UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Wholesale Competition in Regions with Organized Electric Markets	Docket No. RM07-19-001

REQUEST FOR CLARIFICATION, OR IN THE ALTERNATIVE REHEARING, OF THE AMERICAN PUBLIC POWER ASSOCIATION, THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, TRANSMISSION ACCESS POLICY STUDY GROUP, AND AMERICAN MUNICIPAL POWER, INC.

Pursuant to Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*, and Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713, the American Public Power Association ("APPA"), the National Rural Electric Cooperative Association ("NRECA"), the Transmission Access Policy Study Group ("TAPS"), and American Municipal Power, Inc. ("AMP") (collectively "Petitioners") hereby request clarification, or in the alternative rehearing, of the July 16, 2009 Order on Rehearing in the above-captioned proceeding, Order No. 719-A.[1]

Order No. 719-A took an important step in accepting, with modifications, the compromise proposed by APPA and TAPS with respect to the operation of aggregators of retail customers ("ARC") served by utilities with annual retail sales 4 million MWhs or less. If properly implemented, the compromise would substantially reduce the burden on small systems associated with Order No. 719,[2] which would have required a relevant

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[1] Wholesale Competition in Regions with Organized Electric Markets, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), 128 F.E.R.C. ¶ 61,059 (2009) ("Rehearing Order" or "Order No. 719-A").

[2] Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), III F.E.R.C. Stat. & Regs. ¶ 31,281, *on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), 128 F.E.R.C. ¶ 61,059 (2009).

electric retail regulatory authority ("RERRA") to enact a law or regulation expressly prohibiting such aggregation, if the RERRA wanted to prevent unsupervised third-party ARCs from bidding the demand response of the retail customers of such systems into organized wholesale markets to the detriment of the small systems' own demand response programs.

The Preamble of Order No. 719-A makes clear the Commission's intent to adopt this compromise in a manner that allows load serving entities ("LSE") to maintain their existing demand response programs and reduces barriers to new ones. Ambiguities and inconsistencies in the regulatory text, however, raise concerns that Order No. 719-A will be misinterpreted and applied, so as: (a) to create uncertainty and confusion as to the circumstances when the small system compromise approach applies; and (b) to have the unintended side effect of *discouraging* continued and expanded LSE demand response participation, by conditioning that participation on small systems undertaking the very burdens that the compromise intended to avoid.

We strongly support Order No. 719-A's small system compromise, but propose clarifying regulatory language to eliminate confusion and accomplish the Commission's expressed intent. Our proposed clarifications would:

1. Eliminate the inconsistency between the unless "prohibited" clause at the end of Section 35.28(g)(1)(i)(A) (as carried over, without change, from Order No. 719) and the unless "permitted" clause for small systems adopted in Order No. 719-A and reflected in Section 35.28(g)(1)(iii), in a manner that achieves the Commission's intent to apply that same test whether an ARC is acting for multiple small customers or is an individual retail customer bidding in its own demand response.

2. Revise Section 35.28(g)(1)(iii) to make clear that RERRA permission to aggregate demand response may be ARC-specific, thereby accommodating and preserving the RERRA's authority to ensure that the ARCs authorized to aggregate the demand response of retail customers subject to the RERRA's jurisdiction meet qualifications determined by the RERRA.

3. Ensure that the LSEs responsible in the RTO markets for the retail load of small utilities may bid in such retail customers' demand response without securing a resolution from the RERRA for each small utility—*i.e.*, without going through the same burdensome process that the compromise was rightly designed to avoid. This clarification would avoid creating a new, plainly unintended barrier to the continued and expanded demand response programs of LSEs (including joint action agencies ("JAA") and generation and transmission cooperatives ("G&T Cooperatives")) responsible in RTO markets for the retail load of small utilities; and place such LSEs on the same footing as large utilities undertaking demand response for their retail customers.

4. Facilitate LSE demand response participation by accommodating their designation of third-parties with appropriate technical expertise to more efficiently and effectively provide the demand response, as a number of municipal and cooperatives utilities are doing or considering, without requiring the RERRAs of each affected small system to enact a law or regulation permitting them to do so.

Specifically, to achieve these goals, APPA, NRECA, TAPS, and AMP recommend that the Commission adopt the following changes to the regulatory text:

18 C.F.R. § 35.28(b)(9) (new)

Aggregator of retail customers **means an entity that aggregates demand response bids (which are mostly from retail loads). An individual retail customer that bids its own demand response into a Commission-approved independent system operator's or regional transmission organization's organized markets shall be considered an aggregator of retail customers.**

