

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

Advanced Energy Economy

)

Docket No. EL17-75-000

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

Pursuant to section 313 of the Federal Power Act (“FPA”)¹ and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”),² American Municipal Power, Inc., the American Public Power Association, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the Public Power Association of New Jersey (collectively, “Joint Parties”) hereby request rehearing of the Commission’s December 1, 2017 order in the above-captioned proceeding.³

I. INTRODUCTION

The participation of retail electric customers in the organized wholesale electric markets as energy efficiency resources (“EERs”)⁴ raises important regulatory issues given “the confluence of State and Federal jurisdiction.”⁵ In Order Nos. 719 and 719-A, the Commission

¹ 16 U.S.C. § 825l.

² 18 C.F.R. § 385.713 (2017).

³ *Advanced Energy Economy*, 161 FERC ¶ 61,245 (2017) (“December 1 Order”).

⁴ Beyond referencing the PJM Interconnection, L.L.C. (“PJM”) Tariff definition, the December 1 Order does not provide a clear definition of what the term “energy efficiency resources,” or “EERs” encompasses. *See id.* at P 59. In general, the Commission appears to use the term to refer to any program in which retail customers would participate, either directly or indirectly, in organized wholesale electric markets that permit a continuous and verifiable reduction in retail energy consumption below forecast amounts to be bid into the market. That is how Joint Parties use the term here.

⁵ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh’g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 54, *order on reh’g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

adopted a reasoned, cooperative approach to similar jurisdictional issues in the demand response context, prescribing that a regional transmission organization (“RTO”) or independent system operator (“ISO”) follow certain rules to respect the “opt-in/opt-out” decisions made by the relevant electric retail regulatory authorities (“RERRAs”).⁶ In *FERC v. Electric Power Supply Association*,⁷ the United States Supreme Court upheld the Commission’s exercise of jurisdiction over wholesale demand response compensation based in part on this safeguard, which “allows any State regulator to prohibit its consumers from making demand response bids in the wholesale market.”⁸

The petition of Advanced Energy Economy (“AEE”) concerning the participation of EERs in the wholesale electricity markets raised jurisdictional issues similar to those associated with wholesale demand response. Like demand response resources, EERs are “composed of retail customer actions that reduce load.”⁹ Instead of extending the Order Nos. 719/719-A opt-in/opt-out framework to EER bids in capacity markets (or simply dismissing the AEE Petition as premature as many urged), the Commission departs from precedent and makes a number of broad jurisdictional pronouncements that, if not reconsidered, could have significant adverse ramifications on retail energy efficiency programs and on retail electricity regulation generally.

The Joint Parties do not challenge the Commission’s decision in the December 1 Order to permit the Public Service Commission of Kentucky to bar or restrict retail customers of utilities

⁶ Under the rules adopted in Order Nos. 719 and 719-A and currently reflected in the Commission’s regulations, an ISO/RTO may not accept bids from an aggregator of retail customers (“ARC”) that aggregates the demand response of the customers of utilities that distributed more than 4 million MWhs in the previous year, where the RERRA prohibits the demand response of such customers from being bid into the organized markets by an ARC (opt-out). 18 C.F.R. § 35.28(g)(1)(iii) (2017). In the case of customers of utilities that distribute 4 million megawatt hours or less, the ISO/RTO may not accept bids from an ARC unless the RERRA affirmatively permits it (opt-in). *Id.*

⁷ 136 S.Ct. 760 (2016) (“*EPSA*”).

⁸ *Id.* at 779.

⁹ December 1 Order at P 59.

under its jurisdiction from participating as suppliers in PJM’s capacity market.¹⁰ The Joint Parties only seek rehearing and clarification of the other portions of the December 1 Order, which provide an erroneous, unworkable framework for deciding these issues in other states.

The Commission states “that a RERRA may not bar, restrict, or otherwise condition the participation of EERs in wholesale markets unless the Commission expressly gives RERRAs such authority,”¹¹ and indicates that any RERRA restrictions on EER wholesale market participation not authorized by the Commission are preempted under the FPA. The Commission’s suggestion that its authority over practices directly affecting wholesale rates affords it exclusive jurisdiction to determine EERs’ eligibility to participate in the wholesale electric markets does not reflect a reasonable interpretation of the FPA, nor is it supported by the Supreme Court’s holdings in *EP SA* and *Hughes v. Talen Energy Marketing LLC*.¹² The Commission’s assertion of authority – which has no obvious limiting principle – improperly intrudes on the authority of state and local authorities to specify the terms of retail electric service. Contrary to the Commission’s assertions in the December 1 Order, state and local authority to adopt conditions on retail customer participation in wholesale markets is not granted by the Commission at its discretion, but is derived from established police powers under state law and this authority is explicitly recognized and reserved to the states in the FPA.¹³ Consistent with state authority over retail sales, state law determines the terms and conditions of retail electric service –including whether there is an energy efficiency “resource” that may participate in wholesale electricity markets and what entity or entities own that resource and may exercise

¹⁰ December 1 Order at PP 66-70.

¹¹ *Id.* at P 61.

¹² 136 S.Ct. 1288 (2016) (“*Hughes*”).

¹³ 16 U.S.C. § 824(b)(1).

that right of participation. While the Commission may exercise authority over the participation of an EER in wholesale electric markets, the terms and conditions of retail electric service nonetheless may restrict or condition the retail customer's use of the load reduction in wholesale markets without running afoul of the FPA.

The Supreme Court's decision in *EPSA* does not support the Commission's authority to override such state and local law governing EERs. The only jurisdictional issue in *EPSA* was whether the Commission had authority under the FPA to regulate wholesale demand response compensation. The opt-in/opt-out rules of Order Nos. 719 and 719-A were not at issue, but taken by the Supreme Court as a given. The case provides no basis to abandon those rules.

The Supreme Court's decision in *Hughes* also does not support the Commission's broad assertion that state or local limitations on participation of EERs in the wholesale market are preempted under the FPA. The Commission has recognized that regulation of demand-side management programs is among the traditional areas of state authority, and RERRA limits or conditions on retail customer eligibility to participate in wholesale markets are not preempted merely because they may have an effect on rates in the wholesale markets. Moreover, in the December 1 Order, the Commission did not find – much less support such a finding – either that compliance with both state and federal law is impossible, or that state or local restrictions on retail customer participation as EERs in wholesale markets would stand as an obstacle to accomplishing Congress' purposes in enacting the FPA.

