UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Voltus, Inc.	)	
Complainant,	)	
v.	)	Docket No. EL21-12-000
Midcontinent Independent System Operator, Inc.	)	
Respondent	)	

COMMENTS OF PUBLIC INTEREST ORGANIZATIONS

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC or the Commission), 18 C.F.R. §§ 385.212, 385.214, the undersigned Public Interest Organizations (PIOs) hereby file these comments in the above-captioned proceeding.[1]

A. Introduction

PIOs support the complaint and the relief requested by Voltus, Inc. (Voltus). The Midcontinent Independent System Operator (MISO) tariff requires that demand response aggregators, as a prerequisite to market participation, certify that the relevant electric retail regulatory authority (RERRA) does not preclude aggregators from serving RERRA customers.[2] This requirement is contrary to federal law, the Commission's orders, and is unjust and

[1] PIOs include Citizen Utility Board of Michigan, Citizens Action Coalition of Indiana, Clean Wisconsin, Environmental Law and Policy Center, Natural Resources Defense Council, and Sustainable FERC Project.
[2] Section 38.6 of MISO's Open Access Transmission, Energy, and Operating Reserve Markets Tariff.

unreasonable, unduly discriminatory, and preferential. The Commission should find that the RERRA exclusions of third-party demand response aggregators in MISO are void. The Commission should also initiate a rulemaking that removes Order No. 719's[3] RERRA opt-out provision because it violates the Federal Power Act (FPA), results in unjust and unreasonable rates, and is unduly discriminatory and preferential.

Order No. 719's RERRA opt-out provision, as implemented in the MISO tariff, has severely constrained demand response in MISO. MISO is now the geographically largest regional transmission organization (RTO) in the United States. Of the 15 states wholly or partly in MISO, only Illinois, Michigan, and Texas allow demand response aggregation from aggregators not operating on behalf of a load serving entity (LSE). In Michigan, aggregators are only allowed to compete with LSEs for demand response customers in the 10% of the state subject to retail competition. Third-party demand response aggregator bans have led to a lack of competition in the demand response space, possibly resulting in increased wholesale rates and reduced efficacy of retail demand response programs.

The Commission should undo Order No. 719's RERRA opt-out provision and require MISO to eliminate its requirement that aggregators certify RERRA authority before participating in wholesale markets.

B. The Commission Lacks Discretion to Grant States the Authority to Adopt Bans on Wholesale Demand Response Participation

As Voltus argued in its complaint, "jurisprudence since the adoption of Order No. 719 now dictates that the opt-out approach taken in Order No. 719 is inconsistent with the Federal

[3] Wholesale Competition in Regions with Organized Electric Markets, 125 FERC ¶ 61,071 (Oct. 17, 2008) ("Order No. 719").

Power Act's basic jurisdictional divide."[4] PIOs write separately to stress that settled understanding of the jurisdictional scheme of the Federal Power Act prevents the Commission from granting States the authority that Act denies them. The Commission's goal of promoting a "program of cooperative federalism,"[5] though laudable, "cannot override the statutory limitations of FERC's jurisdiction."[6]

1. **States Cannot Ban Wholesale Demand Response Participation.**

The Supreme Court has recognized from the earliest days that the FPA creates a "dual system" of jurisdiction calculated to prevent "futile duplication of [federal and state] authorities over the same subject matter."[7] After the Supreme Court held in *Pub. Utilities Comm'n of R.I. v. Attleboro Steam & Elec. Co.*[8] that states lack jurisdiction over electricity moving in interstate commerce, Congress passed the FPA to fill the jurisdictional gap thus created. It never relaxed the "the limits of state authority to restrain interstate trade."[9] Quite the contrary: the FPA creates a "dual system" of jurisdiction calculated to prevent "futile duplication of [federal and state] authorities over the same subject matter."[10] Then, in *FERC v. EPSA*, the Court conclusively established that demand response participation in wholesale markets lies on the federal side of the jurisdictional divide.[11]

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[4] Voltus Complaint at *8.
[5] FERC v. EPSA, 136 S. Ct. 760, 780 (2016).
[6] NARUC v. FERC, 964 F.3d 1177, 1188 (D.C. Cir. 2020) (quoting FERC v. EPSA, 136 S. Ct. at 774-75) (internal citations omitted).
[7] First Iowa Hydro-Elec. Co-op. v. FPC, 328 U.S. 152, 171 (1946).
[8] Pub. Utilities Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 84 (1927).
[9] New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982) (referring to Supreme Court decisions limiting state authority prior to *Attleboro*).
[10] First Iowa Hydro-Elec. Co-op. v. FPC, 328 U.S. 152, 171 (1946).
[11] *EPSA*, 136 S. Ct. at 767.

