

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

**Participation of Aggregators of Retail
Demand Response Customers in Markets
Operated by RTOs and ISOs**)) **Docket No. RM21-14-000**

**COMMENTS OF THE
ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON)**

The Electricity Consumers Resource Council (ELCON) respectfully submits these comments on the March 18, 2021 Notice of Inquiry (NOI)¹ pursuant to the Notice of Extension of Time² issued by the Federal Energy Regulatory Commission (FERC or the Commission) in the above-captioned docket, in which the Commission seeks input on whether to revise its regulations that require Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) not to accept demand response bids from an Aggregator of Retail Customers (ARC) when the Relevant Electric Retail Regulatory Authority (RERRA) prohibits such bids (the Demand Response Opt-Out).³

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the industrial community. ELCON members own and operate hundreds of major facilities and are significant consumers of electricity in the footprints of all organized markets and other regions throughout the United States. Reliable electricity supply at just and reasonable rates is essential to our members' operations.

¹ *Participation of Aggregators of Retail Demand Response Customers in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Notice of Inquiry, 174 FERC ¶ 61,198 (2021).

² *Participation of Aggregators of Retail Demand Response Customers in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Notice of Extension of Time for Filing Initial and Reply Comments, Docket No. RM21-14-000 (June 17, 2021).

³ As set out in the NOI, the Demand-Response Opt-Out would be retained for bids from an ARC that aggregates the demand response of the customers of utilities that distributed four million MWh or less in the previous fiscal year.

INTRODUCTION

In orders issued in 2008 and 2009, the Commission established the Demand Response Opt-Out as a compromise to mitigate burdens associated with the general requirement that RTOs/ISOs accept bids from ARCs.⁴ Specifically, while the Commission recognized that aggregation of demand response may “expand the amount of resources available to the market, increase competition, help reduce prices to consumers, and enhance reliability,” it also wanted to avoid action that, *inter alia*, would “place an undue burden on state and local retail regulatory entities, or raise new jurisdictional concerns.”⁵

Notwithstanding that 18 states adopted the Demand Response Opt-Out,⁶ ELCON agrees with the Commission that, in the dozen years since its establishment, “there have been significant legal, policy and technological developments . . . ,”⁷ and that the changed circumstances may warrant revisiting and revoking the Demand Response Opt-Out. ELCON cautions, however, that the Commission should carefully assess the full costs and benefits of such action to establish that it follows the cost causation principle and results in rates that are just, reasonable, and not unduly discriminatory.

I. ELCON SUPPORTS REMOVING THE DEMAND RESPONSE OPT-OUT

A. Demand Response Is a Valuable Resource That Should Continue to Be Encouraged

Demand response is a valuable resource that promotes competition and reliability. As the Commission observed in the NOI, the North American Electric

⁴ 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).

⁵ NOI at P 4.

⁶ See Commissioner Danly’s concurring statement to the NOI at P 2, referencing Arkansas, Iowa, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, New Mexico, Oklahoma, South Dakota, and Wisconsin.

⁷ NOI at P 2.

Reliability Corporation (NERC) has stated that demand response provides transmission system operators with additional system-balancing tools to maintain bulk-power system reliability.⁸ NERC has also stated that, as the resource mix changes, flexible resources that can be called upon on short notice, including demand response, are needed to ensure resource adequacy and meet ramping needs.⁹ ELCON agrees. Demand response aggregations provide real-time balancing and essential grid services, such as frequency response and ramping capability, to support bulk-power system operations.

Congress has directed the Commission to recognize the benefits of demand response. The Energy Policy Act of 2005 declares that:

It is the policy of the United States that time-based pricing and other forms of demand response, whereby electricity customers are provided with electricity price signals and the ability to benefit by responding to them, shall be encouraged, the deployment of such technology and devices that enable electricity customers to participate in such pricing and demand response systems shall be facilitated, and unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated. It is further the policy of the United States that the benefits of such demand response that accrue to those not deploying such technology and devices, but who are part of the same regional electricity entity, shall be recognized.¹⁰

Commission Orders have indeed recognized the benefits of demand response. In Order No. 719, the Commission determined that “[d]emand response can provide competitive pressure to reduce wholesale power prices; increases awareness of energy usage; provides for more efficient operation of markets; mitigates market power; enhances reliability; and in combination with new technologies can support the use of

⁸ North American Electric Reliability Corporation, *Essential Reliability Services Task Force Measures Framework Report* 63 (Nov. 2015), <https://www.nerc.com/comm/Other/essntlrlbltysrvkstskfrcdl/ERSTF%20Framework%20Report%20-%20Final.pdf>.