The Joint Parties recognize and appreciate that the Commission suggested it would consider requests by RERRAs to opt-out from allowing participation of EERs in wholesale markets, and in the instant case, permitted the use of an RTO/ISO stakeholder process to develop tariff provisions implementing a RERRA's opt-in/opt-out authority. In suggesting this path

forward, however, the Commission did not provide a reasoned basis for declining to adopt the Order Nos. 719/719-A RERRA opt-in/opt-out framework for EER participation in the wholesale markets. The similarity of issues between demand response participation and EER participation in the wholesale markets warrants a consistent regulatory approach, and the Commission did not adequately explain its decision to adopt a different framework for EERs. Requiring RERRAs to request opt-out authority on a case-by-case basis and participate in RTO/ISO stakeholder processes to implement such authority is an inferior and burdensome alternative to the approach adopted by the Commission in Order Nos. 719 and 719-A.

The Joint Parties urge the Commission to grant rehearing of the December 1 Order, rescind the declaratory order, specify that the Order Nos. 719/719-A RERRA opt-in/opt-out framework applicable to aggregators of retail demand response will also be applied to retail EER participation in wholesale markets, and initiate a rulemaking to revise the Commission's regulations to implement the Order Nos. 719/719-A RERRA opt-in/opt-out framework for retail EER participation in wholesale markets. This solution would, like Order Nos. 719 and 719-A, accommodate the cooperative federalism structure of the FPA while acknowledging the direct link that EERs have to retail rates and service.

II. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2),¹⁴ the Joint Parties provide the following enumerated statement of issues, including citations to representative Commission and court precedent on which we rely:

1. The Commission erred in concluding “that a RERRA may not bar, restrict, or otherwise condition the participation of EERs in wholesale markets unless the Commission expressly gives RERRAs such authority.”¹⁵

¹⁴ 18 C.F.R. § 385.713(c)(2) (2017).

¹⁵ December 1 Order at P 61. *See Hughes*, 136 S.Ct. 1288; *EPSA*, 136 S.Ct. 760; *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591 (2015) (“*Oneok*”); *Northwest Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493 (1989);

2. The Commission erred in finding that the terms of eligibility of EERs' participation in the wholesale market are within its exclusive jurisdiction because such terms may have a direct effect on wholesale rates.¹⁶
3. The Commission erred in claiming that it has exclusive jurisdiction to determine eligibility to participate in wholesale markets, regardless of any state-imposed limitations on such participation.¹⁷
4. The Commission erred in asserting that a RERRA's authority to bar, restrict, or otherwise condition the participation of EERs in wholesale markets is dependent upon the Commission expressly granting the RERRA such authority.¹⁸
5. The Commission erred in finding that it has jurisdiction to determine the terms of eligibility for retail customers to participate as EERs in the wholesale market before there is a product to participate in the relevant market.¹⁹
6. The Commission erred in asserting that any state limits or prohibitions on EER participation in the wholesale markets are preempted under the FPA.²⁰
7. The Commission erred by failing to provide a reasoned basis for declining to apply the Order No. 719 opt-in/opt-out framework to EERs.²¹

Arkansas Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375 (1983); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983); *Allco Fin., Ltd. v. Klee*, 861 F.3d 82 (2nd Cir. 2017) ("*Allco*"); *City of Cleveland v. FERC*, 773 F.2d 1368 (D.C. Cir. 1985); Order No. 719, FERC Stats. & Regs. ¶ 31,281; Order No. 719-A, FERC Stats. & Regs. ¶ 31,292; *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 FR 21540 (May 10, 1996); *order on reh'g*, Order No. 888-A, 78 FERC ¶ 61,220, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998); 18 C.F.R. § 35.28(g)(1)(iii) (2017).

¹⁶ See *EPSA*, 136 S.Ct. 760; *Allco*, 861 F.3d 82; *City of Cleveland v. FERC*, 773 F.2d 1368.

¹⁷ See 16 U.S.C. § 824; *Hughes*, 136 S.Ct. 1288; *EPSA*, 136 S.Ct. 760; *Oneok*, 135 S.Ct. 1591; *Arkansas Elec. Coop. Corp.*, 461 U.S. 375; *Northwest Cent. Pipeline Corp.*, 489 U.S. 493; *Allco*, 861 F.3d 82; *City of Cleveland*, 773 F.2d 1368; Order No. 719, FERC Stats. & Regs. ¶ 31,281; Order No. 719-A, FERC Stats. & Regs. ¶ 31,292; Order No. 888, FERC Stats. & Regs. ¶ 31,036; 18 C.F.R. § 35.28(g)(1)(iii) (2017).

¹⁸ See 16 U.S.C. § 824; *Hughes*, 136 S.Ct. 1288; *EPSA*, 136 S.Ct. 760; *Oneok*, 135 S.Ct. 1591; *Northwest Cent. Pipeline Corp.*, 489 U.S. 493; *Arkansas Elec. Coop. Corp.*, 461 U.S. 375; *Pacific Gas & Elec. Co.*, 461 U.S. 190; *Allco*, 861 F.3d 82; *City of Cleveland*, 773 F.2d 1368; Order No. 719, FERC Stats. & Regs. ¶ 31,281; Order No. 719-A, FERC Stats. & Regs. ¶ 31,292; Order No. 888, FERC Stats. & Regs. ¶ 31,036.

¹⁹ 16 U.S.C. § 824(b)(1); *Northwest Cent. Pipeline Corp.*, 489 U.S. 493; *American Elec. Power Serv. Corp.*, 117 FERC ¶ 61,359 (2006); *New York Transco, LLC*, 151 FERC ¶ 61,005, *aff'd on reh'g*, 153 FERC ¶ 61,259 (2015).

²⁰ See *Hughes*, 136 S.Ct. 1288; *EPSA*, 136 S.Ct. 760; *Oneok*, 135 S.Ct. 1591; *Arkansas Elec. Coop. Corp.*, 461 U.S. 375; *Northwest Cent. Pipeline Corp.*, 489 U.S. 493; *Allco*, 861 F.3d 82; Order No. 719, FERC Stats. & Regs. ¶ 31,281; Order No. 719-A, FERC Stats. & Regs. ¶ 31,292; Order No. 888, FERC Stats. & Regs. ¶ 31,036.

²¹ See *Michigan Pub. Power Agency v. FERC*, 405 F.3d 8 (D.C. Cir. 2005); *County of Los Angeles v. Shalala*, 192 F.3d 1005 (D.C. Cir. 1999); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810 (D.C. Cir. 1998); *ANR Pipeline Co. v. FERC*, 71 F.3d 897 (D.C. Cir. 1995); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

8. To the extent the Commission denies the Joint Parties' alternative requests for limited clarification, the December 1 Order does not reflect a process of reasoned decision-making.²²

III. ARGUMENT

A. **The Commission Erred in Declaring that a RERRA May Not Bar, Restrict, or Otherwise Condition the Participation of EERs in Wholesale Markets Unless the Commission Expressly Gives RERRAs Such Authority.**

The Commission concludes in the December 1 Order “that a RERRA may not bar, restrict, or otherwise condition the participation of EERs in wholesale markets unless the Commission expressly gives RERRAs such authority.”²³ In reaching this conclusion, the Commission asserts that any RERRA restrictions on EER wholesale market participation not authorized by the Commission are preempted under the FPA.²⁴ The sweep of the Commission’s ruling is potentially far-reaching, reserving as it does FERC authority to overrule any state action the Commission deems to be a restriction – or even a “condition” – on the participation of retail electric customers as EERs in the organized wholesale markets. As discussed below, the Commission does not provide a sufficient basis for its assertion of authority to disregard state and local restrictions on retail customer participation as EERs in wholesale markets.