18 C.F.R. § 35.28(g)(1)(i)(A)

Every Commission-approved independent system operator or regional transmission organization that operates organized markets based on competitive bidding for energy imbalance, spinning reserves, supplemental reserves, reactive power and voltage control, or regulation and frequency response ancillary services (or its functional equivalent in the Commission-approved independent system operator's or regional transmission organization's tariff) must accept bids from demand response resources in these markets for that product on a basis comparable to any other resources, if the demand response resource meets the necessary technical requirements under the tariff, and submits a bid under the Commission-approved independent system operator's or regional transmission organization's

bidding rules at or below the market-clearing price**, subject to subsection (iii).** ~~unless not permitted by the laws or regulations of the relevant electric retail regulatory authority.~~

18 C.F.R. § 35.28(g)(1)(iii)

Aggregation of retail customers. Each Commission-approved independent system operator and regional transmission organization must accept **a** bid~~s~~ from an aggregator of retail customers that aggregates the demand response of: (1) the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, and (2) the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by ~~an~~ **that** aggregator of retail customers **or where the demand response bid is submitted by the load-serving entity responsible for that retail customer's load in such organized markets or such load-serving entity's designee**. An independent system operator or regional transmission organization must not accept **a** bid~~s~~ from an aggregator of retail customers that aggregates the demand response of: (1) the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, where the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into organized markets by ~~an~~**that** aggregator of retail customers, or (2) the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by ~~an~~ **that** aggregator of retail customers**, or the demand response bid is submitted by the load-serving entity responsible for that retail customer's load in such organized markets or such load-serving entity's designee**.

SPECIFICATIONS OF ERROR

1. Order No. 719-A, in properly deciding that changes to the regulatory text were needed to reduce the burden on small utilities with annual retail sales of 4 million MWhs or less, erroneously implemented those changes in a manner that created an inconsistency between the unless "prohibited" clause at the end of Section 35.28(g)(1)(i)(A) (as carried over, without change, from Order No. 719) and the unless "permitted" clause for small systems adopted in Order No. 719-A and

reflected in Section 35.28(g)(1)(iii). The Commission shoud modify or clarify the regulatory text to correct the inconsistency, while achieving the Commission's intent to apply that same test whether an ARC is acting for multiple retail customers or is an individual retail customer bidding in its own demand response.

2. The Commission, in the new regulatory text of Section 35.28(g)(1)(iii), erroneously failed to make clear that RERRA permission to aggregate demand response may be ARC-specific, thereby failing to clearly preserve and accommodate the RERRA's authority to ensure that the ARCs authorized to aggregate the demand response of retail customers subject to the RERRA's jurisdiction meet qualifications determined by the RERRA.

3. Order No. 719-A, in properly deciding that changes to the regulatory text were needed to reduce the burden on small utilities with annual retail sales of 4 million MWhs or less, erroneously failed to implement those changes in a manner that ensures the LSEs responsible in the RTO markets for the retail load of small utilities may bid in such retail customers' demand response without securing a resolution from the RERRA for each small utility—*i.e.*, without going through the same burdensome process that the compromise was rightly designed to avoid. The regulatory text should be modified or clarified: (a) to avoid creating a new, plainly unintended barrier to the continued and expanded demand response programs of LSEs (including joint action agencies ("JAA") and generation and transmission cooperatives ("G&T Cooperatives")) responsible in RTO markets for the retail load of small utilities; and (b) to place such LSEs on the same footing as large utilities undertaking demand response for their retail customers.

4. The Commission erred by failing to facilitate LSE demand response participation by clearly accommodating designation by LSEs of third-parties with appropriate technical expertise to more efficiently and effectively provide the demand response, as a number of municipal and cooperatives utilities are doing or considering, without requiring the RERRAs of each affected small system to enact a law or regulation permitting them to do so.

STATEMENT OF ISSUES

1. Did Order No. 719-A, in properly deciding that changes to the regulatory text were needed to reduce the burden on small utilities with annual retail sales of 4 million MWhs or less, erroneously implement those changes in a manner that created an inconsistency between the unless "prohibited" clause at the end of Section 35.28(g)(1)(i)(A) (as carried over, without change, from Order No. 719) and the unless "permitted" clause for small systems adopted in Order No. 719-A and reflected in Section 35.28(g)(1)(iii)? Should the regulatory text be modified to correct the inconsistency, while achieving the Commission's intent to apply that same test whether an ARC is acting for multiple retail customers or is an individual retail customer bidding in its own demand response? Order No. 719, PP 3 n.3, 68-69, 158; Order No. 719-A, P 50.

2. Did the Commission, in the new regulatory text of Section 35.28(g)(1)(iii), erroneously fail to make clear that RERRA permission to aggregate demand response may be ARC-specific, thereby failing to clearly preserve and accommodate the RERRA's authority to ensure that the ARCs authorized to aggregate the demand response of retail customers subject to the RERRA's jurisdiction meet qualifications determined by the RERRA? Order No. 719-A, PP 50, 54, 67-68; Order No. 719, PP 49 n.78, 158 n.212.

