

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

PJM Interconnection, L.L.C.

)

Docket Nos. ER09-701-000

**RESPONSE TO MOTIONS FOR LEAVE TO ANSWER AND ANSWER OF
THE AMERICAN PUBLIC POWER ASSOCIATION AND
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. §§ 385.213 (2007), the American Public Power Association (“APPA”) and the National Rural Electric Cooperative Association (“NRECA”) submit this Response to Motions for Leave to Answer and Answer to the answers filed in this proceeding by PJM Interconnection, LLC (“PJM”) on March 13, 2009,¹ and by Demand Response Supporters² and EnergyConnect, Inc.³ (“EnergyConnect”) on March 26, 2009.

On February 10, 2009, PJM filed revised tariff sheets intended to comply with the Commission’s directives in Order No. 719⁴ with respect to the aggregation of retail customer demand response by aggregators of retail customers (“ARCs”) for purposes of PJM’s Economic and Emergency Load Response Programs. On March 3, 2009, APPA and NRECA filed a Motion to Intervene and Protest (“APPA/NRECA Protest”) of PJM’s

¹ Motion for Leave to Answer and Answer of PJM Interconnection, LLC, Docket No. ER09-701 (March 13, 2009) (“PJM Answer”).

² Motion for Leave to Answer and Answer to Protest of Demand Response Supporters, Docket No. ER09-701 (March 26, 2009).

³ Motion for Leave to Answer and Answer of EnergyConnect, Inc. , Docket No. ER09-701 (March 26, 2009).

⁴ *Wholesale Competition in Regions with Organized Electric Markets*, 125 FERC ¶ 61,071 (2008) (“Order No. 719”).

proposed tariff revisions. APPA and NRECA believe those revisions would defeat Order No. 719's intended accommodation of the regulatory discretion of "relevant electric retail regulatory authorities" ("RERRA") to determine how retail loads subject to their supervision may participate in demand response programs run by RTOs and ISOs. PJM's proposed tariff would require RERRAs either to permit any ARC to bid the loads of retail customers subject to their supervision into PJM's demand response program or to prohibit such retail customers' participation in RTO- and ISO-administered demand response programs. APPA and NRECA demonstrated in their Protest that forcing RERRAs to choose between exposing their load serving entities' ("LSE") demand aggregation activities to potential disruption by third-party ARCs or prohibiting all participation in RTO and ISO demand response programs was inconsistent with the purpose of Order No. 719. Requiring such a choice would lead to reduced participation in RTO- and ISO-administered wholesale demand response programs and a reduction in the benefit of demand response to wholesale markets.

I. ANSWER TO MOTIONS FOR LEAVE TO ANSWER AND MOTION FOR LEAVE TO ANSWER

The Commission's Rules of Practice and Procedure generally do not permit answers such as the PJM Answer.⁵ Nevertheless, the Commission sometimes accepts answers prohibited by the rules when it finds that they provide the Commission information that assists it in its decision making process.⁶

PJM's Answer fails to meet even this modest standard. It contains no new information but, instead, merely seeks to bolster PJM's application with belated

⁵ 18 C.F.R. § 213(a)(2).

⁶ *E.g., Entergy Services, Inc.*, 126 FERC ¶ 61,227 (2009) at P 76.

additional arguments. PJM claims that these arguments will “clarify PJM’s filing with respect to the issues that various parties raise and provide specific resolutions of certain issues raised in the protests....”⁷ At least as regards the APPA/NRECA Protest, PJM’s Answer, on the contrary, obfuscates, rather than clarifies, the parties’ dispute as to whether Order No. 719 recognizes the power of an RERRA to prohibit some, but not all, ARCs from bidding loads subject to the RERRA’s authority into ISO/RTO demand response programs. It does so, first, by mischaracterizing APPA/NRECA’s position as one favoring what PJM (but not APPA/NRECA) styles as a “conditional opt in.” The Answer then poses a list of “horribles” that are claimed to result. The tendentiousness of the PJM Answer’s arguments regarding APPA/NRECA’s position does nothing to clarify, but instead distracts from, the really quite simple issue requiring decision by the Commission: namely, whether Order No. 719 contemplates that RERRAs may prohibit some, without prohibiting all, bids of aggregated load into PJM’s demand response program. PJM’s motion should be denied and its Answer rejected.