1. **Commission Jurisdiction Over the Terms of Wholesale Market Transactions Does Not Empower the Commission to Make Eligibility Determinations Regardless of State Conditions or Restrictions.**

The Commission starts from the premise that it “has jurisdiction over the participation of EERs in organized wholesale markets as a practice directly affecting wholesale markets, rates,

²² See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

²³ December 1 Order at P 61.

²⁴ See *id.* (claiming that “[a] unilateral state action that directly prohibits or limits the participation of EERs in the wholesale markets directly impacts which EERs are eligible for participation and ‘impermissibly intrudes upon the wholesale electricity market, a domain Congress reserved to [the Commission] alone.’” (quoting *Hughes*, 136 S.Ct. at 1292)).

and prices.”²⁵ From this starting point, the Commission leaps to the significant – and unsupported – conclusion that its jurisdiction over the terms of EER participation in wholesale markets extends to the terms of *eligibility* for EER participation, regardless of any state-imposed limitations or conditions on such participation.²⁶ The Commission’s claim to exclusive jurisdiction over EERs’ eligibility to participate in the wholesale markets is not grounded in the FPA and improperly intrudes on matters reserved to the states.

The Commission indicates that the eligibility of retail customers to participate as EERs in the wholesale markets is within its jurisdiction as a practice affecting wholesale rates.²⁷ Because “there is an infinitude of practices affecting rates and service,”²⁸ the Supreme Court has adopted the construction that the Commission’s “affecting” jurisdiction extends only “to rules or practices that *directly* affect the wholesale rate.”²⁹ In the December 1 Order, the Commission claims that “the terms of eligibility of EERs’ participation in the wholesale market” are within the scope of the Court’s formulation, because such terms have “a direct effect on wholesale rates.”³⁰

The Commission’s position stretches the “direct effect” principle too far. There are myriad legal, regulatory, or contractual considerations that might limit a retail customer’s eligibility to participate, directly or indirectly, in the wholesale market as an energy efficiency resource, and while such limitations might ultimately have some effect on wholesale rates by

²⁵ December 1 Order at P 60 (citing *EPSA*, 136 S.Ct. at 775). The Commission contends that “this direct effect occurs when energy efficiency is offered directly into the wholesale capacity market, causing a reduction in demand and an increase in supply of capacity, thereby resulting in a lower wholesale capacity price.” *Id.*

²⁶ *Id.* at P 61.

²⁷ *See id.* at PP 60-61.

²⁸ *City of Cleveland*, 773 F.2d at 1376.

²⁹ *EPSA*, 136 S.Ct. at 774 (internal quotes, alterations and citations omitted).

³⁰ December 1 Order at P 61.

affecting the level of EERs that can participate in the wholesale market, such effects are indirect and incidental.³¹ Accepting the proposition that this indirect effect on wholesale rates gives the Commission exclusive jurisdiction to evaluate any restrictions or limitations on EERs' wholesale market participation would "extend FERC's power to some surprising places,"³² and the Commission should revisit this overbroad conclusion. While the distinction between "direct" and "indirect" effects might prove difficult to delineate in certain circumstances, the FPA makes clear that retail and such "other sales" remain the exclusive jurisdiction of the states,³³ and elements of retail service, such as energy efficiency that remains bundled with retail sales, remain subject to state jurisdiction even though there may be an effect on wholesale service.

The Commission's exclusive jurisdiction over the eligibility of EERs to participate in the wholesale markets cannot override legitimate state and local regulation of retail electric service. Under the FPA, the Commission does not have authority to regulate retail electricity sales,³⁴ and the Commission's "affecting" jurisdiction cannot be used to circumvent this limit and allow FERC to "specif[y] terms of sale at retail – which is a job for the States alone."³⁵ The Commission recognizes in the December 1 Order that EERs are directly related to electric service to retail customers, stating "EERs that are bid into the PJM market are, by definition, composed of retail customer actions that reduce load."³⁶ RERRAs have authority over the terms

³¹ *Cf. Allco*, 861 F.3d at 101 (finding that state-imposed limitations on the resources eligible to participate in state-sponsored RFP process for renewable generation resources only had an incidental effect on wholesale prices and did not "amount to a regulation of the interstate wholesale electricity market that infringes on FERC's jurisdiction.").

³² *EPSA*, 136 S.Ct. at 774.

³³ 16 U.S.C. § 824(b)(1).

³⁴ *Id.*; *see also, e.g., EPSA*, 136 S.Ct. at 766, 775.

³⁵ *EPSA*, 136 S.Ct. at 775 (footnote omitted).

³⁶ December 1 Order at P 59. The Commission cites similar definitions from the Open Access Transmission Tariffs of ISO New England, Inc. and the Midcontinent Independent System Operator. *Id.* at n.117.

and conditions of retail service, which may include the rights and obligations of a retail customer with respect to energy efficiency load reductions. In the demand response context, the Commission pointedly “did not challenge the role of States and others to decide the eligibility of retail customers to provide demand response.”³⁷ In the December 1 Order, the Commission improperly changes course, claiming that its jurisdiction over the terms of EER participation in the organized wholesale markets ultimately makes it the Commission’s role to determine the eligibility of retail customers to participate in wholesale EER programs, regardless of any RERRA restrictions.³⁸

The Commission cites *EPSA* for the proposition that its jurisdiction extends to deciding which resources are eligible to participate as wholesale EERs.³⁹ But the question of the Commission’s authority to override state or local restrictions on retail customer participation in wholesale markets was not before the Supreme Court in that case. Reviewing Order No. 745,⁴⁰ the Court in *EPSA* considered whether the Commission had “authority to regulate wholesale market operators’ compensation of demand response bids.”⁴¹ The case was about federal authority over wholesale rates under the FPA, not state authority. Moreover, the Court treated the RERRA opt-in/opt-out rules for RTOs and ISOs under Order Nos. 719 and 719-A as an established part of the overall regulatory framework for demand response participation.⁴² Those rules were not at issue in the case. The Court had no reason to address and did not address the

³⁷ Order No. 719-A at P 49.

³⁸ December 1 Order at P 61.

³⁹ *Id.* (citing *EPSA*, 136 S.Ct. at 784).