3. Did Order No. 719-A, in properly deciding that changes to the regulatory text were needed to reduce the burden on small utilities with annual retail sales of 4 million MWhs or less, erroneously fail to implement those changes in a manner that ensures the LSEs responsible in the RTO markets for the retail load of small utilities may bid in such retail customers' demand response without securing a resolution from the RERRA for each small utility—*i.e.*, without going through the same burdensome process that the compromise was rightly designed to avoid? Should the regulatory text be modified or clarified: (a) to avoid creating a new, plainly unintended barrier to the continued and expanded demand response programs of LSEs (including joint action agencies ("JAA") and generation and transmission cooperatives ("G&T Cooperatives")) responsible in RTO markets for the retail load of small utilities; and (b) to place such LSEs on the same footing as large utilities undertaking demand response for their retail customers? Order No. 719-A, P 67; *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 F.E.R.C. ¶ 61,283, P 29, n.26, *reh'g granted in part*, 125 F.E.R.C. ¶ 61,061 (2008) (recognizing the important role of demand response in reducing an LSE's load subject to resource adequacy requirements); ISO-New England Demand Response Programs: CMEEC Experience, at 2 (2007) (Attachment B to TAPS ANOPR Comments), *available at* eLibrary Accession No. 20070914-5137; Wholesale Competition in Regions with Organized Electric Markets, Advanced Notice of Proposed Rulemaking, 72 Fed. Reg. 36,276, 36,283 (proposed July 2, 2007), IV F.E.R.C. Stat. & Regs. ¶ 32,617, P 52 n.52, *comment period extended*, 72 Fed. Reg. 44,437 (Aug. 8, 2007); Federal Power Act, Section 217, 16 U.S.C. § 824*q*; Long-Term Firm Transmission Rights in Organized Electricity Markets, Order No. 681, 71 Fed. Reg. 43,564 (Aug. 1, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,226, *corrected*, 71 Fed. Reg. 46,078 (Aug. 11, 2006), *clarified*, Order No. 681-A, 71 Fed. Reg. 68,440 (Nov. 27, 2006), 117 F.E.R.C. ¶ 61,201 (2006), *clarified*, Order No. 681-B, 74 Fed. Reg. 13,103 (Mar. 26, 2009), 126 F.E.R.C. ¶ 61,254 (2009), *appealed sub nom. Sacramento Mun. Util. Dist. v. FERC*, No. 09-1141 (D.C. Cir. filed May 18, 2009).

4. Did the Commission err by failing to facilitate LSE demand response participation by clearly accommodating designation by LSEs of third-parties with appropriate technical expertise to more efficiently and effectively provide the demand response, as a number of municipal and cooperatives utilities are doing or considering, without requiring the RERRAs of each affected small system to enact a law or regulation permitting them to do so? Order No. 719, PP 19, 48, 54, 274-75.

DISCUSSION

I. ORDER NO. 719-A RIGHTLY INCLUDED A COMPROMISE AGGREGATION PROVISION FOR SMALL SYSTEMS

Responding to arguments raised (including by APPA, NRECA, and TAPS) that the retail aggregation regime adopted in Order No. 719 exceeded the Commission's FPA jurisdiction, unlawfully intruded into the terms and conditions of retail electric service regulated by the RERRAs of public power systems and cooperatives, and significantly burdened small systems, on rehearing the Commission rightly adopted a structure for utilities with annual retail sales of 4 million MWhs or less that relieves them of the burden of adopting new laws or regulations (Order No. 719-A, PP 50-51, footnotes omitted):

> Some rehearing requests, including those from TAPS and Joint Petitioners, ask us to assume that an ARC may not participate in RTO or ISO markets if the relevant state or local laws and regulations are unstated or do not clearly allow ARCs to bid into wholesale markets. We will grant rehearing only to the extent consistent with the compromise proposal by APPA and TAPS based on the RFA threshold of 4 million MWh as modified below. …
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> However, as discussed below, we agree with APPA and TAPS that it is reasonable to take a different approach here with small utilities. The Commission has previously distinguished small utilities using a 4 million MWh cutoff for purposes of granting waivers from Order No. 889's standards of conduct for transmission providers or determining whether a specific cooperative should be considered a non-public utility outside the scope of a refund obligation involving the California energy crisis. Similarly, Congress used the 4 million MWh cutoff in EPAct 2005 when amending exclusions in section 201(f) of the FPA to include small electric cooperatives. Congress also used this same cutoff to exempt small utilities from compliance with any rules or orders imposed under section 211A of the FPA, involving open access by unregulated transmitting utilities. We believe the same considerations underlying those actions by Congress and the Commission

> apply here. Thus, we will grant rehearing and adopt herein APPA's and TAPS's alternative proposal, with modifications. We direct RTOs and ISOs to amend their market rules as necessary to accept bids from ARCs that aggregate the demand response of: (1) the customers of utilities that distributed more than 4 million MWh in the previous fiscal year, and (2) the customers of utilities that distributed 4 million MWh or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an ARC. RTOs and ISOs may not accept bids from ARCs that aggregate the demand response of: (1) the customers of utilities that distributed more than 4 million MWh in the previous fiscal year, where the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into organized markets by an ARC, or (2) the customers of utilities that distributed 4 million MWh or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an ARC.

