clarification/Rehearing

18. APPA Petitioners state that Order No. 719 is ambiguous as to whether load-serving entities are included within the definition of an ARC. If they are considered as ARCs, subject to the small system language adopted in Order No. 719-A, APPA Petitioners assert that the Commission may unwittingly undermine its intent not to interfere with, undermine, or change existing demand response programs, and thereby create a new obstacle to demand response programs.³¹ Under Order No. 719-A's small system ARC language, load-serving entities that want to continue or enhance their existing demand response programs by bidding their own demand response into RTO or ISO markets may have to secure laws and regulations expressly permitting such aggregation from the relevant electric retail regulatory authority for each affected small system, according to APPA Petitioners.

19. To fulfill the Commission's objective in this proceeding to eliminate barriers to demand response, APPA Petitioners urge the Commission to clarify that the small system language does not apply to the load-serving entity responsible for the retail customers in the RTO or ISO market, thereby enabling the load-serving entity to continue and enhance its existing demand response programs as Order No. 719-A expressly intended.³² To that end, APPA Petitioners seek clarification, or in the alternative rehearing, that the small system ARC requirements of section 35.28(g)(1)(iii) do not apply to demand response bids submitted by the load-serving entity "responsible for that retail customer's load in such organized markets" and propose revisions to the regulatory text. APPA Petitioners state that this clarification would reduce barriers to demand response by: (1) avoiding the need to educate small utilities and their relevant electric retail regulatory authorities about the need to take legislative action on this issue; (2) putting load-serving entities responsible for retail load of small utilities in the same position as load-serving entities serving retail customers of large utilities; and (3) minimizing administrative burdens for RTOs and ISOs.

20. Similarly, APPA Petitioners ask the Commission to include language in the regulatory text to clarify that a load-serving entity responsible for retail customer load in the organized market may also designate a third-party agent with appropriate technical expertise to provide demand response, without going through the burdensome resolution process of, or securing new laws or regulations from, the relevant electric retail

³¹ APPA Petitioners at 21-22.

³² *Id.* at 23.

regulatory authority of each affected small system.³³ They state that adopting the revised language would enable a load-serving entity to contract with a third party having demand response experience to facilitate the load-serving entity's own efforts to aggregate retail customer demand response and, thereby, avoid any unintended barriers to effective load-serving entity demand response programs.³⁴

21. If the Commission does not modify the regulatory text, APPA Petitioners ask the Commission to clarify in the preamble that when Order No. 719-A provided assurance that this proceeding is not intended to interfere with, undermine, or change existing demand response programs, the Commission intended to preserve load-serving entities' ability, including joint action agencies' and generation and transmission cooperatives' ability, to aggregate the demand response of the retail customer loads for which they are responsible in the RTO and ISO markets, without first securing new legislation or regulations from the relevant electric retail regulatory authorities of each affected small

³³ APPA Petitioners propose that the Commission provide an exception to the small system aggregation clause by inserting the following phrase in section 35.28(g)(1)(iii): "or where the demand response bid is submitted by the load-serving entity responsible for that retail customer's load in such organized markets or such load-serving entity's designee." APPA Petitioners at 27. Thus, section 35.38(g)(1)(iii) would read as follows:

Aggregation of retail customers. Each Commission approved independent system operator and regional transmission organization must accept a bids from an aggregator of retail customers that aggregates the demand response of . . . **or where the demand response bid is submitted by the load-serving entity responsible for that retail customer's load in such organized markets or such load-serving entity's designee.** An independent system operator or regional transmission organization must not accept a bids from an aggregator of retail customers that aggregates the demand response of . . . **or where the demand response bid is submitted by the load-serving entity responsible for that retail customer's load in such organized markets or such load-serving entity's designee.**

³⁴ APPA Petitioners note that some of their members have contracted or are in the process of contracting with third-party providers. For example, Burlington, Vermont, which participates in ISO-New England's emergency demand response program, contracted with EnerNoc to enhance and expand that program. *Id.* at 26.

system. Also, APPA Petitioners ask the Commission to clarify in the preamble that it expects RTOs and ISOs to cooperate with load-serving entities serving the loads of small utilities that have contracted with third parties to facilitate aggregation of the demand response of retail loads for which they are responsible.³⁵ APPA Petitioners also note that the authorization for these third parties would come from the load-serving entities responsible for the retail customer load in the RTO and ISO market and, therefore, eliminating this barrier to demand response will not be an administrative burden to RTOs and ISOs.

b. Commission Determination

22. We deny APPA Petitioners' rehearing request regarding load-serving entities and their third-party designees.³⁶ We find that the revisions APPA Petitioners seek in this regard are contrary to the goal of this proceeding. In essence, APPA Petitioners ask the Commission to provide special treatment to a particular group of aggregators by allowing them to be exempt from Order No. 719-A's small system provision (which was adopted in response to APPA's own comments and request for rehearing of Order No. 719).