⁹ North American Electric Reliability Corporation, *2020 State of Reliability* 49 (July 2020), https://www.nerc.com/pa/RAPA/PA/Performance%20Analysis%20DL/NERC_SOR_2020.pdf.

¹⁰ Energy Policy Act of 2005, 119 Stat. 594, at §1252(f)

renewable energy resources, distributed generation, and advanced metering.”¹¹ In Order No. 745, the Commission observed that demand response “balance[s] supply and demand, and thereby, helps produce just and reasonable energy prices”¹²

Technological developments since Order Nos. 719 and 745 have enhanced the usefulness and importance of non-discriminatory access to markets for demand response. We agree with the NOI’s observation that such technological progress includes “instant communication of dispatches, real-time visibility and control of load curtailment, immediate settlement of dispatch performance, and automated financial transactions between markets and customers, in part due to the proliferation of broadband, high-speed wireless communication.”¹³ With technology expanding the potential of demand response, it is all the more important to remove barriers to further demand response participation in RTO/ISO markets.

In addition to the Commission’s pronouncements, the economics literature outlines the system-wide benefits of the efficient utilization of demand response resources.¹⁴ Demand response can also provide reliability and resiliency, deferred

¹¹ Order No. 719 at P 16.

¹² *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187 at P 10 (footnotes omitted), *order on reh’g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *rev’d & remanded sub nom. FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016).

¹³ NOI at P 20.

¹⁴ See, e.g., Elaine Hale et al., *Potential Roles for Demand Response in High-Growth Electric Systems with Increasing Shares of Renewable Generation*, National Renewable Energy Lab (Dec. 2018), <https://www.nrel.gov/docs/fy19osti/70630.pdf>; Steve Dahlke and Matt Prorok, *Consumer Savings, Price, and Emissions Impacts of Increasing Demand Response in the Midcontinent Electricity Market*, *The Energy Journal*, Vol. 40, No. 3 (2019), https://www.researchgate.net/publication/334140979_Consumer_Savings_Price_and_Emissions_Impacts_of_increasing_Demand_Response_in_the_Midcontinent_Electricity_Market; *Advanced Energy Economy, Peak Demand Reduction Strategy*, (Oct. 2015), <https://info.aee.net/hubfs/PDF/aee-peak-demand-reduction-strategy.pdf>; Wenxian Yang et al., *Quantifying the benefits to consumers for demand response with a statistical elasticity model*, *IET Gener. Transm. Distrib.*, 2014, Vol. 8, Iss. 3, pp. 503–515, <https://ietresearch.onlinelibrary.wiley.com/doi/10.1049/iet-gtd.2013.0155>.

infrastructure development, and balancing services for variable resources,¹⁵ and can assist in reducing carbon dioxide emissions.¹⁶

Despite these assertions of the value of demand response – by Congress, the Commission, and expert economists – in his concurring statement to the NOI, Commissioner Danly expressed skepticism about the value of demand response and sought evidence of “whether wholesale demand response aggregation programs are providing reliability benefits commensurate with their costs” and “statistics that quantify the actual performance of these demand response resources during critical events.”¹⁷ Referencing the 2020 California reliability crisis in particular, he commented that “[a]necdotal evidence suggests their performance during times of strain may be poor, and perhaps terrible,” and he “encourage[s] a searching inquiry into how much demand response actually contributes to reliability during critical reliability events.”¹⁸

ELCON is sympathetic to searching inquiries into empirical data to support the Commission’s policies.¹⁹ To further Commissioner Danly’s inquiry, we note that early anecdotal evidence indicates that the availability of demand response offered by industrial consumers is very high.²⁰ We also note the incredible flexibility and responsiveness of demand response resources (particularly those with on-site generation) in times of grid stress, as outlined in the prior comments of the Advanced Energy Management Alliance (AEMA) filed with the Commission in Docket No. RM18-1-000:

¹⁵ Advanced Energy Management Alliance, *Advancing Demand Response in the Midwest: Expanding Untapped Potential*, pp. 4-5 (Feb. 12, 2018), <https://aem-alliance.org/download/121043/>.