Petitioners support Order No. 719-A's small system compromise and emphasize why it needs to be preserved and clarified, as proposed below.

For most public power systems and distribution cooperatives (and especially for those which are not in a retail access state or that have opted out of retail competition pursuant to the applicable laws of a retail access state), it is reasonable to presume that the exclusive right and obligation to serve their citizens and ratepayers with electricity at retail includes the right to aggregate their customers' willingness *not* to purchase such electricity—*i.e.*, to aggregate their demand response. Indeed, retail customers' demand response has long been a resource in the power supply portfolio of such entities or the municipal JAAs and G&T Cooperatives responsible for their loads in RTO markets to meet their service obligations.

These systems would have been highly unlikely to have specifically legislated in advance to prevent the eventuality that external third parties would aggregate the demand

response of their retail customers and bid this demand response into wholesale electricity markets. In other words, a public power system's or cooperative's silence would be reasonably construed as an instruction to the RTOs that no such aggregation is allowed by the public power system's or cooperative's RERRA. Nevertheless, if the RERRA of such a small system wanted to avoid uncoordinated activity by multiple third-party ARCs to the detriment of the small system's own demand response program, Order No. 719's aggregation regime would have required it to enact a law or regulation expressly prohibiting aggregations by third-party ARCs.

As explained in the Requests for Rehearing and comments on the Commission's proposed rulemaking of APPA, NRECA, and TAPS, this burden would be severe.[3] For the individual RERRAs of over 1300 small public power systems each to consider an affirmative legislative pronouncement on this issue would cumulatively impose a very substantial FERC-imposed burden. Likewise for the individual RERRAs of the more than 850 small distribution cooperatives to take up a board resolution on this matter would impose a substantial burden. Many of these RERRAs deal only with retail electric matters and have little knowledge of the Federal Energy Regulatory Commission, the Federal Power Act, or the Commission's jurisdiction over wholesale electric markets. In cases where the public system or distribution cooperative is part of a JAA or G&T

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[3] For example, as explained in the November 17, 2008 Request for Rehearing of the American Public Power Association, National Rural Electric Cooperative Association, and California Municipal Utilities Association at 16-17 (*available at* eLibrary Accession No. 20081117-5103), a presumption of implicit authority to allow ARCs to aggregate bids simply makes no sense in California, where there are no longer "laws or regulations" (which can take a variety of forms, *e.g.*, approved tariff provisions, city or district ordinances, etc.) dealing with new direct access since direct access was suspended in most of the state during the 2000-2001 market crisis. CMUA members have simply not structured their retail rules and ordinances as if retail choice was an option. To now require the RERRAs of all of these public power systems to take affirmative actions to consider the issue of retail aggregation by ARCs, and the potential

Cooperative, the distribution entity and its governing body for setting retail rates is likely to have nothing to do with RTO markets; the JAA or G&T Cooperative is typically the sole interface with the RTO for the retail loads served by the distribution entity.[4]

While the proceedings required for a small system's RERRA to enact a law or regulation specifically addressing ARCs may not seem onerous from inside the Beltway, the view may be very different in small cities and towns where, for example, a limited staff, or even the town clerk, must coordinate such matters for the city council or utility board. The process for passing this kind of law or regulation often requires, in addition to drafting the provision, a review process including multiple rounds of consultation with each city attorney, the forwarding of draft legislation to each city council, the education of city council members who do not regularly deal with complex wholesale electricity market issues or RTOs, and notice and/or multiple "readings."[5] Requiring the city council of every municipal electric system and the board of every cooperative distribution

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impact of such action on their own public power systems' demand response activities, is a very substantial undertaking with the end result of uncertain value.

[4] Municipal members of a JAA are often under very long-term full-requirements contracts, which support the JAA's bonds and enable it to carry out its assigned power supply and load aggregation functions; G&T Cooperative contracts are often similarly very long-term.

[5] For example, an APPA small utility member reports that the following procedures are fairly typical for municipal electric utilities in Ohio: Once drafted, an ordinance usually requires three separate "readings." A municipal charter may provide for a different number. The requirement for multiple readings may usually be waived by a super-majority of Council members, but if not waived the process can take as long as six weeks since many Councils meet only bi-weekly (twice a month). Once an ordinance is passed, it generally takes 30 days after passage to take effect. During this period, the measure would be subject to referendum. The 30-day waiting period may usually be waived by the addition of "emergency language," if the measure must go into effect immediately in order to preserve the public peace, health or welfare. Ordinances with "emergency language" generally require a supermajority for passage. However, if such a measure is not immediately necessary for the preservation of the public peace, health or welfare a court may invalidate an emergency ordinance on that basis. Therefore, most municipal ordinances in Ohio will take at least 4 weeks to become effective, and if the requirement for three separate readings is not waived the process can take over two months. This time period would start after the ordinance has been drafted by competent counsel. Some communities have Boards of Trustees of Public Affairs ("BPAs") that must first pass resolutions recommending legislative action to the Council regarding utility matters, which can easily add another month to the legislative process.

system in an RTO to expressly address the issue through legislation or regulation—even where the entity does not allow retail access—is therefore a huge undertaking.