23. We reiterate that the focus of this proceeding is to further improve the operation of wholesale competitive markets in organized market regions.³⁷ Consistent with the national policy of fostering competition in wholesale markets, the Commission recognized that "ensuring the competitiveness of organized wholesale markets is integral to . . . fulfilling its statutory mandate to ensure adequate and reliable non-discriminatory service at just and reasonable prices."³⁸ Providing effective competition that will protect consumers "by providing greater supply options, encouraging new entry and innovation, and encouraging demand response and energy efficiency" is at the core of this proceeding.³⁹

24. If we were to grant APPA Petitioners' request, then a load-serving entity for a small utility system (or its designated third-party aggregator) would not have to make a

³⁵ *Id.* at 27-28.

³⁶ As noted above, we consider APPA Petitioners' filing a request for rehearing, rather than a motion for clarification, because it seeks amendments to the regulatory text that would represent a changed ruling on the Commission's part. 18 C.F.R. § 385.713 (2009).

³⁷ NOPR, FERC Stats. & Regs. ¶ 32,628 at P 1, 12-13.

³⁸ *Id.* P 1.

³⁹ *Id.*

showing of authorization by the relevant electric retail regulatory authority to make a demand response bid into an RTO's or ISO's organized market, as required under Order No. 719-A, while all other ARCs would be required to make such a showing. In that respect, granting APPA Petitioners' request would potentially permit a load-serving entity to circumvent the relevant electric retail regulatory authority's policies regarding ARC qualifications and requirements and, would effectively have the Commission provide load-serving entities and their designees with a competitive advantage over other ARCs. Such action would be contrary to the Commission's stated intent that each relevant electric retail regulatory authority may set and enforce qualifications and requirements for aggregation of demand response within its jurisdiction. We also are not persuaded that such action is consistent with our obligation to prevent undue discrimination.⁴⁰ Therefore, we will deny APPA Petitioners' request for proposed revisions to the regulatory text in this regard.

4. Coordination among Local Authorities

a. Request for Clarification

25. New Hampshire Coop is concerned that Order No. 719-A's discussion regarding aggregators of retail customers could be read, in instances in which cooperative customers have switched to a competitive energy supplier, to preclude New Hampshire Coop from taking actions aimed at ensuring that all of its customers receive retail services at the lowest reasonable costs.⁴¹ New Hampshire Coop states that, for those cooperative members who are purchasing power from them, the relevant electric retail regulatory authority for demand response purposes is the New Hampshire Coop Board. However, according to New Hampshire Coop, it is not clear whether the relevant electric retail regulatory authority for those of its members who are purchasing power from others is the New Hampshire Coop Board or the New Hampshire Public Utilities Commission, or some other entity. This means that those cooperative members who choose to change their power supplier to a competitive alternative may also change their relevant electric retail regulatory authority.⁴²

26. Given this scenario, New Hampshire Coop is concerned that the shift to a competitive supplier and, potentially, a new relevant electric retail regulatory authority, may endanger the cooperative's efforts to coordinate demand response program actions so as to ensure that all of the New Hampshire Coop's members receive service at the

⁴⁰ 16 U.S.C. §§ 824d, 824e (2006).

⁴¹ New Hampshire Coop at 1-2.

⁴² *Id.* at 5.

lowest cost. It is concerned that, if those controlling the demand response programs do not coordinate with New Hampshire Coop, a significant fixed cost can be imposed upon all members. New Hampshire Coop states that it is not asking the Commission to require coordination where a competitive supplier is involved. However, to help facilitate dialogue with other New Hampshire authorities, New Hampshire Coop asks the Commission to clarify that nothing in the orders issued in this docket is intended to preclude or impede actions by New Hampshire Coop and New Hampshire regulatory authorities to confront and craft acceptable solutions to the coordination issues raised here.

b. Commission Determination

27. As stated above, we reiterate that the intent and effect of this proceeding are neither to undermine nor require changes to existing demand response programs.⁴³ The Commission also stated in Order No. 719-A that it is up to the relevant electric retail regulatory authorities, if they so choose, to decide whether existing retail aggregation programs provide benefits and whether retail customer participation in wholesale demand response programs, individually or through an ARC, would adversely affect those programs.⁴⁴ We do not object to relevant electric retail authorities coordinating as needed to achieve these goals.