¹⁶ Navigant, *Carbon Dioxide Reductions from Demand Response: Impacts in Three Markets*, (Nov. 25, 2014), <https://aem-alliance.org/download/10680/>.

¹⁷ Concurring Statement of Commissioner Danly at P 4.

¹⁸ *Id.* at PP 5-6.

¹⁹ See ELCON’s July 8, 2021 letter requesting a Congressional inquiry into the cost of electricity in the United States, including an evaluation of the impact of FERC policies on the cost and reliability of delivered power. Available at: <https://elcon.org/independent-study-of-the-cost-of-electricity/>

²⁰ See, e.g., Yogesh Patil et al, *Case Studies from Industrial Demand Response Audits Integrated with Renewable Energy Assessments*, https://www.aceee.org/files/proceedings/2007/data/papers/18_2_110.pdf (2007).

AEMA provides the following three examples to demonstrate that DR/DER should qualify for any reliability or resilience product:

- PJM credited DR with helping the grid withstand the Polar Vortex, stating: “Although demand response is usually only needed by grid operators in the summer, operators also successfully deployed it during the power emergencies occasioned by the bitter cold ‘Polar Vortex’ weather in January 2014. As PJM set multiple winter peak records early that month, it called on demand response, and received more megawatts as load reductions than it could obtain as generation from all but the very largest generating stations. . . . In the midst of those challenging conditions, demand response – responding to PJM’s dispatch as a wholesale market resource – helped maintain the reliability of the system.”
- After Hurricane Irma, DR helped maintain balance between supply and demand to stabilize the Florida electric grid. As thousands of customers were rapidly having their power restored, demand threatened to outpace supply due to generation outages from the storm. If nothing was done, and demand was higher than supply, a blackout may have been caused when people had already been without power for an extensive period due to the Hurricane. Fortunately, Tampa Electric Company (TECO) had the foresight to contract for a diverse set of resources, and dispatched DR. In this case, DR provided grid resilience, allowing the grid to bounce back from a major disturbance.
- In another recent example, Hurricane Harvey unleashed 33 trillion gallons of rainwater along the Gulf of Mexico and caused a range of energy impacts, including coal-to-gas switching as coal piles were too wet for conveyer systems to handle. However, the Texas Medical Center - the largest medical center in the world - was able to sustain its air conditioning, refrigeration, heating, sterilization, laundry, and hot water needs throughout the storm thanks to a combined heat and power (CHP) installation operated by Thermal Energy Corp (TECO). The 48MW CHP system operated without interruption during the storm.
- ISOs recognize that DERs can enhance system resilience. The NYISO, in their 2017 DER Roadmap, states: “DER can help grid operators by *improving system resilience* [emphasis in AEMA comments], energy security, and fuel diversity. DER can lower consumer prices, improve market efficiency, and allow consumers to take greater control of their electricity use and costs through a variety of new technologies.”²¹

²¹ Comments of Advanced Energy Management Alliance, Docket No. RM18-1-000, pp. 7-8 (Oct. 23, 2017)

As a final data point, one ELCON member reported that – according to one of their demand response aggregators – industrial consumers represented 31 percent of the aggregator’s U.S. load. That is a significant portion, and it underscores the importance of this proceeding to industrial consumers. To the extent the Commission wishes to explore demand response performance data, ELCON stands ready to assist and to offer support for our assertions that industrial demand response performs well and provides important reliability benefits to the electric grid, particularly during times of strain.

B. The Resource Neutrality Principle Dictates That the Demand Response Opt-Out Be Removed

Demand response resources remain uniquely hobbled by an outdated state opt-out and now suffer undue discrimination compared to other resources for which the Commission has considered and explicitly determined not to establish a state opt-out (namely energy efficiency, energy storage, and other distributed energy resource aggregations). Under the principle of resource neutrality, no one class of resources should be favored or disfavored by FERC’s regulations; rather, the Commission should provide a level playing field for all resources.