If, however, the Commission decides nonetheless to accept the PJM Answer, it should also accept the instant filing. The arguments in PJM’s Answer were not raised in its initial filing or fairly inferable from it. This pleading therefore represents APPA’s and NRECA’s only opportunity to respond to those arguments. Furthermore, this pleading corrects the aforementioned mischaracterizations in the PJM Answer.

The belated filings of EnergyConnect and Demand Response Supporters are, if anything, even less helpful to resolution of the issue actually presented in this proceeding and should not be accepted. However, if they are, the observations on them contained herein should also be accepted.

⁷ PJM Answer at 2.

II. ANSWER

A. PJM Presents A False Choice Between “Opt in” And “Opt-Out.”

PJM claims that APPA, NRECA and other “public power protestants” have argued for the adoption of a “‘conditional opt in’ which RERRAs would exercise in lieu of the ‘opt out’ option provided for by the Commission in Order No. 719.” PJM Answer at 2-3. PJM claims that such a construct would lead to myriad “policy and procedural issues” that PJM suggests would undermine the Commission’s policy aims in Order No. 719. PJM Answer at 3. Before responding to alleged procedural and policy issues raised by PJM (see section II.B below), the very premise of PJM’s argument, which obscures the issue presented in this proceeding, is wrong.

At the outset, it should be noted that RERRAs – not LSEs, as such – are responsible for establishing the laws and regulations governing retail customer participation in ARC bids under Order No. 719. PJM’s mistaken reference to an LSE as the arbiter of aggregation policy miscasts the RERRA’s role in the demand response scheme ordained by Order No. 719. The RERRA is defined as the entity that “establishes the retail electric prices and any retail competition policies for customers....”⁸ Entities that qualify for RERRA status – “such as the city council for a municipal utility, the governing board of a cooperative utility, or the state public utility commission”⁹ – were accorded deference in Order No. 719 because of their authority under state laws to set price and competition policy. While in some instances the bodies qualifying as RERRAs may also function as LSEs, this is by no means always the case, and, in any event, it was

⁸ Order No. 719 at P 158(c).

⁹ Order No. 719 at P 158(c).

a fact well understood by the Commission when it issued Order No. 719. APPA and NRECA have never argued that Order No. 719 permits any LSE, as such, to establish a policy with respect to retail customer participation in demand response programs. That right is reserved to the RERRA, as the Commission properly recognizes.

By the same token, APPA and NRECA have never advocated the adoption of some new “conditional opt in” approach to bidding into demand response programs covered by Order No. 719. This is a straw man of PJM’s invention. The term “conditional opt in” appears nowhere in Order No. 719, or in the APPA/NRECA Protest. Indeed, the demand response scheme ordained by Order No. 719 does not provide for the RERRA to “opt in” or “opt out” of the ISO/RTO program. The entities doing that “opting in” or “opting out” are customers and aggregators that actually present bids to the ISO/RTO. RERRAs’ role is *prior* to any “opting in” and “opting out.” Their role is to fashion, as they choose, laws and regulations regarding the aggregation of loads subject to their authority for the purpose of participation in ISO/RTO demand response programs. Order No. 719 does not purport to regulate this legislative function; to the contrary, Order No. 719 accords it deference. Order No. 719 requires that the bids of aggregators that comply with these laws and regulations (and otherwise conform with ISO/RTO rules) must be accepted, and, conversely, that those aggregations that are prohibited by an RERRA’s laws and regulations must not be accepted. The Commission did not purport to dictate to RERRAs what ought to be their general approach to load aggregation for purposes of demand response. Instead it stated only: “[Order No. 719] requires an RTO or ISO to accept a bid from an ARC, unless the laws or regulations of the relevant electric retail regulatory authority do not permit *the customers aggregated in*