B. Market Rules Governing Price Formation during Periods of Operating Reserve Shortage

28. In Order No. 719-A, the Commission affirmed its finding in the Final Rule that existing RTO and ISO market rules that do not allow for prices to rise sufficiently during an operating reserve shortage to allow supply to meet demand are unjust, unreasonable, and may be unduly discriminatory. The Commission stated that the shortage pricing reform in this proceeding is intended to correct this issue while providing protection against the exercise of market power.⁴⁵

29. The Final Rule required each RTO or ISO to reform or demonstrate the adequacy of its existing market rules to ensure that the market price for energy reflects the value of energy during an operating reserve shortage.⁴⁶ The Commission stated that each RTO or

⁴³ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 67.

⁴⁴ *Id.* P 68.

⁴⁵ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 93.

⁴⁶ *Id.* P 194.

ISO may propose in its compliance filing one of four suggested approaches to pricing reform during an operating reserve shortage, or develop its own alternative approach to achieve the same objectives.⁴⁷ The Commission also required each RTO or ISO to support its compliance filing with adequate factual support. To that end, the Commission outlined six criteria it will consider in reviewing whether the factual record compiled by the RTO or ISO meets the requirements of the Final Rule.⁴⁸

1. Request for Clarification/Rehearing

30. NRECA requests clarification that its proposed alternative shortage pricing proposal, which differentiates between the price paid to generation resources and the price paid to demand response resources during periods of operating reserve shortage, complies with the Commission's six pricing criteria and with the regulations implementing those criteria.⁴⁹ According to NRECA, under its approach, RTOs and ISOs would remove bid caps for demand response resources during emergencies, provided that those higher bids for demand response do not set the market-clearing price for all resources. NRECA contends that this approach will encourage additional demand response by allowing demand response resources to obtain a higher price for their

⁴⁷ The four approaches are: (1) RTOs and ISOs would increase the energy supply and demand bid caps above the current levels only during an emergency; (2) RTOs and ISOs would increase bid caps above the current level during an emergency only for demand bids while keeping generation bid caps in place; (3) RTOs and ISOs would establish a demand curve for operating reserves, which has the effect of raising prices in a previously agreed-upon way as operating reserves grow short; and (4) RTOs and ISOs would set the market-clearing price during an emergency for all supply and demand response resources dispatched equal to the payment made to participants in an emergency demand response program. *Id.* P 208.

⁴⁸ The six criteria are: (1) improve reliability by reducing demand and increasing supply during periods of operating reserve shortages; (2) make it more worthwhile for customers to invest in demand response technologies; (3) encourage existing generation and demand resources to continue to be relied upon during an operating reserve shortage; (4) encourage entry of new generation and demand resources; (5) ensure that the principle of comparability in treatment of and compensation to all resources is not discarded during periods of operating reserve shortage; and (6) ensure market power is mitigated and gaming behavior is deterred during periods of operating reserve shortages including, but not limited to, showing how demand resources discipline bidding behavior to competitive levels. *Id.* P 246-47.

⁴⁹ NRECA at 1-2.

response during emergencies and improve reliability without exposing consumers to unjust and unreasonable prices.⁵⁰

31. NRECA states that the Commission indicated in Order Nos. 719 and 719-A that it would allow RTOs and ISOs to consider the NRECA proposal as an alternative to the Commission's four approaches to shortage pricing.⁵¹ However, NRECA contends that its alternative approach can be read to be in conflict with the regulatory text that appears to require that the same market-clearing price be paid to both generator resources and demand response resources.⁵² Similarly, NRECA states that the Commission's fifth criterion could be read to require that the same market-clearing price be paid to both generator resources and demand response resources.⁵³ Therefore, NRECA requests that the Commission clarify that its shortage pricing rules do not require a single market-clearing price for all resources, and that NRECA's alternative approach to shortage pricing complies with the section 35.28(g)(1)(iv)(A) and the shortage pricing criteria.