For example, AMP, which is a member of APPA and TAPS, serves 123 municipal electric systems in the Midwest Independent Transmission System Operator ("Midwest ISO") and PJM Interconnection L.L.C. ("PJM"); APPA and TAPS member Indiana Municipal Power Agency serves 51 municipal electric systems in the Midwest ISO and PJM; APPA and TAPS member Missouri River Energy Services serves 60 municipal electric systems in four states, 23 of which are within the Midwest ISO footprint; and the list goes on. Many of these member systems are very small. Getting the city council or other governing body of each such public power system to explicitly address the retail demand response bidding and ARC issues through legislation or regulation would be a Herculean task. The burden would be equally heavy on the myriad small distribution cooperatives.

APPA, NRECA, TAPS, and AMP support the compromise adopted in Order No. 719-A; if properly implemented, it would substantially solve the concerns that caused us to seek rehearing of the ARC-related provisions of Order No. 719, while promoting demand response.[6] As discussed below, we nevertheless seek limited clarification, or in

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[6] By creating an exception for small systems, the Commission ensures that any RERRA that wishes to allow third-party demand response aggregation can do so, without unduly burdening hundreds of smaller systems. In addition, by making it easier for RERRAs to join at their own pace, the small system compromise allows for adoption of such programs as they build credibility, and could significantly reduce administrative burdens in the long-run. Little is currently known about the effectiveness of the new retail demand response bidding programs made available through Order Nos. 719 and 719-A. Meanwhile, the impacts and costs for LSEs of allowing retail demand response and third-party ARCs could be very significant. If forced to make a choice today, many RERRAs would take the immediate, pre-emptive step of passing legislation prohibiting such aggregation, thus erecting barriers to demand response. (In fact, a number of public power systems passed laws or regulations to this effect in the wake of Order No. 719, as a protective measure.) If an LSE's retail customers later decide, once everyone has gained experience with wholesale bidding of retail demand response and third-party ARCs, that they *do* want to participate in the RTO's retail demand response regime, either directly or through a third-party ARC, extensive work will be

the alternative rehearing, to assure that the intent of the compromise is realized, to prevent confusion and uncertainty, and to reduce unintended barriers to the participation of retail demand response in RTO markets.

II. THE COMMISSION SHOULD ELIMINATE THE INTERNAL INCONSISTENCY IN THE REGULATORY TEXT IN A WAY THAT ENSURES DEMAND RESPONSE BY AN INDIVIDUAL RETAIL CUSTOMER IS TREATED THE SAME AS DEMAND RESPONSE BY ARCS

Order No. 719-A modified the regulatory text of Section 35.28(g)(1)(iii) (emphasis added), so that an RTO must accept the bid of an ARC that aggregates the demand response of the customers of small utilities only "where the relevant electric retail regulatory authority *permits* such customers' demand response to be bid into organized markets by an aggregator of retail customers," and is prohibited from accepting such bids unless the RERRA so *permits*. Order No. 719-A, however, failed to modify the pre-existing parallel language in Section 35.28(g)(1)(i)(A), which continues to allow aggregation by ARCs unless expressly *prohibited* by the RERRA. To eliminate this inconsistency in the regulatory text, Petitioners request that the Commission clarify or grant rehearing to conform Section 35.28(g)(1)(i)(A) to the new requirements of Section 35.28(g)(1)(iii), as modified by Order No. 719-A.[7]

The inconsistency created by Order No. 719-A could be remedied by duplicating the language of Section 35.28(g)(1)(iii) at the end of Section 35.28(g)(1)(i)(A). In lieu of adding that substantial amount of repetitive regulatory text, we suggest the following

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necessary to undo those laws and regulations. Thus the Commission's adoption of the small system compromise, if implemented appropriately, significantly reduces the burdens on small systems while advancing the Commission's objective of promoting demand response.