Recent Commission and federal court decisions reinforce this conclusion, thereby making it clear that MISO's conditioning of demand response wholesale market participation on RERRA allowance is contrary to the FPA. With Order No. 719 the Commission determined that demand response aggregation "would reduce a barrier to demand response."[12] By collecting customers that would otherwise not participate in the markets, aggregation, among other benefits, "expands the amount of resources available to the market, increases competition, helps reduce prices to consumers and enhances reliability."[13] While the Commission might have had reason to believe that jurisdictional and operational concerns required granting wide latitude to RERRAs when it adopted Order No. 719, those concerns have evaporated in recent years.

In its two major rulemakings involving energy storage (Order No. 841[14]) and distributed energy resources (Order No. 2222[15]) after the Supreme Court's decision in *EPSA,* the Commission declined to provide RERRA opt-outs, despite requests to do so. In the case of energy storage, the D.C. Circuit recently upheld FERC's authority to allow energy storage connected to the grid at the distribution level to participate in the wholesale markets without providing a RERRA opt-out.[16]

The D.C. Circuit's reasoning in not requiring a RERRA opt-out for storage resources connected at the distribution level is particularly instructive here in applying the Supreme Court's *EPSA* determination that demand response in wholesale markets is the exclusive

[12] Order No. 719 at P 154
[13] Order No. 719 at P 154.
[14] Electric Storage Participation in Markets Operated by RTOs and ISOs, 162 FERC ¶ 61,127 (Feb. 15, 2018) ("Order 841").
[15] Participation of Distributed Energy Resource Aggregations in Markets Operated by RTOs and ISOs, 172 FERC ¶ 61,247 (Sept. 17, 2020) ("Order 2222").
[16] *Nat'l Ass'n of Regulatory Util. Commissioners ("NARUC") v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020).

jurisdiction of the Commission. The court in *NARUC* could have simply relied on the Supreme Court's three-pronged test and determined that not including an opt-out (1) directly affected wholesale rates, (2) did not regulate state-regulated facilities, and (3) was consistent with the core purposes of the FPA.[17] The D.C. Circuit, however, went further than the *EPSA* test in upholding Order 841's lack of a RERRA opt-out. Relying on the settled principle that the Commission "has the exclusive authority to determine who may participate in the wholesale markets," it held that "the Supremacy Clause – not Order No. 841 – requires that States not interfere [to determine who may participate in the wholesale markets]."[18] In other words, Order 841's explicit denial of an opt-out "is simply a restatement of the well-established principles of federal preemption."[19]

2. The Commission Lacks the Discretion to Grant States the Power Denied Them by Congress.

The dual system of jurisdiction created by Congress is mandatory, and the Commission does not have discretion to grant States to exercise powers that the Act denies them. It is "common ground that if FERC has jurisdiction over a subject, the States *cannot* have jurisdiction over the same subject."[20] Rather, Congress imposed a mandatory duty on the Commission to exercise jurisdiction over wholesale markets in a manner that prevents unjust and unreasonable or unduly discriminatory outcomes. This duty clearly attached to the Commission's regulation of

[17] *NARUC v. FERC* at 1186 (internal quotations omitted).
[18] *NARUC*, 964 F.3d at 1186 (citing Miss. Power & Light Co., 487 U.S. at 374 (1988)).
[19] NARUC v. FERC at 1187
[20] Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 377 (1988) (Scalia, J., concurring in judgment) (emphasis added).

demand response after the Supreme Court decided, in *FERC v. EPSA*,[21] that the participation of demand response resources in the wholesale market lies within federal jurisdiction.[22]