As other FERC regulations, supported by court decisions, have evolved and enabled energy efficiency, energy storage, and other distributed energy resource aggregations to fully participate in the wholesale energy markets, the Demand Response Opt-Out has become outdated. It now creates artificial and unduly discriminatory barriers to demand response participation by retail customers in the wholesale electricity markets, and the result – where the state opt-out persists – is wholesale market inefficiency, inaccurate measures of resource adequacy, lack of operational flexibility, and inflated wholesale electricity market prices.²²

(footnotes omitted).

²² See an example of the cost implications of the Demand Response Opt-Out described in the Comments of the Association of Businesses Advocating Tariff Equity (ABATE) at p. 3 and note 5 and in the Complaint of Voltus at Ex. B in Docket No. EL21-12-000.

Since establishing the Demand Response Opt-Out in Order No. 719, the Commission issued Order No. 745 to address compensation and cost allocation for demand response in the energy markets of the RTOs and ISOs, and then in subsequent Commission actions regarding distributed resources, the efforts of parties seeking an opt-out or similar mechanism were rejected. These include the Commission's actions regarding energy efficiency resources,²³ energy storage resources,²⁴ and distributed energy resource aggregations.²⁵ As outlined in the NOI, in reaching these determinations, the Commission correctly found that the benefits of giving the resources broader access to the wholesale markets outweighed the effects on the distribution system or other considerations that would favor on opt-out.²⁶ Even in the case of distributed energy resource aggregations, the Commission found "that it was not persuaded that concerns about potential effects on the distribution system justify adopting an opt-out that could substantially limit that participation."²⁷

The courts have supported FERC's actions to affirm its jurisdiction over wholesale electricity markets and to enable resources to participate in such markets without promulgating state opt-outs. In *FERC v. EPSA*,²⁸ the U.S. Supreme Court confirmed that FERC has jurisdiction over the participation of demand response resources in the RTO and ISO markets. Later, in its decision reviewing the Commission's order on electric storage resources, the D.C. Circuit agreed with the

²³ *Advanced Energy Economy*, 161 FERC ¶61,245 (2017), *order on reh'g*, 163 FERC ¶ 61,030 (2018).

²⁴ *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127, *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,145 (2019).

²⁵ *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222, 172 FERC ¶ 61,247 (2020), *order on reh'g*, Order No. 2222-A, 174 FERC ¶ 61,197, *order on reh'g and clarification*, Order No. 2222-B, 175 FERC ¶ 61,227 (2021).

²⁶ NOI at PP 6-16.

²⁷ NOI at P 14.

²⁸ *FERC v. EPSA*, 136 S.Ct. 760 (2016).

Commission's view that the Supreme Court's finding of Commission jurisdiction in *FERC v. EPSA* was not tied to the existence of the Demand Response Opt-Out.²⁹

Particularly in view of the Commission's intervening actions, supported by the courts, to not establish an opt-out for other resources (energy efficiency, energy storage, and distributed energy aggregations), retaining an opt-out for demand response would be inconsistent with the principle of resource neutrality and the Commission's statutory obligations. The Federal Power Act (FPA) requires that all rates, charges, and classifications of service must be just and reasonable and cannot be unduly discriminatory or preferential³⁰—as the D.C. Circuit states, it “bristles with concern about undue discrimination.”³¹ As recently as Order No. 2222, the Commission reinforced its commitment to resource neutrality:³²

We find that limiting the types of technologies that are allowed to participate in RTO/ISO markets through a distributed energy resource aggregator would create a barrier to entry for emerging or future technologies, potentially precluding them from being eligible to provide all of the capacity, energy, and ancillary services that they are technically capable of providing.³³

Under the current circumstances, considerably changed from the era of Order No. 719, leaving the Demand Response Opt-Out in place discriminates against demand response. Resource neutrality requires that demand response be given the same opportunities to participate in the markets as not only heterogeneous aggregations including demand response but also energy efficiency resources, energy storage resources, and other distributed energy resources. As one commenter described the

²⁹ *NARUC v. FERC*, 964 F.3d 1177, 1189-90 (D.C. Cir. 2020).