the bid to participate.”¹⁰ The PJM Answer quotes this sentence but never responds to APPA/NRECA’s argument regarding the significance of its focus on the particular bid presented to the ISO/RTO. The Order commands acceptance of *bids*, not customers, and allows for RERRAs’ prohibition of *bids*, not customers. The Order appropriately leaves it to RERRA’s to distinguish among types of *bids* to allow and, thus, to decide for themselves how to distinguish among the possible forms of aggregation they deem appropriate for their loads. To be sure, this leaves RERRAs free to permit or prohibit *any* bidding of load subject to its supervision, as PJM would have it. However, it also leaves RERRAs free to prohibit only *some* forms of aggregation by only *some* types of aggregators, but not others. In short, the Order simply recognizes RERRAs’ authority to decide whether and how loads for which they are responsible may be aggregated for the purpose of constructing a bid. It is not PJM’s province to dictate what retail loads can be aggregated in a bid prior to its presentation to PJM. APPA and NRECA protested PJM’s filing because PJM’s “all-or-nothing” approach would eliminate the discretion that the Commission recognized accompanies RERRAs’ regulatory authority and is therefore inconsistent with Order No. 719.

As APPA and NRECA noted in their protest, some of their members have made the determination that third-party ARC activity would be harmful to their system planning and diminish the service they currently provide to their retail customers. Accordingly, those RERRAs have enacted ordinances, laws and regulations prohibiting their retail customers from participating through an ARC other than the LSE that serves them. Other RERRAs have selected and authorized a single third-party ARC to manage the aggregation of load subject to their authority for wholesale demand response

¹⁰ Order No. 719 at P 155 (*emphasis added*).

programs. Others will no doubt choose to respond differently. Order No. 719 contemplated just such flexibility for RERRAs. The Commission was mindful not to “interfere with the operation of successful demand response programs” or “place an undue burden on state and local retail regulatory entities.”¹¹

APPA and NRECA protested PJM’s filing precisely because it would undermine these stated policies of the Commission. The focus in this proceeding is whether PJM’s proposed tariff provisions conform to Order No. 719’s mandate. PJM’s attempt to re-frame and obfuscate the issue should not divert the Commission’s focus from this central issue.

B. PJM’s Alleged “Policy and Procedural” Concerns are Misplaced

PJM’s Answer poses a series of questions, which, according to PJM, are intended to highlight the “policy and procedural issues” raised by the position taken in the APPA/NRECA Protest. PJM Answer at 3-5. APPA and NRECA respond to these questions in turn.

PJM Question: As a procedural matter, should arguments raised in the context of a PJM compliance filing, which effectively urge establishment of a “conditional opt in” rather than an “opt out” of RTO demand side response tariffs, have more properly been raised in the proceedings leading to Order 719 and, once the Commission’s ruling was known, on rehearing of the Commission’s Order in that case?

APPA/NRECA Response: PJM’s question implies that the APPA/NRECA Protest amounts to a collateral attack on Order No. 719. This is plainly incorrect. APPA and NRECA have not disputed a syllable of Order No. 719 in this proceeding.¹² Rather,

¹¹ Order No. 719 at P 155.

¹² While APPA and NRECA did seek rehearing of certain aspects of Order No. 719’s rulings regarding aggregation of retail customers, they have not raised those arguments in this proceeding. To the contrary, the current controversy does not turn on the issues raised in that rehearing.

they have attempted to show that PJM's purported compliance with the Order, in fact, departs from the Order by attempting to force RERRAs to make an all-or-nothing "opt out" or "opt in" decision. Stated simply, PJM itself has attacked the flexibility granted to RERRAs in Order No. 719.

The APPA/NRECA Protest did not advocate a new position on an issue in the docket underlying Order No. 719. Rather, APPA and NRECA protested the PJM filing because it was inconsistent with the Commission's directives in Order No. 719. By adopting an "all-or-nothing" approach neither discussed nor adopted in the Final Rule, PJM would effectively re-write Order No. 719 in order to support its proposed tariff revisions. If there is a collateral attack on Order No. 719, it is contained in PJM's proposed tariff revisions.

PJM Question: Did the Commission, when it directed RTOs to allow bids from an "aggregator of retail customers" ("ARC") unless this is not permitted under the laws or regulations of the RERRA intend to sanction a "conditional opt in" to such tariffs?