32. In the absence of the requested clarification, NRECA seeks rehearing of Order No. 719-A, to the extent that Order No. 719-A required RTOs and ISOs to provide a single market clearing price for both demand response and generation resources in periods of reserve shortage.⁵⁴

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 6-7 (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 237; Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 104).

⁵² NRECA notes that relevant regulatory text refers to "the market-clearing price," implying that there is to be a single, identical market-clearing price for resources. Section 35.28(g)(1)(iv)(A) states:

Each Commission-approved independent system operator or regional transmission organization must modify its market rules to allow the market-clearing price during periods of operating reserve shortage to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power.

⁵³ The Commission's fifth criterion states that:

Ensure that the principle of comparability in treatment of and compensation to all resources is not discarded during periods of operating reserve shortage.

⁵⁴ NRECA at 2.

33. NRECA argues that the Commission arbitrarily and capriciously rejected its alternative pricing proposal and ignored evidence that the Commission's shortage pricing proposal will likely lead to unjust and unreasonable rates.⁵⁵ NRECA emphasizes that the Commission acknowledged in Order No. 719-A that it has not performed an analysis of the rates that are likely to be produced as a result of the Commission's pricing approaches.⁵⁶ NRECA asserts that, absent such an analysis, Order No. 719's pricing proposal will require RTOs and ISOs to utilize a single-market clearing price for demand response and supply resources to the exclusion of any approach that would differentiate between the prices paid to generation and demand response resources, effectively precluding NRECA's alternative pricing proposal.

34. NRECA further states that the Commission's four pricing approaches are not supported by substantial evidence in the record.⁵⁷ APPA Petitioners add that Order Nos. 719 and 719-A have offered no justification for adopting the four pricing approaches in spite of its evidence demonstrating that the Commission's pricing proposal would yield unjust and unreasonable rates. For example, NRECA argues that the Commission ignored evidence showing significant flaws in the Commission's pricing proposal.⁵⁸ NRECA also argues that the Commission ignored a number of arguments and evidence it presented in this proceeding that the Commission must address in order to sustain an order adopting a single market-clearing price proposal:

⁵⁵ *Id.*

⁵⁶ *Id.* at 3 (citing Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 104).

⁵⁷ For example, NRECA states that Order No. 719-A merely provided that "an entry of demand response over time may lead to lower prices in the long run" and noted that at least one commenter observed that existing market rules may deter investment in demand response and generation resources. *Id.* at 12 (citing Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 96).

⁵⁸ Specifically, NRECA states that it submitted an affidavit of Dr. Laurence D. Kirsch and Dr. Matthew J. Morey (Kirsch-Morey Affidavit) that identified several reasons why bid and offer caps should not be removed without careful consideration during periods of operating reserve shortage: (1) market power problems are ubiquitous in RTO-run markets; (2) the conduct-impact test of the Midwest ISO, ISO New England, and the New York ISO allow suppliers substantial latitude to manipulate market prices and allows inefficient market outcomes; (3) permitting prices to rise during emergencies may not be sufficient to overcome regulatory and other barriers to entry that preserve the market power of incumbents; and (4) increased demand response will not ensure competitive prices in markets that continue to suffer from high concentration of generation ownership given the transmission constraints that limit competition. *Id.* at 12.

- Argument that the Commission's four approaches would undermine reliability, rather than preserve it. And to the extent that they preserve reliability, they do not do so in a manner consistent with the FPA because they would unlawfully permit shifting rents from consumers to generators.⁵⁹
- Argument that the Commission's four pricing approaches will not attract new supply resources in real time and cannot attract long-term investment in new supply resources.⁶⁰
- Argument that Order Nos. 719 and 719-A failed to explain how the Commission's pricing proposal would be superior to the NRECA proposal in attracting investment in demand-side resources. Also, both orders failed to respond to NRECA's argument that the Commission's pricing proposal would attract demand-side resources at a dramatically higher cost to consumers than the NRECA approach.⁶¹
- Argument that by allowing generators to be paid more during emergency situations than they would ordinarily receive under existing market rules, the four pricing approaches would encourage behavior that creates emergencies, thereby undermining reliability during the long-term period required for entry into generation markets.⁶²
- Argument that under the Commission's pricing proposal, suppliers would have the incentive in the short-term to mid-term to create emergencies during these periods so that they can collect the excessively high prices the NOPR's proposals would afford them. Even in the long-term, suppliers would lack the incentive to develop new resources because without the shortages, they would no longer collect excessive rents.⁶³

⁵⁹ *Id.* at 20 (citing NRECA NOPR Comments at 30-32; NRECA Rehearing Request of Order No. 719 at 36).