³⁰ 16 U.S.C. §§ 824d, 824e.

³¹ *American Electric Power Service Corp.*, 67 FERC ¶ 61,168, 61,490 (May 11, 1994) (citing *Associated Gas Distributors v. FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987) (addressing identical terms of the Natural Gas Act)).

³² Order No. 2222 at P 117.

³³ Order No. 2222 at P 141. See also, *Frequency Regulation Compensation in the Organized Wholesale Power Markets*, Order No. 755, 137 FERC ¶ 61,064 (2011) (describing resource neutrality in terms of regulating a particular service, regardless of the resource or technology type that provides that service).

current state of play, in Order No. 2222 “the Commission inexplicably and contradictorily preserved the opt-out in Orders 719 and 719-A, thus allowing retail authorities to bar participation [of] only one specific type of resource, aggregators of demand response resources.”³⁴ The Commission must correct what is now a vestige of incremental regulatory history.

II. COSTS RELATED TO REVOCATION OF THE DEMAND RESPONSE OPT-OUT MUST BE CAREFULLY ASSESSED UNDER THE FPA’S STANDARDS

Although this proceeding is currently a notice of inquiry, when it advances to a rulemaking it will be essential that the Commission fully consider the costs and benefits associated with revocation of the Demand Response Opt-Out. At the wholesale level, the Commission must act in accordance with the requirements of the FPA; in particular, rates under its jurisdiction must be “just and reasonable”³⁵ and follow the cost causation principle, which requires that costs be well understood and borne by the parties that caused them.

However, the Commission must first understand and explicitly recognize that its action in revoking the Demand Response Opt-Out may cause some costs to occur across jurisdictional boundaries. For example, if revocation of the Demand Response Opt-Out causes costs to be imposed on the distribution system – beyond FERC’s jurisdiction but due to FERC’s action – without any state or federal regulator assessing and allocating responsibility for those costs, that would be a clear violation of the cost causation principle.³⁶

For decades, the Commission and the courts have understood that the cost-causation principle “add[s] flesh to [the] bare statutory bones” of the just-and-

³⁴ Voltus Complaint at p. 24; Order No. 222 at PP 59, 145.

³⁵ 16 U.S.C. § 824d(a).

³⁶ System improvement costs required for resources to reach the wholesale market – including new hardware (wires, transformers, etc.) or software, or other indirect costs such as investments needed to maintain reliability – should not be ignored.

reasonable-rate requirement.³⁷ Any changes to rate structures resulting from revocation of the Demand Response Opt-Out should adhere to cost causation principles. Specifically, costs cannot be shifted to ratepayers unless there has been reasonable consideration of the benefits and, based on substantial evidence in the record, the benefits are determined to be sufficient in relation to the costs sought to be shifted to the ratepayers. If the benefits cannot be reasonably quantified, then there must be “articulable and plausible” reasons to believe that the benefits are at least roughly commensurate with the costs imposed.³⁸

The principle of cost causation is well established by court cases and Commission adjudications.³⁹ The cost causation principle is the “touchstone in any legal analysis of FERC-approved rate schemes,” and it requires “that all approved rates reflect to some degree the costs actually caused by the customer who must pay them.”⁴⁰ The D.C. Circuit has stated that compliance with the cost causation principle must be

³⁷ *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992).

³⁸ *Illinois Commerce Comm’n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) (“We do not suggest that the Commission has to calculate benefits to the last penny, or for that matter to the last million or ten million or perhaps hundred million dollars If it cannot quantify the benefits to the Midwestern utilities from new 500 kV lines in the East . . . , but it has an articulable and plausible reason to believe that the benefits are at least roughly commensurate with those utilities’ share of total electricity sales in PJM’s region, then fine; the Commission can approve PJM’s proposed pricing scheme on that basis.”)