APPA/NRECA Answer: Order No. 719 is clear: ARCs may aggregate retail customers "unless the laws or regulations of the relevant electric retail regulatory authority do not permit the customers aggregated in the bid to participate."¹³ The Commission intended to permit RERRAs to define the terms for aggregation of retail load subject to their authority for participation in demand response programs. RERRAs will undoubtedly respond to Order No. 719 in varying ways that reflect their unique circumstances, goals and challenges. The issue at the center of this proceeding is whether PJM's proposed tariff accommodates the flexibility that the Commission afforded to

¹³ Order No. 719 at P 155.

RERRAs in Order No. 719. As discussed above, the PJM tariff obviously provides no such accommodation.

PJM Question: Did the Commission, by allowing “relevant retail *regulatory* authorities” to “opt out” of demand side response tariffs for their customers, authorize those regulatory authorities to modify the RTO tariff to create an exclusive right of aggregation for their own LSE in the case where the retail authority and the LSE is one and the same?

APPA/NRECA Answer: There are really two issues embedded in this query.

First, RERRA policies that may be enacted (and in some case have been enacted) do not “modify” the PJM tariff. To be sure, those policies may be contrary to the policy choices PJM would prefer, and they certainly have not complied with PJM’s interpretation of its tariff to require RERRAs to make an all-or-nothing choice between “opting in” and “opting out” in order to be recognized by PJM. The question presented in this proceeding, however, is whether this aspect of PJM’s tariff is inconsistent with the Commission’s regulations enacted in Order No. 719. If so, the Commission, not RERRAs, would require modification of PJM’s tariff.

Second, Order No. 719 does not distinguish between RERRAs that may also function as LSEs and those that do not. Indeed, the PJM Answer nowhere even suggests that it does. Instead, it appears that PJM disapproves of RERRAs that choose to exercise their authority to restrict aggregation of customer loads to their LSE functions. Why, PJM does not say explicitly. However, a subsequent PJM “query” insinuates that such a law or regulation would be “on its face. . .unjust, unreasonable or discriminatory.” Putting aside the dubiousness of this proposition as a legal matter, it has nothing to do with the question at hand. The Order, at P158, quite plainly contemplates that RERRAs will sometimes function also as LSEs, and the Order nowhere suggests that such

RERRAs’ choices regarding aggregation of loads subject to their authority are regulated by the Order, the Commission, or, indeed, the Federal Power Act. The fact that one effect of PJM’s tariff revisions would be to prevent an RERRA from conferring exclusive authority to aggregate load for demand response on its LSE function is compelling evidence of the revisions’ *noncompliance* with Order No. 719. PJM should not be permitted to force policy choices onto RERRAs in the guise of compliance with a Final Rule that expressly eschewed doing so.¹⁴

PJM Question: If the Commission did intend to sanction a “conditional opt in,” what are the limits to what constitutes an acceptable condition? Can Relevant Electric Retail Regulatory Authority (“RERRAs”), for example, “undo” Commission orders by imposing, through their conditioning authority, a provision which they were unable to obtain through the protest process?

APPA/NRECA Answer: Again, the query misses the essential point that Order No. 719 did not delegate or “sanction” RERRAs’ authority to make laws or regulations regarding load aggregation but, instead, *recognized* authority that preexisted the Order. The Order, unlike the PJM Answer, recognized that there is a universe of retail-level activity preceding the presentation of a wholesale bid to PJM that is not subject to the Commission’s, much less PJM’s, authority. One such activity is legislating the terms on which retail loads subject to RERRAs’ authority may be aggregated for purposes of wholesale demand response, including by whom. The Order explicitly recognizes the divide between federal and state/local jurisdiction. This can be a thorny issue with respect to demand response programs. But the Commission made it clear in Order No.

¹⁴ Order No. 719 at P 155.