[7] As noted in Order No. 719-A, TAPS' request for rehearing of Order No. 719 raised the need to make parallel corrections in both of these sections of the regulation. Order No. 719-A, P 22 n.32.

more limited changes that would eliminate the new inconsistency, while maintaining the intent of Order No. 719 and the original regulatory language:

> *18 C.F.R. § 35.28(b)(9) (new)*
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> ***Aggregator of retail customers*** **means an entity that aggregates demand response bids (which are mostly from retail loads). An individual retail customer that bids its own demand response into a Commission-approved independent system operator's or regional transmission organization's organized markets shall be considered an aggregator of retail customers.**
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> *18 C.F.R. § 35.28(g)(1)(i)(A)*
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> Every Commission-approved independent system operator or regional transmission organization that operates organized markets based on competitive bidding for energy imbalance, spinning reserves, supplemental reserves, reactive power and voltage control, or regulation and frequency response ancillary services (or its functional equivalent in the Commission-approved independent system operator's or regional transmission organization's tariff) must accept bids from demand response resources in these markets for that product on a basis comparable to any other resources, if the demand response resource meets the necessary technical requirements under the tariff, and submits a bid under the Commission-approved independent system operator's or regional transmission organization's bidding rules at or below the market-clearing price**, subject to subsection (iii).** ~~unless not permitted by the laws or regulations of the relevant electric retail regulatory authority.~~

This clarification expressly incorporates the new small system requirements of Section 35.28(g)(1)(iii) into Section 35.28(g)(1)(i)(A). In addition, by clarifying that the term "ARC" includes both individual retail customers and entities that aggregate the demand response of multiple retail customers, it preserves the intent of the original language of Section 35.28(g)(1)(i)(A), which applied the same RERRA-related

requirements to *all* demand response resources, including retail customers that individually bid their demand response directly into the RTO's wholesale markets.

The proposed new definition of "aggregator of retail customers" is consistent with the Commission's intent to treat an individual retail customer the same as an aggregator of multiple retail customers. The ARC definition in footnote 3 of the Order No. 719 Preamble is very broad: "We will use the phrase 'aggregator of retail customers,' or ARC, to refer to an entity that aggregates demand response bids (which are mostly from retail loads)." In addition, Order No. 719 states that, "[a]n ARC can bid demand response either on behalf of only one retail customer or multiple retail customers," and that "[a]n individual customer may serve as an ARC on behalf of itself and others." Order No. 719, P 158. It further states (*id.*), "Demand response bids from an ARC must not be treated differently than the demand response bids of [a] … large industrial customer." Similarly, the Preamble of Order No. 719-A refers repeatedly to retail customer demand response participating in RTO markets "either individually or through an ARC," and does not distinguish between those two methods of participation. *See*, *e.g.*, Order No. 719-A, PP 68-69.

Indeed, the paragraph in Order No. 719-A that adopts the small system aggregation compromise mixes and matches references to ARCs and individual retail customers bidding demand response into wholesale markets, emphasizing the role of the RERRA in both instances without distinction (P 50, emphasis added):

> Some rehearing requests, including those from TAPS and Joint Petitioners, ask us to assume that *an ARC* may not participate in RTO or ISO markets if the relevant state or local laws and regulations are unstated or do not clearly allow ARCs to bid into wholesale markets. We will grant rehearing only to the extent consistent with the compromise

> proposal by APPA and TAPS based on the RFA threshold of 4 million MWh as modified below. … While we leave it to the relevant retail authority to decide the *eligibility of retail customers*, their decision or policy should be clear and explicit so that the RTO or ISO is not tasked with interpreting ambiguities.

Thus, while neither Order No. 719 nor Order No. 719-A expressly states that individual retail customers seeking to bid their own demand response into RTO wholesale markets will always be deemed an "aggregator of retail customers," these Orders indicate an intent to apply the same rules to individual retail customers and entities that aggregate the demand response of multiple retail customers. Significantly, nowhere in Order Nos. 719 or 719-A is there any suggestion of an intent to apply a different standard to determining when an individual retail customer may bid its own demand response into RTO markets and when an ARC may do so. Indeed, Order No. 719's regulatory language consistently covered both situations. The potential inconsistency or confusion arose only with the insertion of the small system compromise language in Section 35.28(g)(1)(iii)'s ARC-specific provision without including parallel language in the more general provision, Section 35.28(g)(1)(i)(A).

Individual retail customer demand response is a very significant issue for small utilities; these are not *de minimis* loads from the perspective of such utilities. For some small municipal systems in Michigan, such as the City of Zeeland, the top ten industrial customers can account for more than 60% of the city's total electric sales. APPA and TAPS member WPPI Energy has three individual retail customers, each with a load that is larger than the total load of each of 41 of WPPI's 51 member utilities; and the aggregate peak demand of the fifteen largest industrial end-users of the 36 Oklahoma municipal distribution systems served by Oklahoma Municipal Power Agency

("OMPA") exceeds the combined aggregate peak demand of fifteen of OMPA's member cities. The load shifts of an individual agricultural retail customer can likewise be a large percentage of the total load of the small rural electric cooperative that serves it. The Commission's reasons for adopting the RERRA compromise approach for small utilities in Order No. 719-A, apply with equal force to both individual retail customers and to aggregators of multiple retail customers that bid their demand response into wholesale markets.