Much confusion has been created by the *EPSA* court's suggestion that the opt-out provision at issue there was a valid implementation of the "program of cooperative federalism."[23] Of course, the Court was not asked to decide—and did not decide—that the opt-out approach is legal.[24] To the contrary, the Supreme Court never ceased to reaffirm that the Commission cannot stretch the statute in pursuit of its goals—no matter how laudable.[25]

Nonetheless, in the present proceeding, it is of course relevant how the Court *would* decide if it were asked to do so. The answer to this question is clear: notwithstanding the fact that the majority offered a fig leaf to those concerned with states' rights in a contentious case, its holding inexorably leads to the conclusion that the opt-out is legal. Indeed, Justice Scalia foresaw the irreconcilable tension resulting from the Court's holding in dissent: "If inducing retail customers to participate in wholesale demand-response transactions is necessary to render wholesale rates 'just and reasonable,' how can FERC, consistent with its statutory mandate, permit States to thwart such participation?"[26] This *per se* unreasonableness of the blanket opt-out alone is sufficient evidence to decide the issue before the Commission in the present proceeding.

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[21] 136 S. Ct. 760 (2016).
[22] *Id.* at 767.
[23] *Id.* at 780.
[24] NARUC v. FERC, 964 F.3d 1177, 1190 (D.C. Cir. 2020) (noting that the *EPSA* court "did not condition its holdings on the existence of an opt-out").
[25] Under the existing jurisdictional scheme, States retain the "ability to contribute, *within their regulatory domain*, to the Federal Power Act's goal[s]." Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring) (emphasis added); *see also id.* at 1299 (majority opinion).
[26] *Id.* at 789 (Scalia, J., dissenting). Justice Scalia's dissent was joined by Justice Thomas. Although the Court addressed the dissent's other arguments in detail, *see id.* at 770 n.3, 775 n.7, 777 n.8, 778 n.9, 780 n.10, it chose not to refute Justice Scalia's reading of the illegality of the opt-out provision.

The law established by the Court, buttressed by subsequent conclusions of the Commission and the courts, require FERC to overturn the RERRA opt-out. The opt-out injects states into the regulation of the wholesale markets, an area over which the federal government has sole and inalienable authority.

C. MISO's Implementation of the Order No. 719 RERRA Opt-Out Results in Unjust and Unreasonable Rates

The Commission's findings since *FERC v. EPSA* only confirm that MISO's implementation of the Order No. 719 RERRA opt-out results in unjust and unreasonable rates by reducing competition and limiting the amount of demand response participating in the MISO wholesale markets. FERC has for years found that demand response increases competition and leads to just and reasonable rates.[27] The Commission has already determined that "[d]emand response can provide competitive pressure to reduce wholesale power prices; increases awareness of energy usage; provides for more efficient operation of markets; mitigates market power; enhances reliability; and in combination with new technologies can support the use of renewable energy resources, distributed generation, and advanced metering."[28] Yet by allowing RERRAs to keep third-party demand response aggregators out of the wholesale markets, FERC has ensured that competitive pressure will disappear in many states.

This is especially true in RTOs such as MISO where most states remain vertically integrated. RERRAs in those states have incentives to protect incumbent utilities and maintain strict control over retail customers even at the expense of increased wholesale rates. It is no

[27] *See* Order No. 719; Order 745; Order 2222.
[28] Order No. 719 at P 16.

surprise, therefore, that nearly every state in the MISO footprint has issued a ban on third-party demand response aggregators.

The lack of competition from third-party demand response aggregators has led to demand response far below its potential in the MISO footprint. According to the MISO market monitor's most recent State of the Market report, MISO has a lower proportion of demand response than ISO-NE.[29] Worse, of the existing demand response in MISO, 94% of it is classified as LMR or Emergency DR.[30] Those resources only respond during emergency conditions, meaning they do not fully participate in wholesale markets. The market monitor lays out clearly the impact of having nearly all demand response locked up as an emergency resource:

> "As MISO's capacity surplus dissipates because of the retirement of large baseload resources that are largely being replaced by intermittent resources, DR resources are expected to be deployed more frequently to satisfy peak loads and respond to system contingencies. **It is important, therefore, to ensure that real-time markets produce efficient prices when DR resources are deployed.**"[31]