719 that it was deferring to the RERRA so as to not “raise new concerns regarding federal and state jurisdiction...”¹⁵

The PJM Answer offers the hypothetical scenario in which a RERRA would condition retail customer participation in RTO- and ISO-administered demand response programs on a modification to the “pricing structure of the tariff...in a manner not accepted by the Commission.”¹⁶ The scenario poses no genuine concern. While such a “condition” placed upon the aggregation of retail load prior to the submission of a bid to PJM would fall within a RERRA’s authority, it would have absolutely no effect on PJM’s tariff or any Commission order unless the Commission, for some reason, independently accorded it effect by ordering a change in PJM’s tariff. Barring that unlikely event, the “condition” would amount to a prohibition of non-complying bids, which PJM would be required to honor. In short, Order No. 719 permits RERRAs to regulate their retail customers’ activity, not a federally-regulated tariff. PJM’s putative concern is illusory and meaningless in the context of implementation of Order No. 719.

The query’s suggestion that APPA and NRECA are attempting to obtain license for a RERRA to “undo” Commission orders by imposing, through their conditioning authority, “a provision which they were unable to obtain through the protest process” only reprises PJM’s claim that the instant controversy is a collateral attack on Order No. 719 that is addressed above.

PJM Question: How is the RTO, which has been instructed by the Commission not to interpret such ordinances or regulations, to know when a condition has exceeded a bound of reasonableness? And how can the RTO assure that it will not be deemed to have engaged in discriminatory or unreasonable conduct were it

¹⁵ Order No. 719 at P 155.

¹⁶ PJM Answer at 9.

to sanction a condition which on its face is unjust, unreasonable or discriminatory?

APPA/NRECA Answer: In Order No. 719, the Commission was unambiguous in its declaration that RTOs and ISOs “should not be in the position of interpreting the laws or regulations of a relevant electric retail regulatory authority.”¹⁷ PJM’s initial filing in this proceeding stated that its tariff revisions were designed to ensure that PJM was not placed in a position where it would need to interpret the laws and regulations of RERRAs.¹⁸ PJM now implies that it must know “when a condition has exceeded a bound of reasonableness.” PJM’s alleged concern is therefore inconsistent with both its proposed tariff and Order No. 719. RERRAs, not PJM, have the authority to determine what is reasonable with respect to participation of loads subject to that authority in PJM-administered demand response markets. If PJM simply follows its own proposed tariff provisions it will never be required to interpret whether an RERRA’s laws or regulations are reasonable.¹⁹ Nor can PJM interpret those regulations without arrogating to itself the role of regulator of RERRAs, plainly exceeding the role allotted it by Order No. 719, to say nothing of state and local law.

PJM’s second question implies that PJM is concerned that it might be deemed liable in the event that its tariff were to “sanction a condition” contained in the laws and regulations of RERRAs. Again, PJM appears to be simply mistaken about its role under Order No. 719. Order No. 719 mandates that RTOs and ISOs are to modify their market rules to accept bids from ARCs unless those bids are prohibited by law or regulation of

¹⁷ Order No. 719 at P 158, n. 212.

¹⁸ See Transmittal Letter at 4.

¹⁹ See e.g. Section 1.51.3 of the revised Operating Agreement. Under the PJM approach, the LSE or EDC must respond to PJM’s generic inquiry as to whether load to be aggregated by an ARC is prohibited from participating pursuant to an RERRA’s laws or regulations.

the RERRA. There is no need, nor is there any power, for PJM to “sanction” bids from an ARC – particularly when the Commission has admonished that RTOs and ISOs should not interpret RERRA laws and regulations.

PJM’s insinuation that laws or regulations of a RERRA that do not accord with PJM’s policy preferences are somehow facially “unjust, unreasonable or discriminatory,” as discussed above, is irrelevant as well as mistaken. Differences in state and local laws, rules and regulations can often result in different treatment of customers from one jurisdiction to another, but such lawful differences do not constitute unjust, unreasonable or unduly discriminatory conduct.

PJM Question: If “conditional opt ins” are to be accepted, how are customers and demand side response providers to know what conditions are outside the bounds of reasonableness and how would they raise such a claim to the Commission?

APPA/NRECA Response: Again, the PJM Answer simply fails to recognize the distinction between the roles of the RERRA, on one hand, and PJM and the Commission, on the other, just as PJM’s purported compliance with Order No. 719, in fact, departs from the Order. PJM’s question assumes that a retail customer’s recourse must lie with the Commission. This is not the case. If a retail customer believes that an RERRA has restricted participation in demand response programs unreasonably, it may raise those concerns with the RERRA. If that customer remains dissatisfied, it may exercise whatever rights it has under applicable laws and regulations to challenge the laws and regulations of the RERRA. This is no different from any other issue within the jurisdiction of the RERRA.

