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FERC Refines DER Wholesale Market Participation Rules

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On March 18, 2021, the Federal Energy Regulatory Commission ("FERC") issued an order on rehearing of its landmark final rule, Order No. 2222, pertaining to the participation of distributed energy resources ("DER") through an aggregator in FERC-jurisdictional Regional Transmission Organization ("RTO") and Independent System Operator ("ISO") organized markets.[1] While FERC largely kept Order No. 2222 intact, Order No. 2222-A did refine and clarify certain aspects of Order No. 2222. The significant refinements made through Order No. 2222-A include:

- Refinements on information sharing and the review process associated with qualification of DER to participate in the wholesale markets through an aggregator by distribution utilities;
- A holding that demand response that is included in heterogeneous aggregation (*i.e.*, the DER aggregation is not solely composed of demand response resources as the type of DER) will not be subject to the "opt-out" and "opt-in" requirements established by Order Nos. 719 and 719-A for demand response;
- A finding that FERC's interconnection policies pertaining to Qualifying Facilities ("QFs") do not apply to QFs requesting interconnection if that QF only seeks to participate in the RTO/ISO wholesale markets through a DER aggregator; and
- Clarifications on restrictions to avoid double counting of services.

Information Sharing and Review Process

Order No. 2222 directed each RTO/ISO to modify its tariff to incorporate a comprehensive and non-discriminatory process for timely review by a

Related People

Michael W. Brooks
Partner
WASHINGTON, DC
+1.202.828.5879
michael.brooks@bracewell.com

Catherine P. McCarthy
Partner
WASHINGTON, DC
+1.202.828.5839
cathy.mccarthy@bracewell.com

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distribution utility of the individual DERs that comprise a DER aggregation. This distribution utility review process is triggered by an initial registration of the DER aggregation or incremental changes to a DER aggregation already participating in the markets, *i.e.*, additions or subtractions of DER from the DER aggregator's resource portfolio.[2] Commenters sought certain clarifications with regard to the mechanics of the distribution utility review and Order No. 2222-A clarified that "*only* the distribution utility hosting a [DER] (i.e., the utility that owns and/or operates the distribution system to which the resource is interconnected) should be given an opportunity to review the addition of that resource to a [DER] aggregation," finding that adding a resource to a DER aggregation is "unlikely to directly affect the distribution system of more than the one distribution utility that hosts the [DER]."[3] Additionally, FERC clarified that the removal of a resource, particularly a large resource, from a DER aggregation needs to be reviewed by the distribution utility because such removal "could drastically change the operation and configuration of an aggregation on the distribution system."[4] However, FERC recognized that such drastic impacts likely will not be common and encouraged RTOs/ISOs to propose abbreviated distribution utility review processes for modifications to existing aggregations.[5]

To support the distribution utility review process, Order No. 2222 required RTOs/ISOs to share any necessary information and data about individual DER with distribution utilities, and that the results of a distribution utility's review be incorporated into the DER aggregation registration process.[6] As part of the information exchange, Order No. 2222-A clarified that any specific information provided by a distribution utility to an RTO/ISO regarding DERs as part of the distribution utility review process should be shared with the DER aggregator, which may include whether a DER (1) affects the safety and reliability of the distribution system or (2) is capable of participating in an aggregation.[7] FERC found that such transparency would give DER aggregators the opportunity to supplement or correct information as necessary.[8]

Additionally, FERC clarified that, if a distribution utility recommends removal of a DER resource from an aggregation due to a reliability concern, an RTO/ISO should not remove the resource without a showing that the resource's market participation presents a threat to distribution system reliability. However, FERC declined to require that wholesale market access denials be supported by clear and convincing evidence of a threat to distribution system reliability. Rather, any such denial only needs to be supported by "a showing that the resource presents significant risks to the reliable and safe operation of the distribution system."[9]

Demand Response

With respect to demand response resources, in the past, FERC sought to preserve the ability of states and other Relevant Electric Retail Regulatory Authorities ("RERRAs") to prohibit retail customers' demand response from being bid into RTO/ISO markets by an aggregator pursuant to Order Nos. 719 and 719-A.[10] Specifically, Order Nos. 719 and 719-A prohibited RTOs and ISOs from accepting bids from aggregators of demand response resources if the RERRA prohibited the participation of the demand response resource (the "opt-out") or, in the case of demand response resources that are customers of small utilities (defined as utilities that distributed less than 4 million megawatt-hours in the previous fiscal year),[11] the RERRA does not expressly permit such demand response resources to be bid into the RTO/ISO organized markets by an aggregator (the "opt-in").