³⁹ The cost causation cases trace their origin to *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 588 (1945), which held that “[t]he problem [to be addressed by a rate case] is to allocate to each class of the business its fair share of the costs.” The cost causation principle has been reaffirmed in numerous cases, see, e.g., *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305 (D.C. Cir. 1991), *Complex Consolidated Edison Co. of New York v. FERC*, 165 F.3d 992 (D.C. Cir. 1999), and *Transcontinental Gas Pipe Line Corp. v. FERC*, 518 F.3d 916 (D.C. Cir. 2008). In these cases, the court required FERC to, “outline[] with reasonable particularity the system-wide benefits which each new facility produces.” *Algonquin*, 948 F.3d at 1313, 1315 (this is not a theoretical exercise, but a question of fact dependent on “the impact the order would actually have on ultimate consumers”). See also *Complex Consolidated*, *supra*, 165 F.3d at 998, 1006 (affirming FERC’s holding that rolled-in rates were not just and reasonable based on FERC’s conclusion that “the alleged system benefits postulated by JMC Power [were] insubstantial”); *Transcontinental*, *supra*, 518 F.3d at 920 (affirming FERC’s order adopting incremental rates where “FERC . . . correctly concluded that existing customers would have . . . subsidized the Cherokee shippers if [the gas company] had been allowed to roll in rates”).

⁴⁰ *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992); see also *Village of Bethany v. FERC*, 276 F.3d 934, 937 (7th Cir. 2002) (“The overriding policy concern in a ratemaking proceeding is to establish rates that require each customer to bear a fair and proportional share of . . . costs.”)

evaluated “by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.”⁴¹ Thus there must be substantial and specific benefits to the system as a whole for the Commission to approve a rule that would result in system-wide costs.⁴² The Commission has also, in case after case, affirmed its support of the cost causation principle.⁴³

In his partial concurrence and partial dissent in Order No. 841-A, Commissioner McNamee explained the cost causation issue, there in relation to energy storage resources, noting that the Commission should account for “operational, safety and reliability concerns highlighted by commenters [that] may increase costs to the states or distribution utilities and, ultimately, to consumers.”⁴⁴ He further stated:

The majority also should not dismiss concerns over equity or cost allocation. When a distribution utility is concerned that it “will need to harden the underlying distribution system to support bidirectional power flows and pay for substantial metering upgrades” to accommodate [energy storage resources], and that the associated costs “could be trapped at the distribution level and allocated to end-users rather than wholesale market participants[,]” in my view the Commission should not flatly disclaim involvement. The majority is willing to assert jurisdiction over the distribution system through the participation model, but they are

⁴¹ *Midwest ISO Transmission Owners*, 373 F.3d 1361, 1368-69 (D.C. Cir. 2004).

⁴² *See, e.g., Transcontinental, supra*, 518 F.3d at 921 (“Rolling in the power costs of the Cherokee compressors forced existing Transco customers to subsidize the power costs of compressors they had no need for . . .”), *Algonquin*, 948 F.2d at 1313 (“What we do require, however, is that the Commission, before ordering a roll-in . . . offer more than a conclusionary statement that the existence of system-wide benefits renders it unjust to allocate facilities costs incrementally.”); *Complex Consolidated, supra*, 165 F.3d at 997 (“[T]he weight of the evidence favored the conclusion that the [new] facilities provided neither operational benefits nor additional reliability to Tennessee’s system customers.”).

⁴³ *New Dominion Energy Coop.*, 122 FERC ¶ 61,174, P 41 (2008), *citing Alabama Electric Coop., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982). *See also, California Power Exchange Corp.*, 106 FERC ¶ 61,196, P 17 (2004), (the “well-established principle of cost causation requires that costs should be allocated, where possible, to customers based on customer benefits and cost incurrence”). *See also Cal. Indep. System Operator Corp.*, 103 FERC ¶ 61,114, P 26 (2003) (“[w]hile this fundamental idea of matching costs to customers is often referred to in terms of cost causation, it has also often been described in terms of the costs which ‘should be borne by those who benefit from them’” (*quoting Gulf Power Co. v. FERC*, 983 F.2d 1095, 1100 (D.C. Cir. 1993))).