PJM Question: Assuming the Commission intended to authorize “conditional opt ins” to RTO demand side response tariffs, at what point does the issuance of a myriad of separate conditions by each RERRA lead to a balkanized tariff which

frustrates the point of having a single uniform tariff enforced by this Commission, and itself becomes a barrier to entrepreneurs seeking to provide demand side response aggregation across a broad region?

APPA/NRECA Answer: It is not clear what “preconditions” PJM is concerned about. But it is clear that the Commission did not entertain any similar concern in Order No. 719 when it granted flexibility to RERRAs to craft individualized laws and regulations concerning participation, nor should it have done so. PJM’s expressed concern is entirely speculative. The Commission refused to adopt a single uniform tariff in Order No. 719 and instead encouraged “RTOs and ISOs to coordinate their efforts with customers, state and local regulatory entities, and other stakeholders” to develop “regional proposals in the compliance filings.”²⁰ The Commission clearly did not believe that regional and local differences would be a significant hindrance to demand response participation.

With respect to PJM’s expressed administrative concerns, as discussed above, PJM’s registration process places the entire burden of determining whether a particular registration is permitted on the individual LSEs and EDCs. PJM will therefore have no administrative burden in the event that RERRAs tailor individualized laws and regulations concerning demand response participation.

PJM’s own proposed tariff belies its claimed need for uniformity. PJM’s tariff would permit RERRAs to enact laws or regulations prohibiting a certain “customer class or rate class of end-use customer” from participating in demand response programs.²¹ How would such restrictions be any less cumbersome to administer or less “balkanizing” than restrictions on which ARCs may aggregate an RERRA’s retail customers? The real

²⁰ Order No. 719 at P 160.

²¹ PJM Transmittal Letter at 4.

potential for an adverse impact on demand response participation is, in fact, PJM’s proposed all-or-nothing approach. As was demonstrated in the APPA/NRECA Protest, when faced with the option presented by PJM – *i.e.* requiring RERRAs to either permit third party aggregation of their LSEs’ retail customers or to forego participation in wholesale demand response markets altogether – the net result can only be to *reduce* participation in demand response programs.

PJM Question: If “conditional opt in” is authorized, how can demand side response providers and retail customers be assured that the demand side response registration process can operate in an expeditious and predictable manner if there are no limits on the number or type of conditions that a RERRA can place on such a tariff?

APPA/NRECA Answer: As discussed above, no one is suggesting that RERRAs can place conditions on—or, for that matter, do anything else to—FERC-jurisdictional tariffs. What RERRA’s can do, as Order No. 719 recognized, is regulate whether, which and how load subject to their authority can be aggregated for participation in ISO/RTO demand response programs. Since PJM’s own tariff places the burden of advising PJM whether an ARC’s bid is prohibited by an RERRA law or regulation on LSEs there is no reason to fear that RERRA processes will somehow disrupt PJM’s registration process.

PJM Question: Assuming “conditional opt in” is authorized, when do the RERRAs’ conditions become a “back door” means to effectively regulate a tariff that is subject to the exclusive jurisdiction of this Commission?

APPA/NRECA Answer: As discussed above, PJM’s concern that RERRAs could utilize their authority to impose conditions on issues within the Commission’s exclusive jurisdiction is unjustified. APPA and NRECA note, however, that if PJM’s interpretation of Order No. 719 and its resulting tariff provisions are accepted, PJM will

have effectively exercised “backdoor veto” power over validly passed RERRA regulatory policies, rules, regulations and ordinances.

C. RERRA Flexibility Was Not Rejected By the Commission.

PJM claims that the history of the Order No. 719 rulemaking demonstrates that “many of the arguments made in protest of PJM’s compliance filing were made in the rulemaking proceeding...”²² But none of the examples cited on page 6 of PJM’s Answer to support this claim address the issue of RERRA flexibility to restrict retail customer participation in ARC demand response bids.