⁴⁰ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322, *order on reh’g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011).

⁴¹ *EPSA*, 136 S.Ct. at 773.

⁴² *See id.* at 771, 772, 779-80.

scope of the Commission’s authority to determine which demand response resources are eligible to participate in the wholesale market in the first place, let alone suggest that the Commission may override retail service terms and conditions that might restrict or condition such eligibility.⁴³ The authority of states to “veto” retail customer participation under the opt-in/opt-out framework was, in fact, one of the bases on which the Supreme Court rested its holding in *EPSA* that the Commission’s regulation of demand response compensation in wholesale capacity markets did not improperly intrude upon the states’ jurisdiction over retail sales.⁴⁴ The Court observed that “[w]holesale demand response as implemented in the Rule is a program of *cooperative federalism*, in which the States retain the last word.”⁴⁵ Given the Court’s reliance on the right of states to bar, limit, or condition, retail customer participation in wholesale markets, *EPSA* does not support the Commission’s broad assertion of jurisdiction here to override state authority.

The Commission also claims that a RERRA’s authority to bar, restrict, or otherwise condition the participation of EERs in wholesale markets is dependent upon the Commission expressly granting the RERRA such authority.⁴⁶ It also suggests that its accommodation of RERRAs’ authority to restrict retail customer participation in wholesale demand response programs is discretionary.⁴⁷ Under the FPA, the Commission does not grant or delegate

⁴³ The specific passage from *EPSA* cited by the Commission in paragraph 61 of the December 1 Order simply observes that “FERC set the terms of transactions occurring in the organized wholesale markets, so as to ensure the reasonableness of wholesale prices and the reliability of the interstate grid – just as the FPA contemplates.” *EPSA*, 136 S.Ct. at 784. The Court’s reference to the Commission setting “the terms of transactions occurring in the organized wholesale markets” says nothing about the scope of the Commission’s authority to determine the eligibility of retail customers to engage in such wholesale transactions.

⁴⁴ *See EPSA*, 136 S.Ct. at 779-80.

⁴⁵ *Id.* at 780 (emphasis added).

⁴⁶ December 1 Order at P 61 (stating that “we also find that a RERRA may not bar, restrict, or otherwise condition the participation of EERs in wholesale markets *unless the Commission expressly gives RERRAs such authority.*” (emphasis added)).

⁴⁷ *Id.* at P 62 (asserting that the Commission “has discretion to decide whether to grant states an opt-out from allowing participation of EERs in wholesale electricity markets.”).

authority to state and local regulators over retail electric sales. The authority to regulate retail electric sales – as well as the related terms of service – predates the FPA and derives from state and local law, not from the FPA.⁴⁸ Section 201 of the FPA explicitly preserves that state and local authority over retail sales.⁴⁹ The Commission’s regulations adopted in Order Nos. 719 and 719-A do not grant or delegate any authority to RERRAs; those regulations by their terms are directed only at RTOs and ISOs, and they condition the obligation of an RTO or ISO to accept demand response bids from aggregators of retail customers on the opt-in/opt-out decisions of the RERRA.⁵⁰ The RERRA acts under state and local law, not under a grant or delegation of regulatory authority by the Commission.⁵¹ Thus, while the Commission may exercise jurisdiction over “the terms of transactions occurring in the organized wholesale markets,”⁵² this authority does not bestow upon the Commission the power to authorize a retail customer to violate existing state laws or regulations or contract rights.

Any jurisdiction the Commission may have over the terms of EER participation in the wholesale markets does not arise until there is an energy efficiency resource or product to participate in the relevant wholesale market.⁵³ Energy efficiency resources are tied to the

⁴⁸ See *Arkansas Elec. Coop. Corp.*, 461 U.S. at 377-80; *Pacific Gas & Elec. Co.*, 461 U.S. at 205-06; see also, e.g., *Advanced Energy Economy*, Docket No. EL17-75-000, “Protest of the American Public Power Association and National Rural Electric Cooperative Association” at 8 n.16 (July 19, 2017); *Advanced Energy Economy*, Docket No. EL17-75-000, “Motion to Dismiss and Comments of the PJM Utilities Coalition” at 17 (July 19, 2017).

⁴⁹ 16 U.S.C. § 824(b)(1).

⁵⁰ See 18 C.F.R. § 35.28(g)(1)(iii) (2017).

⁵¹ The RERRA is “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.” Order No. 719 at P 158. The Commission has no authority over retail electric prices or retail competition policies; these are determined under state law and local law.

⁵² *EPSA*, 136 S.Ct. at 784.

⁵³ See, e.g., *Advanced Energy Economy*, Docket No. EL17-75-000, “Motion to Dismiss and Comments of the PJM Utilities Coalition” at 18 (arguing that “State regulators may determine whether retail consumers can participate in the PJM market; once they are in the PJM market, then the Commission has exclusive jurisdiction over the rates, terms and conditions of service.”).

provision of retail electric service,⁵⁴ and a retail customer's load reduction does not even exist as an energy efficiency "resource" whose wholesale market participation is subject to the Commission's regulatory authority if the terms and conditions of retail service bar, limit, or condition a third-party aggregator or the customer's use of the load reduction in wholesale markets.⁵⁵ The fact that the exercise of the Commission's authority may be contingent upon activities or entities that the FPA has placed beyond its jurisdictional reach in this fashion is hardly unusual. Under the FPA, for example, authority to permit new generating facilities is generally left to the states,⁵⁶ and, thus, the Commission cannot regulate the terms or conditions under which a new generating plant will be sited and constructed, even though the increase in supply that the plant may provide could directly affect wholesale rates.⁵⁷ Moreover, just as the Commission does not have FPA section 205/206 authority over electric markets where there are no wholesale sales or transmission in interstate commerce (*e.g.*, ERCOT, Hawaii),⁵⁸ and FERC does not have FPA section 203 authority over electric transmission facilities until they are energized,⁵⁹ FERC does not have authority over energy efficiency participation in wholesale electricity markets unless and until the energy efficiency measure becomes a resource or product at wholesale. Otherwise, the energy efficiency load reduction remains a component of retail

⁵⁴ December 1 Order at P 59 (recognizing that "EERs that are bid into the PJM market are, by definition, composed of retail customer actions that reduce load.").

⁵⁵ Although the December 1 Order does not address the issue, it is evident that an aggregator of retail customers that operates purely as an EER is not a public utility under the FPA because it does not sell electric energy for resale, just as an aggregator of retail customers that operates purely as a demand response resource entity is not a public utility. *See EnergyConnect, Inc.*, 130 FERC ¶ 61,031 at PP 26-31 (2010).

⁵⁶ *See* 16 U.S.C. 824(b)(1).