APPA, NRECA, TAPS, and AMP urge the Commission to adopt their proposed revised regulatory language, which would reduce barriers to demand response by avoiding confusion and controversy, and by assuring that a single, consistent set of rules applies to retail customers bidding their demand response into organized markets "either individually or through an ARC," without distinguishing between those two methods of participation, as the Commission appears to intend. *See*, *e.g.*, Order No. 719-A, PP 68-69. If the Commission does not clarify the regulatory text, it should at least make clear in the Preamble of Order No. 719-B that: (1) individual retail customers that bid their own demand response are subject to the same provisions as ARCs as to when an RTO may accept their bids; and (2) the more specific language of Section 35.28(g)(1)(iii), with its compromise language for small systems, is intended to cover individual retail customers, as well as aggregators of multiple retail customers.

III. THE COMMISSION SHOULD CLEARLY PRESERVE AND ACCOMMODATE THE AUTHORITY OF RERRAS TO ENSURE THAT ARCS AUTHORIZED TO AGGREGATE THE DEMAND RESPONSE OF THEIR RETAIL CUSTOMERS MEET QUALIFICATIONS

Although Order No. 719-A emphasized the role of RERRAs in determining whether, and setting the terms on which, an ARC may aggregate the demand response of

retail customers within their jurisdiction, the regulatory language requires clarification to preserve and accommodate the authority of RERRAs to fulfill that important role.

Order No. 719-A made express that RERRAs retain authority to place limits on which ARCs may aggregate retail customers' demand response and under what terms (P 68):

> It 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.

Order No. 719-A also expressly recognized a RERRA's continuing role in addressing the complexity of allowing the sale of demand response into organized wholesale markets by retail customers subject to the RERRA's jurisdiction, whether those sales are made by the customer on its own or through an entity aggregating the demand response of multiple retail customers, and the implications of such activities for existing programs and retail rates (PP 54, 68):

> We recognize that demand response is a complex matter that is subject to the confluence of state and federal jurisdiction. The Final Rule's intent and effect are neither to encourage or require actions that would violate state laws or regulations nor to classify retail customers and their representatives as wholesale customers, as Ohio PUC asserts. The Final Rule also does not make findings about retail customers' eligibility, under state or local laws, to bid demand response into the organized markets, either independently or through an ARC. The Commission also does not intend to make findings as to whether ARCs may do business under state or local laws, or whether ARCs' contracts with their retail customers are subject to state and local law. Nothing in the Final Rule 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.
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> * * *
>
> TAPS and Joint Petitioners emphasize that existing retail aggregation programs provide significant benefits that would be adversely impacted or lost by the Final Rule's ARC requirement. This is not the proper forum to address these issues, which are for the relevant electric retail regulatory authority to consider. It 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. Therefore, TAPS and Joint Petitioners may raise these issues with the relevant electric retail regulatory authority.

See also Order No. 719-A, P 50 (the Commission is leaving eligibility to the RERRA); Order No. 719-A, P 67 (emphasis added) (expressly preserving an RERRA's authority and stating the Commission's intent not to "prevent [RERRAs] from: (1) preserving existing aggregation programs, *in whatever fashion is appropriate for its jurisdictional area*; or (2) authorizing retail customers, via an ARC, to participate in wholesale markets").

But Order No. 719-A's strong statements that it is up to the RERRA to determine "whether and how" (P 68) to permit participation in wholesale demand response programs can only be given effect if the permission granted by an RERRA to aggregate retail customer demand response is ARC-specific, so that it can be appropriately regulated (*e.g.*, conditioned on adherence to the requirements and contract terms the RERRA establishes for participation). Conversely, RERRAs will not have that crucial capability if the regulatory language assumes that permission for ARC aggregation of

retail customer demand response necessarily extends to all ARCs, regardless of whether they meet the RERRA's requirements.

However, Order No. 719-A's regulatory language creates an ambiguity that some may seek to use to restrict the RERRA's ability to determine and enforce qualifications as to which ARCs may aggregate the demand response of retail customers subject to its jurisdiction and on what terms. Petitioners therefore request clarification, or in the alternative rehearing, and urge the Commission to adopt the following proposed modest changes to the language of Section 35.28(g)(1)(iii) that are narrowly crafted to eliminate any question about the Commission's acceptance of the RERRA's authority to protect its retail customers. As quoted in full above, we propose to particularize the RTO's obligations to "accept **a** ~~bids~~ from an aggregator of retail customers" where, for small systems, "the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by ~~an~~ **that** aggregator of retail customers." By parallel changes we would particularize the prohibition against an RTO accepting an ARC's bid for retail customers of large systems where the RERRA "prohibits such customers' demand response to be bid into organized markets by ~~an~~**that** aggregator of retail customers," and for small systems, "unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by ~~an~~ **that** aggregator of retail customers." These modest proposed changes to the regulatory text will reduce barriers to demand response by facilitating the RERRA's ability to establish and enforce qualifications for ARCs (which, in practice, necessarily would be applied on an ARC-by-ARC basis), thus encouraging their authorization. As

demonstrated above, these changes are intended to effectuate Order No. 719-A's stated intent to preserve the role and flexibility of RERRAs.