For example, PJM cites (in the first bullet point on page 6 of the PJM Answer) to the Commission’s treatment of APPA and NRECA arguments in Order No. 719, but the issues addressed in the cited paragraphs have nothing to do with RERRA flexibility.

There, the question for the Commission was whether RERRAs must affirmatively act to prohibit aggregation by third-party ARCs or whether such a prohibition would be assumed until a RERRA affirmatively acted to permit such activity. While APPA and NRECA have sought rehearing on this issue, it has no bearing on whether a RERRA can act to place restrictions on retail customer participation (*e.g.* barring unauthorized third-party ARC activity) without completely foregoing participation in wholesale markets.

The NARUC argument (cited by PJM in its final bullet point on page 6 of the PJM Answer), also drawn from the Commission’s Order No. 719, addresses this same burden issue and is equally inapposite.²³

²² PJM Answer at 5-6.

²³ Order No. 719 at p 29 (“NARUC argues that the state-law exemption within the NOPR should be modified to avoid displacing state authority and state policy decisions on demand response. NARUC explains that this exemption places the burden on state regulators to show that the demand response proposal conflicts with state laws or regulations. NARUC would like to see this

In some instances, NRECA and APPA have referred to policy considerations in their Protest that were earlier raised in the rulemaking process, simply because they are as valid now as they were then and were apparently of assistance to the Commission in its decision-making in Order No. 719. Arguments with respect to potential exposure to deviation charges, coordination problems based on the free-lance activities of unauthorized third-party ARCs, and the potential for cherry-picking of certain retail customers by ARCs were all reasons why the Commission granted flexibility to RERRAs. APPA and NRECA highlighted these concerns in their Protest to demonstrate that PJM's proposed tariff was unreasonable and inconsistent with the Commission's holding in Order No. 719, which specifically responded to these concerns.²⁴ It does not undermine APPA's and NRECA's argument that they have reminded the Commission of the reasons it afforded flexibility to RERRAs in Order No. 719, in order to show how PJM's approach is non-compliant.

The PJM Answer's claim that the RTO/ISO Council "raised concern with the very type of 'conditional opt in' that protestants seek to exercise in this case,"²⁵ is profoundly misleading. The cited RTO/ISO Council argument concerned potential burdens in the *registration* process, not whether an RERRA could establish rules prior to the registration process regarding how their retail customers would be aggregated for participation in demand response programs. There is no reason why a RERRA prohibition on third-party

reversed, and the burden placed on the RTO or ISO to obtain the state regulator's permission to allow the demand response proposal.")

²⁴ Order No. 719 at P 155 ("In the NOPR, the Commission sought to address the concerns of state and local retail regulatory entities by proposing to require that an ARC may bid retail load reduction into an RTO or ISO regional market unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate in this activity.")

²⁵ PJM Answer at 7.

aggregation would need to be addressed on a case-by-case basis once the LSE or EDC has provided notice of the restriction to the RTO/ISO, although APPA and NRECA note that PJM's tariff would appear to contemplate this, by requiring an LSE to state whether each new registrant is prohibited from bidding the loads included in its bid. Furthermore, the Commission holdings that PJM claims responded to the RTO/ISO Council argument are immaterial – none of the cited findings stand for the proposition that an RERRA is prohibited from restricting retail customers from participating through a particular ARC.

In short, the PJM Answer's list of citations to pages of various parties' pleadings in the docket underlying Order No. 719 does nothing to advance its argument that APPA and NRECA seek to attack Order No. 719 collaterally. The cited material does not on its face establish the point, and the Answer does nothing to explain how the cited material relates to PJM's contention that Order No. 719 allows RERRAs only an all-or-nothing choice regarding the aggregation of load subject to their authority for purposes of demand response.