⁶⁰ *Id.* (citing NRECA NOPR Comments at 36-42; NRECA Rehearing Request of Order No. 719 at 36-37; Kirsch-Morey Affidavit at 57-63).

⁶¹ *Id.* at 21 (citing NRECA NOPR Comments at 43-44; NRECA Rehearing Request of Order No. 719 at 37).

⁶² *Id.* (citing NRECA Rehearing Request of Order No. 719 at 37).

⁶³ *Id.*

NRECA states that in the absence of any evidence in response to these arguments, the Commission has failed to demonstrate that its four pricing approaches are just and reasonable.

35. Further, NRECA states that when the Commission acts under section 206 of the FPA, it bears the burden of showing that the existing rate structure it seeks to modify is unjust and unreasonable. It asserts that the Commission has made no such showing in the this proceeding that the bid caps it seeks to remove are related to the lack of generation and demand response investment it seeks to promote.⁶⁴ NRECA adds that Order No. 719-A failed to address its arguments that the Final Rule's four pricing approaches will not achieve the Commission's goals, including improving reliability and spurring investment in demand response and generation resources.⁶⁵ NRECA also argues that the Commission ignored its argument and evidence that the existence of emergencies is a reflection not of unreasonably low prices during those emergencies, but rather a failure of the RTO and ISO market design to assure resource adequacy.⁶⁶ According to NRECA, the Commission failed to provide a reasoned explanation for why it prefers to raise prices during emergencies rather than looking for alternative market structures that would be consistent with the Commission's obligation under the FPA.

36. Finally, NRECA states that, absent a clarification that RTOs and ISOs are not required to adopt a single market-clearing price for all resources during emergency periods, the Commission's holding in Order No. 719-A that RTOs and ISOs are free to propose the NRECA approach is arbitrary and capricious. It states that if the Commission is to reject the NRECA approach it is required to articulate the reasons for its decision and not create the impression that it is open to considering this approach in a subsequent proceeding.⁶⁷

2. Commission Determination

37. We will dismiss NRECA's request for clarification and rehearing. The Commission does not allow rehearing of an order denying rehearing.⁶⁸ Any other result

⁶⁴ *Id.* at 16.

⁶⁵ *Id.* at 16-17.

⁶⁶ *Id.* at 17 (citing NRECA NOPR Comments at 33).

⁶⁷ *Id.* at 22.

⁶⁸ *See, e.g., Southern Co. Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Co. d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

would lead to never-ending litigation as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing unless presumably that response were word-for-word identical to what the Commission earlier said.⁶⁹ Litigation before the Commission cannot be allowed to drag on indefinitely – at some point it must end – and so the Commission does not allow parties to seek rehearing of an order denying rehearing. And, as the District of Columbia Circuit has put it, even “an improved rationale” would not justify a further request for rehearing.⁷⁰

38. Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.⁷¹ In fact, a second rehearing request is required in instances when the later order modifies the results of the earlier order in a significant way.⁷²

39. We find that NRECA has not provided any new arguments in its present request for clarification and rehearing. As discussed below, we find that Order Nos. 719 and 719-A did address NRECA's contentions that it raises here, but the Commission did so as part of responding to similar issues. Although we dismiss the requests for clarification and rehearing, we will discuss them for the purposes of providing clarity and guidance.

40. With regard to NRECA's request for clarification as to whether its proposed alternative pricing proposal complies with the Final Rule's six pricing criteria and with the regulations pertaining to shortage pricing, we reiterate that Order No. 719 required each RTO or ISO to file a shortage pricing proposal in its compliance filing that incorporated one of the four pricing approaches offered by the Commission or to develop its own approach that would meet the Commission's requirements as presented in the Final Rule.⁷³ Order Nos. 719 and 719-A both state that an RTO or ISO may consider

⁶⁹ *Accord, e.g., Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of “infinite regress” that would “serve no useful end”).

⁷⁰ *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (Southern) (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)).

⁷¹ *See Southern*, 273 F.3d at 424.

⁷² *See California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood, Massachusetts v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990).

⁷³ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 234.

