Updates
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FERC Plants the Seeds for DER Aggregators' Participation in the RTO/ISO Markets: Work Must Be Done to See What Will Grow

The Federal Energy Regulatory Commission issued Order 2222 on September 17, 2020. The order amends its regulations with the expansive goal of removing barriers to distributed energy resource (DER) aggregations' participation in the capacity, energy, and ancillary service markets operated by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs).

While Order 2222 is an essential step towards incentivizing development of DERs by opening federally regulated RTO/ISO markets, it only plants the seeds for DER growth: FERC left critical work crafting DER aggregation participation models to be sorted out by the RTOs and ISOs. Given the broad range of known and future technologies that fit within FERC's definition of DER, this RTO/ISO process promises to be complex and contentious. Further, while FERC relied on recent U.S. District Court for the District of Columbia Circuit precedent to support its decision not to allow states the ability to prohibit DER participation in wholesale markets, states still retain substantial authority over the connection to and use of distribution systems where DERs are located. Moving forward, DERs will have to navigate the potentially complex and uncertain intersection between federal, state, and local regulation. It remains to be seen whether FERC's initiative in Order 2222 takes root as intended.

This order arises out of the same FERC inquiry that led to Order 841, in which FERC amended its regulations under the Federal Power Act to remove barriers to the participation of electric storage resources in RTO/ISO markets. However, unlike Order 841, which applied to storage connecting both to the transmission system and to the distribution system, Order 2222 is squarely aimed at small facilities located on the distribution systems regulated by the states. FERC adopted an expansive definition of DER that includes any resource located on the distribution system, any subsystem thereof or behind a customer meter. FERC intentionally adopted a technologically neutral definition of DER that includes not only existing technologies—like electric storage resources, distributed generation, demand response, energy efficiency, thermal storage, and electric vehicles and their supply equipment—but also technologies that have not yet been invented.

Order 2222 Requirements

In summary, the order requires each RTO/ISO to amend its tariff to establish DER aggregators as a category of market participant. These changes must allow DER aggregators to register their resources under one or more participation models that accommodate the physical and operational characteristics of those resources. Each RTO/ISO must establish a minimum size requirement for DER aggregations that does not exceed 100 kW. Additionally, each RTO/ISO must address technical considerations such as: locational requirements for DER aggregations; distribution factors and bidding parameters; information and data requirements; metering and telemetry requirements; and coordination among the regional grid operator, the DER aggregator, the distribution utility and the relevant retail regulatory authority. Through these mandated changes, FERC seeks to remove barriers in order to promote effective wholesale competition, innovation, efficient operation of resources, and appropriate risk allocation between consumers and producers.

Since important details have been left to individual RTO/ISOs to resolve, the RTO/ISO filings will likely be contentious, and regional differences in approach to participation models are likely to develop. An inherent tension exists between FERC's requirement that RTO/ISOs implement participation models that are flexible enough to accommodate the physical and operational characteristics of a wide variety of possible DER

aggregations and its requirement that, at the same time, the participation models must ensure that DER aggregations are able to meet the qualification and performance requirements of products offered into RTO/ISO markets. Qualifications and performance requirements that delineate a product necessarily limit the types of resources that can provide the product and can ultimately lead to the very kinds of barriers to participation that FERC is trying to remove. As a result, the RTO/ISO filings will be critical to determining what product definitions are acceptable to ensure RTO/ISOs can procure the services they need to reliably operate their systems, and what product definitions are deemed unnecessary barriers to DER aggregator participation.

Moreover, the focus on DERs connected to distribution systems and behind customer meters brought the issue of FERC's jurisdiction front and center once again, particularly as FERC decided that states will not be allowed to expressly prohibit DERs from participating in the RTO/ISO markets (the so-called "opt-out"). To support its jurisdictional authority, which was questioned by numerous parties in comments on the NOPR that preceded Order 2222, FERC relied heavily on the D.C. Circuit decision issued over the summer in *National Association of Regulatory Utilities Commissioners (NARUC) v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020), which upheld a very similar FERC rejection of state opt-out in Order 841. There, the court adopted a muscular defense of FERC's exclusive jurisdiction to determine who may participate in the wholesale markets, rooted in the Supremacy Clause of the U.S. Constitution. FERC's analysis in Order 2222 appears designed to track the *NARUC* court's analysis.

That said, while the *NARUC* court was clear that FERC is within its rights to preclude an express state opt-out, the states retain significant discretion to condition DER access to distribution systems and regulate both DER siting as well as distribution system planning, operations, and reliability. Moreover, FERC was careful to avoid overstepping the *NARUC* precedent in certain ways, such as declining to exercise jurisdiction over the distribution-level interconnection of DERs exclusively as part of a DER aggregation (though it did leave open application of its interconnection rules to stand-alone DERs, under existing precedent). Instead, FERC agreed with parties that state and local authorities, which have traditionally regulated DER interconnections, have the requisite experience, interest, and capacity to oversee these distribution-level interconnections. Thus, whether FERC's actions here actually result in explosive DER growth will depend not only on RTO/ISO participation model development, but also on state-by-state adoption of favorable conditions for DERs.

Effective Date

Order 2222 will be effective 60 days after publication in the federal register, and RTO/ISO compliance filings are due 270 days after publication of the order in the federal register.

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