D. PJM's Proposed Tariff Revision Would Harm Consumers by Increasing Costs of Power in RTO and ISO Markets.

APPA and NRECA have argued that requiring RERRAs to make an all-or-nothing choice would result in election of "nothing" by many public power and cooperative systems that would otherwise participate in RTO- and ISO-administered demand response markets. The various harms to municipal and cooperative system that would impel such a decision were spelled out in significant detail in the APPA/NRECA Protest.²⁶ PJM claims that "[t]hese arguments tend to lose the key focus, which is what is in the interest of the ultimate customer who is the intended beneficiary of the demand

²⁶ See APPA/NRECA Protest at 15-18.

side response program provided by the RTO.”²⁷ PJM has it precisely backwards. Public power systems and rural electric cooperatives are not-for-profit systems that are owned by and are directly accountable to their retail customers. They share the goal of providing service to all of their customers at the lowest feasible cost. Public power and cooperative systems achieve this goal through a wide variety of activities, including offering demand response programs.

PJM’s all-or-nothing approach, by needlessly driving available demand response out of the market, would hurt the consumers served by public power and cooperative systems by artificially and needlessly inflating the price of generation. PJM’s Answer fails to explain how its approach which, as witnessed by the number and tenor of protests filed in this proceeding, could well lead to many public power and cooperatives systems choosing to forego participation in RTO- and ISO-administered demand response markets (even though they are in a position to provide considerable benefits to wholesale markets) is anything but a barrier to demand response. The Commission should be alarmed when an RTO recommends²⁸ that LSEs remove their demand response from the wholesale markets that the RTO administers based on nothing more than unsupported claims of potential discrimination and administrative burdens. Assuredly, it is not retail customers that are the “intended beneficiary” of such a policy. The Commission should reject such unnecessary barriers to demand response participation.

²⁷ PJM Answer at 8.

²⁸ PJM Answer at 10.

E. The Answers Filed by Curtailment Service Providers Demonstrate the Unreasonableness of the PJM Approach They Support.

Several curtailment service providers have filed answers which themselves demonstrate the unreasonableness of the PJM proposal and its patent departure from the requirements of Order No. 719. These aggregators' pleadings make it crystal clear that PJM's all-or-nothing approach is intended precisely to prevent RERRAs from using their authority over the aggregation of retail customers' loads to determine which entities will be authorized to aggregate and on what terms.

For example, EnergyConnect, even though it was approved as an aggregator by Southern Maryland Electric Cooperative ("SMECO"), quarrels with the *process* by which the RERRA (in this case SMECO) made the determination about the aggregation of retail load subject to its authority.²⁹ The Answer filed by the self-styled "Demand Response Supporters"³⁰ is equally revelatory. It states baldly that the DSR qualification provisions will prevent an RERRA from choosing a single aggregator to aggregate retail customers' loads for participation in PJM's demand response program. This choice, which the Demand Response Supporters call "discriminatory and restrictive"³¹ is plainly one among many choices that RERRAs might make in exercising the authority over retail customer loads that the Commission, in Order No. 719, decided to honor. It seems particularly ill-considered for entities professing an interest in aggregating retail loads subject to RERRAs' authority to advocate that if RERRAs elect to play a role in selecting the means by which that aggregation takes place, all of the RERRAs' customers must be shut

²⁹ EnergyConnect Answer at 2.

³⁰ Demand Response Supporters are comprised of Comverge, Inc., CPower, Inc., Energy Curtailment Specialists, Inc., EnergyConnect, Inc., EnerNOC, Inc. Wal-Mart Stores East, LP and Sam's East, Inc.

³¹ Demand Response Supporters Answer at 4.

out of participation in PJM's demand response program. But make no mistake; that is precisely what they advocate in their pleadings.

III. CONCLUSION

In their Protest, APPA and NRECA suggested revised tariff language that, if adopted, would conform PJM's tariff to the requirements of Order No. 719 and eliminate PJM's alleged concerns. The PJM Answer does not address this suggested language, so there is no reason to believe that if APPA and NRECA are correct about the ambit of RERRAs' authority to prohibit aggregation of load subject to their authority, the language change they suggested would not be the appropriate remedy for noncompliance in this docket.

WHEREFORE, APPA and NRECA respectfully request that the Commission reject the PJM Answer or, in the alternative, accept this answer and condition acceptance of PJM's filing upon acceptance of a compliance filing consistent with Order No. 719, as construed by APPA and NRECA in this Answer and in their earlier Protest as regards the authority of RERRAs to prohibit the aggregation of load subject to their authority.

Respectfully submitted,

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March 30, 2009

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 30th day of March, 2009.

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