⁵⁷ *See also, e.g., Northwest Cent. Pipeline Corp.*, 489 U.S. at 521 (rejecting argument that a Kansas regulation limiting the right of natural gas producers to maintain production "underages" was preempted by FERC's abandonment authority under section 7 of the Natural Gas Act because "FERC's abandonment authority necessarily encompasses only gas that operators have a right under state law to produce.").

⁵⁸ *See, e.g., American Elec. Power Serv. Corp.*, 117 FERC ¶ 61,359 at P 16.

⁵⁹ *See, e.g., New York Transco, LLC*, 151 FERC ¶ 61,005 at P 16, *aff'd on reh'g*, 153 FERC ¶ 61,259 (2015).

service, subject to state jurisdiction.⁶⁰

2. The Commission Does Not Support its Assertion that Any State Limits or Prohibitions on EER Participation in the Wholesale Markets are Preempted.

The December 1 Order cites *Hughes* for the proposition that “unilateral state action that directly prohibits or limits the participation of EERs in the wholesale markets” is preempted under the FPA.⁶¹ The Commission’s reliance on *Hughes* is misplaced. That case involved a Maryland program under which load serving entities in the State were obligated to enter into contracts-for-differences with generating resources selling capacity into the PJM markets.⁶² The Court found the Maryland program “set[] an interstate wholesale rate,”⁶³ and thereby invaded the Commission’s exclusive jurisdiction over interstate wholesale sales.⁶⁴ Here, in contrast, state requirements that might restrict or limit retail customer participation in wholesale markets as an EER do not set a wholesale rate. Indeed, the Commission’s position is that EER participation in the wholesale markets is only a practice affecting rates.

Likewise, for the reasons discussed in section III.A.1, above, *EPSA* does not support a claim that state restrictions or limitations on retail customer participation in wholesale markets would be preempted under the FPA. In *EPSA*, the Court found that the Commission’s regulation

⁶⁰ 16 U.S.C. § 824(b)(1). The answer of EMC Development Company notes this fact. “In some PJM states, end-use customers who receive utility incentives for energy efficiency projects transfer the associated capacity rights to the utility. In other PJM states, end-use customers retain capacity rights even after they receive utility incentives.” *Advanced Energy Economy*, Docket No. EL17-75-000, “Motion for Leave to Answer and Answer of EMC Development Company, Inc.” at 3 (Oct. 6, 2017). Moreover, “ownership of the capacity stemming from an EE Measure lies with the Measure’s owner, who may transfer it to third parties through ordinary commercial transactions. Some utility Energy Efficiency Programs in the PJM area transfer EE capacity to the utility as part of the commercial arrangement with the program participant.” *Id.* at 4.

⁶¹ December 1 Order at P 61 (citing *Hughes*, 136 S.Ct. at 1292). Notably, the specific language from *Hughes* quoted by the Commission in asserting preemption is merely *dicta* summarizing the Fourth Circuit holding under review.

⁶² See *Hughes*, 136 S.Ct. at 1294-95.

⁶³ *Id.* at 1297.

⁶⁴ *Id.*

of the compensation of demand response resources in the wholesale market did not violate the FPA’s proscription on FERC regulation of retail sales, even if the Commission’s regulation affected the quantity and terms of retail sales.⁶⁵ It does not follow from this finding that Commission regulation of the compensation of demand response resources in the wholesale market *preempts* state or local limits on retail customer participation in the wholesale markets, particularly given the Court’s specific observation that the Commission’s implementation of wholesale demand response was “a program of cooperative federalism.”⁶⁶ Certainly the Commission reads too much into *EPSA* by suggesting that expansive federal authority can be inferred from the words used by the Court to describe adoption of the RERRA opt-in/opt-out framework in Order Nos. 719 and 719-A.⁶⁷

The Commission’s assertion of federal preemption is not supported by other precedent, under either a field preemption or conflict preemption theory.⁶⁸ In assessing whether state action is barred under field preemption, the Supreme Court has stressed “the importance of considering the *target* at which the state law *aims*.”⁶⁹ “[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States,”⁷⁰ and regulations aimed at retail sales and service are not preempted merely because they have an

⁶⁵ *EPSA*, 136 S.Ct. at 776.

⁶⁶ *Id.* at 780. *See also, e.g., Hughes*, 136 S.Ct. at 1300 (Sotomayor, J., concurring) (observing that “[p]re-emption inquiries related to such collaborative programs are particularly delicate.”).

⁶⁷ *See* December 1 Order at P 62 n.127 (citing *EPSA*, 136 S.Ct. at 776).

⁶⁸ Field preemption involves situations where Congress “intended to foreclose any state regulation in the *area*, irrespective of whether state law is consistent or inconsistent with federal standards.” *Oneok*, 135 S.Ct. at 1595 (internal quotes and citations omitted). Conflict preemption “exists where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (internal quotes and citations omitted).

⁶⁹ *Id.* at 1599.

⁷⁰ *Arkansas Elec. Coop.*, 461 U.S. at 377; *see also, e.g., Allco*, 861 F.3d at 101.

effect on rates in the wholesale markets.⁷¹ EERs participating in the wholesale market “are, by definition, composed of retail customer actions that reduce load,”⁷² and RERRA limits or conditions on retail customer eligibility to participate in wholesale markets that aim to ensure maintenance of reliable and reasonably-priced retail service are a proper exercise of traditional state and local authority over retail sales and service, even if such eligibility restrictions may have an indirect and incidental effect on wholesale rates.⁷³ Indeed, the states’ regulation of retail service is not preempted but instead is expressly reserved to the states by section 201 of the FPA.

The Commission also has not established that RERRA restrictions on EER participation in the wholesale markets would be preempted under conflict preemption principles. In the first place, the Commission makes no finding under section 206 of the FPA that any such state restriction renders any wholesale rate unjust, unreasonable, or unduly discriminatory or preferential so as to be unlawful under the FPA. Moreover, the Commission’s willingness to consider RERRA proposals to implement an opt-in/opt-out for EERs indicates that the Commission did not purport to make any findings in the December 1 Order that particular state laws or regulations were preempted on conflict preemption grounds.⁷⁴ If it was the Commission’s intention to find that state or local laws restricting or conditioning EER participation in the wholesale markets are conflict-preempted, the Commission did not support such a finding. The Commission did not find that compliance with both state and federal law is

⁷¹ See, e.g., *Oneok*, 135 S.Ct. at 1599-600; *Northwest Cent. Pipeline Corp.*, 489 U.S. at 515; *Allco*, 861 F.3d at 101. In Order No. 888, the Commission specifically cited “utility buy-side and demand-side decisions, including [demand-side management]” as among traditional areas of state authority upon which Order No. 888 would “not affect or encroach.” Order No. 888, FERC Stats. & Regs. ¶ 31,036, p. 31,782, n.544.