NRECA's alternative proposal and present it to the Commission within its compliance filing, with supporting documentation to show how it complies with the Commission's requirements.⁷⁴ If and when such an alternative proposal is presented to the Commission, the Commission will review the evidence and information provided by the RTO or ISO in its compliance filing and make a determination as to whether its proposal meets the requirements set out in the Final Rule.⁷⁵ Therefore, NRECA's request for clarification is misplaced. This is not the proper forum to seek a determination as to whether NRECA's alternative pricing proposal meets the Commission's requirements. As noted in Order Nos. 719 and 719-A, such a determination is better left to each RTO's and ISO's compliance filing.

41. With regard to NRECA's request for rehearing, had it been properly filed, we would have reaffirmed our finding in Order Nos. 719 and 719-A that the existing RTO and ISO market rules that do not allow for prices to rise sufficiently during an operating reserve shortage to allow supply to meet demand are unjust and unreasonable, and may be unduly discriminatory.⁷⁶ The pricing approach adopted in the Final Rule and affirmed in Order No. 719-A is designed to correct this issue while providing protection against the exercise of market power. We reiterate, contrary to NRECA's assertion, this procedure does not remove price caps during periods of system emergencies. Rather, it requires RTOs and ISOs to propose to the Commission a pricing proposal that is designed to better match market supply and demand and to allow the market price to more accurately reflect market conditions.⁷⁷ The Commission's approach to pricing also requires each RTO and ISO to make a factual showing as to how its proposed pricing methodology achieves the Commission's goal of better matching market demand and supply while simultaneously protecting consumers from the exercise of market power. The Commission will determine whether any specific proposal meets its requirements after it is submitted by the RTO or ISO in its compliance filing.⁷⁸ Therefore, this is not

⁷⁴ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 104.

⁷⁵ The Commission has already addressed issues related to shortage pricing for some RTOs and ISOs in their Order No. 719 compliance filings. *See, e.g., Southwest Power Pool, Inc.*, 129 FERC ¶ 61,163 (2009); *Calif. Indep. Sys. Operator Corp.*, 129 FERC ¶ 61,157 (2009); *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,164 (2009).

⁷⁶ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 192; Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 93.

⁷⁷ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 195; Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 95.

⁷⁸ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 235 ("only when an RTO or ISO submits a compliance filing can and will the Commission determine if its pricing

(continued...)

the proper forum for NRECA's assertion that the Commission's policy will result in rates that are unjust and unreasonable and will allow the exercise of market power. Any issues regarding particular rates belong within each RTO's and ISO's compliance filing.

42. NRECA argues that the Commission's four pricing approaches would undermine reliability.⁷⁹ We will not make specific findings here, but we reiterate that the Final Rule addressed concerns regarding reliability. To ensure that RTOs and ISOs incorporate safeguards to protect reliability, Order No. 719 required each RTO and ISO to provide, in its compliance filing, "a factual record that includes historical evidence for its region regarding the interaction of supply and demand during periods of scarcity and the resulting effects on market prices, an explanation of the degree to which demand resources are integrated into the various markets, the ability of demand resources to mitigate market power, and how market power will be monitored and mitigated."⁸⁰ Also, Order No. 719 specifically stated that the RTO's or ISO's pricing approach must show how it improves reliability by reducing demand and increasing generation during periods of operating reserve shortage.⁸¹ Therefore, any reliability concerns regarding an RTO's or ISO's shortage pricing proposal should be raised in the RTO's or ISO's compliance filing. This is not the proper forum to discuss such concerns since the Commission is not making any specific findings regarding each RTO's or ISO's pricing proposal.

43. We disagree with NRECA's argument that the four pricing approaches will not attract new supply resources in real time and will not attract long-term investment in new supply resources. As the Commission has stated on numerous occasions, the Commission's goal in this proceeding is to eliminate barriers to demand response, including barriers to demand response resources' participation in organized energy markets.⁸² The Commission found that existing market rules do not accurately reflect the value of energy during periods of shortage and, therefore may deter new entry of demand response and generation resources. Higher shortage prices will encourage investment in

rules are just and reasonable, not unduly discriminatory and sufficient to meet the stated goals of this rulemaking"); Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 102.

⁷⁹ For example, it contends that the four pricing approaches would encourage behavior that creates emergencies that would undermine reliability during the long-term period required for entry into generation markets.

⁸⁰ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 194.

⁸¹ *Id.* P 239.