Order No. 2222-A narrowed the applicability of the "opt-out" requirement established in Order Nos. 719 and 719-A for demand response resources when a DER aggregator does not exclusively bid demand response resources into the RTO/ISO organized markets. In other words, if the DER aggregation is composed of more than demand response (referred to as a heterogeneous DER aggregation), RERRAs may not prohibit the wholesale market participation of demand response resources being aggregated by heterogeneous DER aggregators. Only when an aggregation is made up *solely* of resources that participate as demand response resources does the "opt-out" of Order Nos. 719 and 719-A apply.[12] However, FERC also held that RERRAs broadly retain the "opt-in" rights for all DER, including demand response, if the DER is a customer of a small utility.[13]

QF Interconnections

The third significant change presented in Order No. 2222-A pertains to QF interconnections. Order No. 2222 generally sought to preserve existing policy respecting DER interconnections by not subjecting the interconnection of DER to distribution facilities for the purpose of participating in RTO/ISO markets to FERC jurisdiction, thereby leaving the interconnection of these resources to the states or RERRAs.[14] FERC expressly noted, however, that Order No. 2222 was not intended to modify FERC's historic policy of asserting jurisdiction over QF interconnections where the interconnecting utility does not purchase all of the QF's output and instead transmits the QF's power in interstate commerce.[15] On rehearing, however, FERC clarified that, while it is not revising its policy on QF interconnections, a QF that only seeks to participate in the RTO/ISO markets through a DER aggregator will be treated the same as non-QF DER resources with regard to interconnections, *i.e.*, the states or RERRAs shall have jurisdiction to decide issues pertaining to such QF interconnections.[16]

Double Counting

In Order No. 2222, FERC held that it is appropriate for RTOs/ISOs to place narrowly tailored restrictions on the RTO/ISO market participation of DER through aggregations, if necessary to prevent double counting of services.[17] Double counting of services may occur where, for example, a DER is offered into an RTO/ISO market and the quantity of that offer is not added back to a utility's or other load serving entity's load profile. Not adding the DER back into the load profile may result in that resource being counted as both a load reduction and a supply resource. Another example provided by FERC where double counting may occur is when a DER is included in a DER aggregator's bid and that same resource is bid as a standalone demand response resource.[18]

With respect to not adding DERs back to the load profile, Order No. 2222-A clarifies that FERC intended to indicate that "double counting of services would occur if the same [DER] reduces the amount of a service that an RTO/ISO procures on a forward-looking basis in a certain time period while also acting as a provider of that same service in that same delivery period."[19] FERC further clarified an RTO/ISO that already has restrictions in place to avoid double counting of services is not required to propose new restrictions in its tariff but rather "must explain on compliance how these existing restrictions prevent double counting."[20]

[1] *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222-A, 174 FERC ¶ 61,197 (2021).

[2] *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222, 172 FERC ¶ 61,247, at P 292 (2020).

[3] Order No. 2222-A at P 70 (emphasis added).

[4] *Id.* P 71.

[5] *Id.*

[6] Order No. 2222 at P 292.

[7] Order No. 2222-A at P 75.

[8] *Id.*

[9] *Id.* P 76.

[10] *Wholesale Competition in Regions with Organized Elec. Mkts.*, Order No. 719, 125 FERC ¶ 61,071 (2008), *order on reh'g*, Order No. 719-A, 128 FERC ¶

61,059, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009); *see also* 18 C.F.R. § 35.28(g)(1)(iii).

[11] 18 C.F.R. § 35.28(g)(1)(iii).

[12] Order No. 2222-A at P 22, 28 (finding DER aggregations composed solely of demand response resources as "materially indistinct" from the aggregations of retail customers subject to the Order No. 719 opt-out.).

[13] *Id.* P 34.

[14] Order No. 2222 at PP 96-97.

[15] *Id.* P 98. Previously, FERC has found that its authority over QFs includes all interconnections of QFs that intend to make wholesale sales, including interconnections of QFs to distribution facilities. *See Standardization of Generator Interconnection Agreements & Procedures*, Order No. 2003, 104 FERC ¶ 61,103, at PP 813-814 (2003); *PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,087, at P 7 (2008).

[16] Order No. 2222-A at PP 46-47.

[17] Order No. 2222 at P 161.

[18] Order No. 2222-A at P 56.

[19] *Id.* P 63.

[20] *Id.* P 64.