⁷² December 1 Order at P 59.

⁷³ See, e.g., *Allco*, 861 F.3d at 101 (rejecting arguments that state-imposed limitations on the resources eligible to participate in an RFP for wholesale supply were preempted under the FPA).

⁷⁴ See December 1 Order at PP 71, 72.

impossible, nor did the Commission explain how allowing RERRAs to regulate in a “traditional area[] of state authority”⁷⁵ such as energy efficiency programs “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷⁶ Further, under a collaborative federalism statute such as the FPA, “conflict pre-emption analysis must be applied sensitively . . . so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role.”⁷⁷ Conflict preemption should not be applied where a state law’s impacts on matters within federal control are “an incident of efforts to achieve a proper state purpose.”⁷⁸ In the context of energy efficiency, state and local restrictions on wholesale market participation by retail customers are likely to be intended to achieve legitimate state purposes, such as ensuring reliable and reasonably-priced retail power. Thus, even if state restrictions or limitations on retail customer participation in the wholesale markets could be an obstacle to development of EERs in the wholesale markets, such effects would be incidental to state and local efforts to achieve proper purposes, and a conflict preemption finding would be unsupported.⁷⁹

Finally, even accepting, *arguendo*, that certain state and local laws or regulations could conceivably intrude on federal jurisdiction over EER participation in wholesale markets, the Commission’s preemption finding in the December 1 Order is overly broad. The Commission’s claim to exclusive authority over the “terms of eligibility” to participate in the wholesale electric markets does not reflect any limiting principle, and, left uncorrected, could create significant

⁷⁵ Order No. 888 at p. 31,782, n.544.

⁷⁶ *Oneok*, 135 S.Ct. at 1595 (internal quotes and citations omitted).

⁷⁷ *Northwest Cent. Pipeline Corp.*, 489 U.S. at 515. *See also Hughes*, 136 S.Ct. at 1300 (Sotomayor, J., concurring); *Allco*, 861 F.3d at 101-02.

⁷⁸ *Northwest Cent. Pipeline Corp.*, 489 U.S. at 516.

⁷⁹ *See id.* at 522.

legal uncertainty concerning states' ability to regulate energy efficiency programs, effectively nullifying the FPA's preservation of state jurisdiction over retail sales in this context.⁸⁰ For example, parties may argue that the Commission, in preempting state-imposed restrictions or conditions on EER participation in the wholesale market, has reserved authority to determine issues previously addressed under state or local law, such as ownership of capacity rights connected with curtailed consumption and eligibility to be an EER aggregator.⁸¹ Granting rehearing to adopt the Order Nos. 719/719-A opt-in/opt-out framework would address these concerns and strike a reasonable balance between facilitating EER participation in the wholesale markets and accommodating state authority over retail electric service.

B. The Commission Did Not Provide a Reasoned Basis for Departing from the Approach Adopted in Order Nos. 719 and 719-A.

Even setting aside whether the December 1 Order improperly forbids state and local restrictions on retail customers participating as EERs in the wholesale markets without FERC authorization, the Commission did not provide a reasoned basis for declining to extend the Order Nos. 719/719-A opt-in/opt-out rules to EERs, as commenters proposed.⁸² The Commission appears to accept the proposition that participation of retail customers, directly or indirectly, as EERs in the wholesale market, raises similar, if not identical, concerns and considerations as

⁸⁰ See, e.g., Order No. 719-A at P 54 (acknowledging state law issues raised by the potential participation of retail customers in wholesale demand response programs). Taken to its logical conclusion, the Commission's assertion of exclusive federal authority over issues relating to "eligibility" to access the wholesale market would allow it to direct states to allow retail access.

⁸¹ See, e.g., *id.*

⁸² See, e.g., *Advanced Energy Economy*, Docket No. EL17-75-000, "Protest of American Municipal Power, Inc. and Public Power Association of New Jersey" at 14 (July 19, 2017); *Advanced Energy Economy*, Docket No. EL17-75-000, "Protest of the Organization of MISO States" at 12-15 (July 19, 2017) ("OMS Protest"). Notably, AEE did not dispute RERRAs' authority to regulate their energy efficiency programs, "or the participation of their retail utilities in those programs, including the commercial arrangements governing who owns the load reductions produced by those programs and whether they will participate in the wholesale market." December 1 Order at P 40.

demand response.⁸³ The Commission also agrees “that RERRAs have a strong interest in maintaining and promoting retail energy efficiency programs.”⁸⁴ Notwithstanding these acknowledgements, the December 1 Order adopts a fundamentally different approach from Order Nos. 719 and 719-A in addressing state and local conditions and restrictions on participation of EERs in wholesale markets.

The direct connection of EERs to retail service means that participation of energy efficiency in wholesale markets may implicate the terms and conditions of retail service under state and local law, as the Commission correctly recognized with respect to demand response in Order Nos. 719 and 719-A.⁸⁵ There, the Commission acknowledged “that demand response is a complex matter that is subject to the confluence of State and Federal jurisdiction,”⁸⁶ and the Commission made clear that nothing in Order No. 719 and 719-A “authorizes a retail customer to violate existing State laws or regulations or contract rights. In that regard, we leave it to the appropriate State or local authorities to set and enforce their own requirements.”⁸⁷

As with demand response, allowing retail customers to access, directly or indirectly, the organized wholesale market as providers of energy efficiency resources may conflict with state and local laws governing retail service. Such direct customer access, moreover, threatens to

⁸³ See, e.g., December 1 Order at P 60 (asserting that “[l]ike compensation for demand response, the Commission has jurisdiction over the participation of EERs in organized wholesale markets as a practice directly affecting wholesale markets, rates, and prices.”), P 62 (citing *EPSA*’s rulings on wholesale demand response compensation as support for the Commission’s rulings on its jurisdiction over wholesale EERs), P 68 (noting that “energy efficiency measures would also generally qualify as demand-side management under the industry’s common understanding of the term.”).

⁸⁴ *Id.* at P 63.

⁸⁵ See, e.g., Order No. 719-A at PP 49, 54, 68.

⁸⁶ *Id.* at P 54.