⁸² *See, e.g.,* Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 96.

additional generation and demand response resources.⁸³ As noted in Order No. 719-A, “with improved price signals, more buyers would find it worthwhile to invest in technologies that allow them to respond to prices.”⁸⁴

44. We also reject NRECA’s argument that Order Nos. 719 and 719-A failed to explain how the Commission’s pricing proposal is superior to the NRECA’s alternative proposal in attracting investment in demand-side resources. In Order No. 719, the Commission did not comment on each individual alternative approach because it was not mandating one specific approach. Instead, the Commission offered a menu of options.⁸⁵ The Commission also clearly stated that it will allow each RTO and ISO to propose to amend its market rule to adopt any of the four approaches or adopt an alternative approach that is appropriate for its market.⁸⁶ Order No. 719 did not reject any of the alternative pricing approaches, including NRECA’s. Therefore, there was no need to explain why or how the Commission’s proposal was “superior” to NRECA’s proposal.

45. We also reiterate our finding in Order No. 719-A that our Final Rule relied on sufficient evidence to support our determinations.⁸⁷ The Commission carefully considered the evidence and arguments submitted by many commenters, including NRECA, in reaching its determination regarding shortage pricing. The Commission gathered evidence from three technical conferences, as well as evidence submitted in the ANOPR and NOPR, to conclude that RTO and ISO market rules do not produce rates that accurately reflect the true value of energy during periods of operating reserve shortages.⁸⁸ The fact that this evidence does not support NRECA’s desired outcome does not mean that the Commission’s findings are arbitrary and capricious, as NRECA asserts.

⁸³ *Id.*

⁸⁴ *Id.* P 98.

⁸⁵ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 235.

⁸⁶ *Id.* at P 234.

⁸⁷ Order No. 791-A, FERC Stats. & Regs. ¶ 31,292 at P 94.

⁸⁸ *Id.* P 57.

The Commission orders:

The requests for rehearing of Order No. 719-A are hereby denied, as discussed in the body of this order. Clarification is granted to the extent discussed in the body of this order.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Wholesale Competition in Regions with Organized Electric Markets Docket No. RM07-19-002

(Issued December 17, 2009)

KELLY, Commissioner, *dissenting in part*:

I dissent in part on this order with regard to the Commission's failure to update the regulatory text of section 35.28(g)(1)(i)(A) of the Commission's regulations¹ to reflect changes made in Order No. 719-A.² In Order No. 719-A, the Commission granted rehearing in part, modifying the aggregator of retail customers (ARC) requirements by directing RTOs and ISOs to amend their market rules as necessary to accept bids from ARCs that aggregate the demand response of: (1) the customers of utilities that distributed more than 4 million MWh in the previous fiscal year, and (2) the customers of utilities that distributed 4 million MWh or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an ARC.³ Under Order No. 719-A, RTOs and ISOs may not accept bids from ARCs that aggregate the demand response of the customers of utilities that distributed 4 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. Order No. 719-A amended the language in the ARC-specific regulation, section 35.28(g)(1)(iii),⁴ to reflect these changes.

Unfortunately, the Commission failed to correspondingly update the regulatory text in section 35.28(g)(1)(i)(A), which regulates the provision of ancillary services by demand response resources. Under this section, RTOs/ISOs must accept the bids of demand response resources that are technically capable of

¹ 18 C.F.R. § 35.28(g)(1)(i)(A).

² *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719-A, 74 Fed. Reg. 37,776 (Jul. 16, 2009), FERC Stats. & Regs. ¶ 31,292 (2009).

³ *Id.* P 51.

⁴ 18 C.F.R. § 35.28(g)(1)(iii).

providing the enumerated ancillary services and submit a bid at or below the market-clearing price, “unless not permitted by the laws or regulations of the relevant electric retail regulatory authority.” I believe that the Commission should have updated this language when it made the changes to section 35.28(g)(1)(iii) in Order No. 719-A. While it is true that a non-ARC demand response resource may provide ancillary services “unless not permitted by the laws of regulations of the relevant electric retail authority”, this section also covers ARC demand response resources and should have been amended to specify that, for those ARCs that aggregate the demand response of the customers of utilities that distributed 4 million MWhs or less in the previous fiscal year, the relevant regulatory authority must specifically permit such customers’ demand response to be bid into organized markets by an aggregator of retail customers. I would have so clarified the regulatory text of section 35.28(g)(1)(i)(A) in this order.

Accordingly, I respectfully dissent in part.

Suedeem G. Kelly