The result of having so little market-based demand response is that MISO relies on demand response resources that are rarely (but increasingly) called only during emergencies. They are, in effect, a resource of last resort rather than a regular participant in MISO markets that can help ensure efficient prices. By shutting third-party demand response aggregators such as Voltus out of the MISO markets, the RERRA opt-out prevents demand response aggregation from reaching

[29] Potomac Economics, *2019 State of the Market Report for the MISO Electricity Markets* ("State of the Markets"), 107 (June 2020).
[30] State of the Markets at 108.
[31] State of the Markets at 109 (emphasis added).

its full potential to drive down wholesale prices and prevent emergency events. This has the effect of creating unjust and unreasonable rates across the MISO footprint.

D. MISO's Implementation of Order No. 719's RERRA Opt-Out is Unduly Discriminatory

The FPA requires the Commission to remedy any "rule, regulation, practice, or contract affecting such rate, charge, or classification" that it finds "unduly discriminatory or preferential".[32] MISO's RERRA opt-out is just such an unduly discriminatory and preferential practice requiring a remedy.

FERC finds undue discrimination where "there is a difference in rates or services among similarly situated entities."[33] In this case, MISO's RERRA opt-out is unduly discriminatory because it prevents third-party demand response aggregators from providing the same services as incumbent utilities and because it keeps third-party demand response aggregators from providing the same services through demand response as they could through other technologies such as storage or other distributed energy resources.

The undue discrimination of the RERRA opt-out is especially clear post Orders 841 and 2222, where FERC omitted an opt-out provision for storage and distributed energy resources. Third-party demand response aggregators can provide many of the same services as storage and distributed energy resources but are treated much differently because of Order No. 719's RERRA opt-out provision. The Commission should find the practice unduly discriminatory and preferential.

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[32] 16 U.S.C. § 824e.
[33] *Calpine Oneta Power, L.P.,* 116 FERC ¶ 61,282 at P 36 (2006).

E. Eliminating the RERRA Opt-Out Will Not Harm and May Improve Retail Demand Response Programs

While PIOs do not dispute a state's right to ensure fair retail rates and distribution system reliability, PIOs disagree with the argument that limiting wholesale market participation is necessary for states to meet those objectives. States can and should address their goals without intruding on wholesale market participation under the Commission's jurisdiction pursuant to the FPA and the Supremacy Clause of the US Constitution. Eliminating the RERRA opt-out might have the ancillary benefit of improving existing retail demand response programs run by incumbent utilities. At the very least, there is no reason to believe that competition from aggregators will harm existing programs.

While many incumbent utilities in the MISO footprint have some form of retail demand response programs, as stated above and demonstrated in Voltus's complaint, those programs have not led to significant wholesale market participation from demand response in MISO. Of the 135,979 MW of capacity cleared in MISO's most recent Planning Resource Auction, only 7,557 MW (5.5%) was demand response.[34] Worse still, Demand Response Resource that participate directly in MISO markets represent a mere 6% of all demand response and less than 0.7% of MISO's forecast coincident peak demand.[35] In fact, many retail demand response programs run by incumbent utilities are stagnant or rely on resources participating in antiquated load control programs that are rarely called. It is possible that eliminating the RERRA opt-out might lead to better outcomes for those retail customers by allowing them to participate in better programs than what utilities currently offer. Eliminating the opt-out will enhance competition

[34] MISO, *2020/2021 Planning Resource Auction (PRA) Results* (April 14, 2020), *available at* https://cdn.misoenergy.org/2020-2021%20PRA%20Results442333.pdf
[35] Voltus Complaint, Attachment A at 19.

between state programs and aggregators providing direct access to the wholesale markets. This competition could lead to retail programs providing better services for customers. Several recent filings in MISO states give an indication of the state of many demand response programs and provide evidence that there are untapped opportunities in those states for greater demand response penetration.