⁸⁷ *Id.*; see also *id.* at P 49 (explaining that “our Final Rule did not challenge the role of States and others to decide the eligibility of retail customers to provide demand response”); *id.* at P 68 (observing that “[i]t 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 and, if so, whether and how to permit such participation.”).

have detrimental effects on state energy efficiency programs. The Organization of MISO States explained, for example, that allowing retail customers to participate in wholesale demand response programs could adversely impact the accuracy of retail load forecasting, achievement of energy efficiency policy objectives, and utility efficiency program planning and evaluation.⁸⁸ These difficulties, in turn, could adversely impact distribution system reliability as the distribution utility may not have visibility into the level of load connected to its distribution system.⁸⁹ The Commission does not appear to dispute that retail customer participation in the wholesale markets could have detrimental effects on retail rates and service, by, for instance, allowing third-party EERs to “siphon off” financially valuable energy efficiency projects.⁹⁰

The RERRA opt-in/opt-out framework adopted in Order Nos. 719 and 719-A sought to accommodate “the confluence of State and Federal jurisdiction”⁹¹ and address the concerns of state and local regulators, in recognition of demand response’s direct connection to, and potential impacts on, retail service.⁹² Responding to concerns that retail customer participation in wholesale demand response aggregation could adversely affect existing retail programs, for example, the Commission made clear this was a matter for the relevant RERRAs to address.⁹³ Nothing in Order Nos. 719 and 719-A, the Commission stressed, “would require a State or local regulator to take any action or prevent them from . . . [p]reserving existing aggregation

⁸⁸ See OMS Protest at 7-11.

⁸⁹ The fact that the states, not FERC, have general jurisdiction over the reliability of the electric distribution system in accordance with FPA section 215 further reinforces the need for the Commission to respect state jurisdiction over such retail matters and to conform to its precedent of assuring the states of an opt-in/opt-out right.

⁹⁰ December 1 Order at P 64; see also *id.* at P 62 (stating “[a]s to arguments that EER participation in wholesale markets increases costs for retail customers and affects utilities’ ability to forecast retail load, we note that the Commission may regulate practices directly affecting wholesale rates, even if that regulation affects retail rates.”).

⁹¹ Order No. 719 at P 54.

⁹² See Order No. 719 at PP 154-63; Order No. 719-A at PP 41-71; see also 18 C.F.R. § 35.28(g)(1)(iii) (2017).

⁹³ See Order No. 719-A at P 68; see also Order No. 719 at P 157.

programs, in whatever fashion is appropriate for its jurisdictional area.”⁹⁴

The December 1 Order abandons the Commission’s previous recognition of state and local authority to restrict retail customer participation in the wholesale market, asserting that such eligibility determinations are the Commission’s dominion alone. The Commission’s claim that it possesses authority to disregard any restrictions or conditions a RERRA might place on participation of a retail customer in wholesale EER programs represents a significant and unjustified swerve in course from the approach adopted in Order Nos. 719 and 719-A. The Commission’s position is also at odds with the pending notice of proposed rulemaking concerning the participation distributed energy resources (“DERs”) in wholesale markets, which proposes to retain the RERRA framework for demand response resources, and proposes that DER providers comply with state and local requirements as a condition of participating in wholesale markets.⁹⁵ It is axiomatic that the Commission must provide an adequate explanation for departing from previous rulings or treating similar situations differently.⁹⁶ Here, the Commission fails to provide a reasoned explanation for departing from the RERRA opt-in/opt-out approach to addressing the jurisdictional tensions it previously acknowledged in Order Nos. 719 and 719-A.

The Commission fails to provide any specific rationale for treating EER participation

⁹⁴ Order No. 719-A at P 67; *see also* Order No. 719-B at P 16.

⁹⁵ *See Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 157 FERC ¶ 61,121 at P 157 & n.238 (2016) (proposing that market participant agreements for DER aggregators “must also require that the distributed energy resource aggregator attests that its distributed energy resource aggregation is compliant with the tariffs and operating procedures of the distribution utilities and the rules and regulations of any other relevant regulatory authority.”).

⁹⁶ *See, e.g., County of Los Angeles*, 192 F.3d at 1022 (explaining that “an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently”); *Koch Gateway Pipeline Co.*, 136 F.3d at 815-16 (same); *ANR Pipeline Co.*, 71 F.3d at 901 (same); *see also, e.g., Michigan Pub. Power Agency*, 405 F.3d at 12-13 (an agency may not depart from its previous rulings without providing an adequate justification); *Greater Boston Television Corp. v. FCC*, 444 F.2d at 852 (same).

differently from participation of demand response resources in the wholesale market. To the extent the Commission purports to justify its departure from the opt-in/opt-out approach by claiming that there will be no substantial effect on retail markets from EER participation in wholesale markets,⁹⁷ the Commission provides no support for such a conclusion. The Commission cited no record evidence for this observation, and, in fact, petitioner AEE contended only legal and policy issues were involved in this declaratory order proceeding.⁹⁸ The Commission noted, however, that the genesis of these proceedings began with a claim by East Kentucky Power Cooperative (“EKPC”) that it could not accurately estimate its load due to EERs bidding into PJM’s market, resulting in “EKPC acquiring more capacity than needed, with the cost of the excess paid by EKPC’s retail customers.”⁹⁹ As discussed above, the Commission elsewhere in the December 1 Order implicitly acknowledged that prohibiting RERRAs from limiting retail customer participation in the wholesale market as EERs could have detrimental impacts on state programs and rates.¹⁰⁰

C. The Commission Should Grant Rehearing, Rescind its Declaratory Order and Implement Procedures to Adopt the Opt-in/Opt-out Framework of Order Nos. 719 and 719-A for EERs or Otherwise Limit Its Ruling.

Joint Parties recognize and appreciate that the Commission suggested it would consider requests by RERRAs to opt-out from allowing participation of EERs in wholesale markets, and

⁹⁷ December 1 Order at P 63 (finding that “any incidental effects from EER participation on the retail markets are not substantial,” and asserting that “[u]nlike demand response resources, EERs are not likely to present the same operational and day-to-day planning complexity that might otherwise interfere with an LSE’s day-to-day operations.”).

⁹⁸ See AEE Petition at 13 (arguing that “[b]ecause this Petition raises questions of law and policy, and there are no significant factual issues in dispute, there is no need for an evidentiary hearing to be conducted.”).

⁹⁹ December 1 Order at P 9.

¹⁰⁰ See footnote 90, *supra*. The Commission’s assertion that “any incidental effects from EER participation on the retail markets are not substantial,” December 1 Order at P 63, is also somewhat inconsistent with allowing RERRAs to request an opt-out. If the Commission does not grant rehearing as requested by Joint Parties, it should clarify that its assertion that there will be a lack of substantial impact on retail markets from EER wholesale market participation is not intended to prejudice any RERRA request for an opt-out.

also permitted the use of an RTO/ISO stakeholder process to develop tariff provisions implementing a RERRA's opt-in/opt-out authority.¹⁰¹ It is possible that stakeholders, including RERRAs, in the respective RTOs/ISOs could agree on tariff provisions that reasonably accommodate a RERRA's "opt-in/opt-out" authority for Commission review.¹⁰²

The Joint Parties nonetheless urge the Commission to grant rehearing of its December 1 Order and rescind its declaration that a RERRA may not bar, restrict, or otherwise condition the participation of EERs in wholesale markets unless the Commission expressly gives RERRAs such authority, as well as the assertion that any unilateral state action that directly prohibits or limits the participation of EERs in wholesale markets is preempted.¹⁰³ The Commission's findings, as discussed above, are not supported by the authority on which it relies, and, if left undisturbed, could interfere with state and local regulation of retail service, including retail energy efficiency programs and the reliability of the electric distribution system. The framework adopted in the December 1 Order fosters legal uncertainty and increases regulatory burdens by requiring stakeholders to negotiate RTO market rules to implement authority purportedly given RERRAs by the Commission. RERRAs should not be made to bargain for their rights in the RTO stakeholder process, particularly since entities that object to legitimate state and local regulation that could restrict retail customer participation in the wholesale markets will doubtless

¹⁰¹ December 1 Order at PP 71-72.

