



July 24, 2009

FERC Defends its Authority to Require Bids from Demand Response Resources in Order No. 719-A

On July 16, 2009, the Federal Energy Regulatory Commission (FERC) issued Order No. 719-A.¹ The order largely affirms its findings in Order No. 719² confirming FERC's jurisdiction to require Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) to accept bids for demand response resources.

Order No. 719 is intended to remove barriers to the use of demand response resources. Its primary requirements are that: (1) each RTO and ISO accept bids from demand response resources in its market for certain ancillary services on a basis comparable to other resources; (2) during a system emergency, each RTO and ISO eliminate a charge to buyers that take less electric energy in the real-time market than they purchased in the day-ahead market; (3) an aggregator of retail customers (ARC) is permitted to bid demand response on behalf of its retail customers directly into the organized energy market in certain circumstances; and (4) during periods of operating reserve shortage, RTOs and ISOs are required to modify their market rules to allow the market-clearing price to reach a level that rebalances supply and demand.

Requests for rehearing of Order No. 719 focused heavily on the question of whether FERC has jurisdiction to make rules concerning demand response. In Order No. 719-A, FERC emphasizes its broad authority under the Federal Power Act (FPA) to identify practices that "affect" public utility wholesale rates. FERC further states that in exercising its authority under the FPA, it determined that competitive electric markets should reflect current demand and supply conditions, and that such markets are the most efficient when demand can respond to the wholesale price.

In response to claims that FERC is overstepping its jurisdiction and intruding upon State regulatory jurisdiction over retail sales,

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FERC cited a large body of judicial precedent, including a recent decision from the U.S. Court of Appeals affirming FERC's jurisdiction to approve the Installed Capacity Requirement used in ISO New England Inc.'s Forward Capacity Market.³ Moreover, FERC summarizes the ways in which it has previously determined that demand response affects public utility wholesale rates, and highlights that "this proceeding is a very narrowly-focused rule with respect to demand response resources" which affects only RTOs and ISOs, "market[s] subject to the Commission's exclusive jurisdiction."

While largely affirming Order No. 719, FERC does modify certain discrete aspects of its demand response policy including:

- Aggregate Demand Response. In revised 18 C.F.R. § 35.28, FERC requires that RTOs and ISOs continue to accept bids from ARCs that aggregate the demand response of customers of utilities that distributed more than 4 million MWh in the previous fiscal year, unless expressly prohibited by the applicable retail regulator. FERC clarifies, however, that a utility that distributed 4 million MWh or less in the previous fiscal year will be permitted to bid its customers' demand response into organized markets by an ARC only if the relevant electric retail regulator permits it. Each RTO or ISO is required to submit, within 90 days of the date that Order No. 719-A is published in the Federal Register, a compliance filing with FERC incorporating such revisions in its Open Access Transmission Tariff.
- Stakeholder Process. FERC directs each RTO and ISO to develop appropriate mechanisms for sharing information about demand response resources through the stakeholder process. Specifically, FERC requires the adoption of a mechanism through which an affected load-serving entity would be notified when load served by that entity is enrolled to participate as a demand response resource in an RTO or ISO market, and of the expected level of that participation for each enrolled demand response resource. Each RTO and ISO is required to submit a compliance filing within 180 days of the date of Order No. 719-A indicating how it has complied with these requirements.
- Market Monitor - Conflicts of Interest. In Order No. 719, FERC prohibited market monitors from performing market monitoring services for any entity other than the RTOs or ISOs in an effort to prevent conflicts of interest. In Order No. 719-A, FERC determines that such a prohibition was too broad. An RTO or ISO market monitor may now monitor a market participant in the same RTO or ISO if the contract between the parties is reviewed and approved by FERC, and if the parties agree that FERC approval is needed for termination.
- Market Monitor - Referring Market Design Flaws. FERC also clarifies that market monitors have discretion in determining whether to refer a possible market design flaw or other issue to FERC. Specifically, FERC states that if the perceived market design flaw is



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already being addressed by the RTO or ISO, or if the flaw is *de minimis*, the market monitor likely does not need to make a referral.

¹ *Wholesale Competition in Regions with Organized Electric Markets*, 128 FERC ¶ 61,059 (2009).

² *Wholesale Competition in Regions with Organized Electric Markets*, 73 Fed. Reg. 61,400 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008).

³ *CT DPUC v. FERC*, No. 07-1375 (D.C. Cir. June 23, 2009).

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