⁴⁴ Order No. 841-A, statement of Commissioner McNamee at P 19.

unwilling to confront or take responsibility for the practical ramifications of their decisions.⁴⁵

In the time since Commissioner McNamee wrote the above statement, the regulatory winds have shifted – the FERC majority has since prevailed in the courts in *NARUC v. FERC*⁴⁶ and explained its current view in Order No. 2222. The Commission clearly has the jurisdictional authority to revoke the Demand Response Opt-Out. However, the Commission should tread softly in removing RERRAs’ ability to prevent costs from being shifted to distribution systems by FERC orders. The Commission’s revocation of the Demand Response Opt-Out should be contingent on a continued finding that the benefits – whether they occur on the transmission or distribution system – are at least roughly commensurate with the imposed costs.

This is not a legal question. It is a practical and empirical question that should guide the Commission’s decision to fully exercise its jurisdiction or to show restraint. The question “What is the magnitude of the costs imposed by this FERC rule, not just on the transmission system but also the distribution system?” should be explored and weighed against the question “What is the magnitude of the benefits conferred by this FERC rule, not just on the transmission system but also on the distribution system?” Further, the Commission should use the well-established cost causation principle to evaluate any equity impacts that arise from the uneven incidence of costs and benefits caused by its actions – even if benefits outweigh costs overall, the cost causation principle requires FERC to dig deeper and make sure costs are borne by those who benefit from them.

In answering these important questions, the Commission should collaborate with individual RERRAs as well as the National Association of Regulatory Utility Commissioners and be sensitive to the possible (and perhaps growing) costs imposed by the Commission on regulators of the distribution system. To date, the Commission

⁴⁵ *Id.* at P 21 (footnotes omitted).

⁴⁶ *NARUC v. FERC*, 964 F.3d 1177, 1189-90 (D.C. Cir. 2020).

has not acknowledged the distribution-level costs it is imposing. In Order No. 841-A, for example, the Commission dismissed a concern raised by a load serving entity, a concern ELCON finds legitimate. FERC stated:

[W]e deny Xcel Energy Services' request for rehearing regarding a cost recovery mechanism for distribution utility upgrades and improvements required to implement Order No. 841. The requirements of Order No. 841 apply to the RTOs/ISOs, not distribution utilities, and therefore this request is outside the scope of this proceeding. As stated in Order No. 841, we are not changing the responsibilities of the distribution utilities or their ability to allocate any costs that they incur in operating and maintaining their respective power systems.⁴⁷

The above dismissal is not only insensitive to a valid concern but violates the cost causation principle. If costs caused directly by Commission regulations fall outside of the Commission's jurisdiction, are those costs always "outside the scope" of the relevant rulemaking proceeding? If so, what is the appropriate venue for challenging such costs? ELCON disagrees that the Commission can simply dismiss the costs caused by its rulemakings if their impacts are felt at the distribution level. In fact, we again reiterate our call for the Commission to study the impacts of its policies on the cost of delivered power.⁴⁸

Under the longstanding cost causation principle, the costs of revoking the Demand Response Opt-Out should be acknowledged and balanced with a specific and substantial showing of commensurate benefits. Thus, in connection with this rulemaking proceeding to revoke the Demand-Response Opt-Out, the Commission should vigorously pursue questions regarding costs imposed on (and benefits conferred to) the distribution system. The dismissal issued in Order No. 841-A is not reasoned decision-making, does not comport with the cost causation principle, and should not be

⁴⁷ Order No. 841-A, 167 FERC ¶ 61,154 at P 156.

⁴⁸ See Comments of ELCON to the Supplemental NOPR on Electric Transmission Incentives Policy under Section 219 of the Federal Power Act, Docket No. RM20-10-000 (June 25, 2021). See also ELCON's July 8, 2021 letter requesting a Congressional inquiry into the cost of electricity in the United States, including an evaluation of the impact of FERC policies on the cost and reliability of delivered power. Available at: <https://elcon.org/independent-study-of-the-cost-of-electricity/>

relied upon in this proceeding to ignore distribution-level costs created by FERC rules. The Commission's conclusory dismissal of the load serving entity's concern over "costs that they incur" – particularly when those costs are a direct result of a FERC rulemaking – is alarming and should not become the norm.

CONCLUSION

ELCON supports the NOI and initiation of a Commission rulemaking to remove the Demand Response Opt-Out, provided that in doing so the Commission does not dilute or outright ignore the cost causation principle.

Respectfully submitted,



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