¹⁰² The December 1 Order is unclear concerning the process for a RERRA to request an opt-out from allowing participation of EERs in wholesale markets. If the Commission does not grant rehearing as requested herein, the Commission should clarify whether each state and local RERRA must separately file a request for an opt-out, whether an opt-out can be proposed for multiple states and localities as part of an RTO/ISO filing developed in accordance with paragraph 71 of the December 1 Order, or whether the Commission intends some other process for RERRAs to request opt-out authority. If the Commission intends that each RERRA would need to file a request for an opt-out, such an approach could impose a significant burden on states and localities, particularly smaller municipal or cooperative utilities, in contrast to the Commission's efforts in Order No. 719-A to ameliorate the burdens placed on RERRAs supervising small utilities. *See* Order No. 719-A at PP 51, 58-60.

¹⁰³ December 1 Order at P 61.

seize on the Commission's jurisdictional assertions and make any stakeholder compromise implementing an opt-out less likely. RTOs/ISOs, moreover, should not be placed in the position of having to interpret state law and evaluate and assess the concerns of state and local regulators about the effects that the participation of their retail customers in wholesale EERs could have on retail service in their states and regions.¹⁰⁴

To remedy the legal and practical flaws of the rulings adopted in the December 1 Order, the Commission should grant rehearing of the December 1 Order and expressly state that the opt-in/opt-out process in Order Nos. 719 and 719-A applies to EERs, rescind the declaratory order, and initiate a rulemaking to revise the Commission's regulations to implement the Order Nos. 719 and 719-A RERRA opt-in/opt-out framework as to retail EER participation in wholesale markets. The RERRA opt-in/opt-out process adopted in Order Nos. 719 and 719-A accommodates state and local regulation of retail service, avoids imposing burdens on RERRAs associated with requesting an opt-out, and provides legal certainty without requiring RTO/ISOs to interpret state law.¹⁰⁵ This solution would, like Order Nos. 719 and 719-A, accommodate the cooperative federalism structure of the FPA while acknowledging the direct link that EERs have to retail rates and service. The Commission could also allow additional time for discussion of these important issues by limiting its holding to the facts of the AEE Petition on which PJM requested guidance.

¹⁰⁴ RTO/ISO tariffs, moreover, cannot effectuate rules governing retail sales or local distribution service, and the Commission cannot even accept a tariff that has such language. *See Detroit Edison Co. v. FERC*, 334 F.3d 48, 53-54 (D.C. Cir. 2003).

¹⁰⁵ *See* Order 719-A at P 50.

D. Absent Rehearing, the Commission Should Clarify Its Ruling.

If the Commission does not grant rehearing as discussed above, it should, at a minimum, clarify the declarations in the December 1 Order in certain respects. *First*, the Commission should specify that its declarations only apply to EER participation in RTO/ISO centralized capacity markets. Portions of the December 1 Order clearly suggest that this was the Commission’s intention, and, if that is the case, the Commission should so clarify.¹⁰⁶ In the absence of rehearing, clarification would be beneficial because the Commission’s holdings are worded broadly, making no such mention of the limitation to RTO/ISO markets.¹⁰⁷ *Second*, as discussed herein, the Commission does not have jurisdiction over wholesale energy efficiency in any given market until such a wholesale energy efficiency product exists. Otherwise, the product is bundled with retail service and remains subject to a state’s exclusive jurisdiction over retail sales. This clarification would ensure that the December 1 Order is limited to RTO/ISO markets where wholesale energy efficiency products exist and have been unbundled from retail service.¹⁰⁸ *Third*, the Commission should clarify that the declarations apply only to EERs, and not to any other energy technologies. At several places in the December 1 Order, the Commission indicates that RERRAs may request an opt-out “for EERs or other energy technologies.”¹⁰⁹ The references to “other energy technologies” in this context could lead to disputes over whether the Commission’s discussion of its jurisdiction over the eligibility of

¹⁰⁶ Joint Parties note that AEE’s Petition was focused on RTO/ISO markets. *See e.g.*, December 1 Order at P 15 (describing AEE’s petition as being made for declarations “in RTO/ISO markets”).

¹⁰⁷ *See e.g., id.* at P 61 (“because we have exclusive jurisdiction to regulate the participation of EERs in wholesale markets, we also find that a RERRA may not bar, restrict, or otherwise condition the participation of EERs in wholesale markets unless the Commission expressly gives the RERRA such authority.”).

¹⁰⁸ Such a clarification would be consistent with the Commission’s holding in Order No. 888 that the states would be afforded the initial opportunity to decide whether to unbundle retail transmission. *See* Order No. 888, 61 FR 21540, 21572, 21578-79, 21625, 21627 (May 10, 1996).

¹⁰⁹ December 1 Order at P 72; *see also id.* at P 57. The Commission was apparently repeating the language used by AEE in its Petition. *See id.* at P 14.

EERs to participate in the wholesale market is confined to EERs. Given that the jurisdictional declarations in the December 1 Order are focused exclusively on EERs, the Commission should clarify that its rulings are limited to EERs. To the extent the Commission denies any of these clarifications, Joint Parties request rehearing, as contrary findings are not supported by the discussion and analysis included in the December 1 Order.¹¹⁰

IV. CONCLUSION

The December 1 Order does not adequately support the Commission's broad assertion of authority to preempt any state or local limitation that bars, restricts, or otherwise conditions the participation of EERs in wholesale markets without express FERC permission. The December 1 Order also does not provide a reasoned basis for declining to adopt the Order Nos. 719/719-A RERRA opt-in/opt-out framework for EER participation in the wholesale markets. Accordingly, the Joint Parties urge the Commission to grant rehearing of the December 1 Order, rescind the declaratory order, and initiate a rulemaking to revise the Commission's regulations to implement the Order Nos. 719/719-A RERRA opt-in/opt-out framework as to retail EER participation in wholesale markets.

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¹¹⁰ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. at 51-52.

Respectfully submitted,

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Dated: January 2, 2018

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 Arlington, Virginia, this 2nd day of January, 2018.

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