The Michigan Public Service Commission (MPSC) recently issued an order that found benefits of demand response aggregation.[36] In an October 29, 2020 order, the MPSC agreed with a staff recommendation that incumbent utilities work with third-party aggregators to better manage existing DR portfolios.[37] Additionally, the Commission ordered the reopening of Case No. U-20348 for the purpose of reviewing the MPSC's current ban on demand response aggregators.[38] This renewed interest in exploring aggregation in Michigan comes from Order 2222's removal of barriers for DERs, including DR, and from MSPC Case No. U-20628 exploring demand response in Michigan.[39]

In its demand response report in U-20628, MPSC staff summarized ongoing discussions around the role that demand response aggregation could play in Michigan.[40] This includes both incumbent utilities working with aggregators as well as the possibility that demand response could be improved by allowing demand response aggregators to operate independently in Michigan. While that process is ongoing in Michigan, the Commission's interest in reassessing

[36] Michigan Public Service Commission, Order, U-20628 and U-20348 (Oct. 29, 2020).
[37] *Id*. at 9.
[38] *Id*. at 9-10.
[39] *Id*.
[40] MI Power Grid Stakeholder Group, *Demand Response* Report, 19-21, U-20628 (July 31, 2020).

the existing aggregator ban is a recognition by the Commission that the status quo of total aggregation bans may be detrimental to demand response.

In Wisconsin, the Wisconsin Public Service Commission (WPSC) recently issued its Final Strategic Energy Assessment 2020-2026.[41] The WPSC found that while demand response capacity has reached up to 10% of statewide peak demand, it is rarely deployed.[42] Further, the WPSC found that existing programs are being discontinued due to low enrollment.[43] While new utility programs that leverage smart thermostats and other Internet-connected technologies might prompt growth in new programs, the WPSC projects reductions in demand response leading to a flattening of subscribed megawatts through 2026.[44] It is more than plausible that injection of competition from third-party demand response aggregators could help subscribe more demand response in Wisconsin by offering new products and business models.

In Iowa, incumbent utilities have struggled to find much use for their demand response programs. In 2019, MidAmerican failed to call a single cycling residential demand response event despite subscribing more than 62,000 load control receivers.[45] MidAmerican also saw a reduction in nonresidential demand response participation and called only one event.[46] Similarly, Interstate Power and Light only called on its more than 35,000 demand response customers on two days in 2019.[47] The utility also retired 8,100 water heater cycling switches.[48] It is

[41] Public Service Commission of Wisconsin, *Final Strategic Energy Assessment*, 5-ES-110 (Oct. 2020).
[42] *Id*. at 63-65.
[43] *Id*.
[44] *Id.*
[45] MidAmerican Energy Company, *Energy Efficiency Plan*, Iowa Utilities Board EEP-2012-0002 and EEP-2018-0002, 52 (May 4, 2020).
[46] *Id*. at 55-56.
[47] Interstate Power and Light Co., *Revised Annual Report for 2019 Energy Efficiency Plan*, Iowa Utilities Board EEP-2018-0003, 30-31 (May 12, 2020).
[48] *Id*.

implausible that third-party demand response aggregators would somehow harm utility demand response programs in Iowa to such an extent that allowing an outright ban on wholesale market participation is warranted, and allowing aggregators could benefit existing utility customers by providing new products that are more likely to be utilized to benefit the system.

While PIOs recognize that it is not FERC's responsibility to ensure that retail demand response programs are optimized, it is important to recognize that eliminating the RERRA opt-out is unlikely to harm existing demand response programs in MISO states and may provide opportunities for customers not adequately served by existing programs.

F. Conclusion

As detailed above, the Commission should find that MISO's tariff requirements that demand response aggregators certify that the RERRA does not preclude aggregators as a prerequisite to market participation is contrary to federal law, unjust and unreasonable, and unduly discriminatory and preferential. Because of this finding, the Commission should void those parts of MISO's tariff and require MISO to amend its tariff accordingly. This change would eliminate any requirement of RERRA approval before third-party demand response aggregators can participate in MISO's markets. In addition, the Commission should begin a rulemaking that undoes Order No. 719's RERRA opt-out provision because it violates the FPA and results in unjust and unreasonable rates.

Respectfully submitted this November 19, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Chicago, Illinois, this 19th Day of November 2020.

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