Further, these changes are fully consistent with the Commission's desire not to put the RTO in the middle, interpreting local laws and ordinances. *See* Order No. 719, PP 49 n.78, 158 n.212; Order No. 719-A, P 50. The RTO can implement this text in a "no muss, no fuss" way by requiring the ARC to certify to the RTO that it is not prohibited from aggregating the demand response of retail customers of a large utility, or that it has been granted permission to aggregate the demand response of retail customers of a small utility.

If the Commission does not accept the proposed clarifications to the regulatory text, the Preamble to Order No. 719-B at least should make clear the Commission's intent to allow RERRAs to determine which specific ARCs satisfy their qualifications (*e.g.*, credit worthiness) and other requirements (*e.g.*, providing needed coordination with the LSE) to aggregate their retail customers' demand response. Thus, the Commission should make clear that it is not restricting a RERRA's authority to permit some ARCs from operating in their jurisdiction and not others.

IV. THE COMMISSION SHOULD CLARIFY THAT LSES RESPONSIBLE IN THE RTO MARKETS FOR THE RETAIL LOAD OF SMALL UTILITIES SHOULD BE ABLE TO BID SUCH DEMAND RESPONSE WITHOUT SECURING A RESOLUTION FROM THE RERRA FOR EACH SMALL UTILITY

In response to rehearing requests submitted by APPA, NRECA, and TAPS expressing concern that Order No. 719's authorization of direct wholesale market participation by third-party ARCs, unless expressly prohibited by the RERRA's laws or regulations, could interfere with significant and highly beneficial LSE demand response

activities already underway among our members,[8] Order No. 719-A made clear (*id.* P 67) that "[t]he intent of the Final Rule is not to interfere with, undermine, or change existing demand response programs." According to the Commission (*id.*),

> Nothing in the Final Rule would require a state or local regulator to take any action or prevent them from:
> (1) preserving existing aggregation programs, in whatever fashion is appropriate for its jurisdictional area; or
> (2) authorizing retail customers, via an ARC, to participate in wholesale markets.

The regulatory text added by Order No. 719-A, however, may unwittingly undermine the Commission's clear intent, if RTOs treat an LSE aggregating the demand response of the retail load for which it is responsible in RTO markets as an ARC subject to Order No. 719-A's new small system compromise requirements.

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[8] For example, as explained in TAPS' November 17, 2008 Request for Rehearing at 14-16 (*available at* eLibrary Accession No. 20081117-5117), LSEs can integrate their retail demand response programs into their power supply planning, and through that process deliver significant value to all of their customers by avoiding or deferring generation investment. Some TAPS members have been able to avoid purchases of a block of power for the peak season by implementing programs that commit retail customers to interruptions when directed by the LSE. Because those interruptions are predictable and can be coordinated with the LSE's power supply plans, LSEs can get additional value for all of their customers by integrating demand response into their planning and avoiding the need to carry planning reserves for interruptible load. The Commission has recognized the important role of demand response in reducing an LSE's load subject to resource adequacy requirements. For example, under the Midwest ISO's Resource Adequacy Requirement, an LSE may deduct certain demand response resources from the firm load for which it must meet MISO's planning reserve margin. *Midwest Indep. Transmission Sys. Operator, Inc*., 122 F.E.R.C. ¶ 61,283, P 29, n.26, *reh'g granted in part*, 125 F.E.R.C. ¶ 61,061 (2008).

LSE programs have significant impact. While the load of APPA and TAPS member Connecticut Municipal Electric Energy Cooperative ("CMEEC") is only about 1.5% of ISO-New England's total load, when ISO-New England called upon CMEEC during its August 6, 2006 "OP-4" emergency, CMEEC's demand response represented over 12% of total demand response in ISO-NE during that event. *See* ISO-New England Demand Response Programs: CMEEC Experience, at 2 (2007), Attachment B to TAPS ANOPR Comments (*available at* eLibrary Accession No. 20070914-5137). When MISO called a reliability emergency in August 2006, LSEs responded by contributing close to 3,000 MW in demand reductions. *See* Wholesale Competition in Regions with Organized Electric Markets, Advanced Notice of Proposed Rulemaking, 72 Fed. Reg. 36,276, 36,283 (proposed July 2, 2007), IV F.E.R.C. Stat. & Regs. ¶ 32,617, P 52 n.52, *comment period extended*, 72 Fed. Reg. 44,437 (Aug. 8, 2007).

Order No. 719 is ambiguous as to whether such LSEs[9] are included within the definition of ARC. Paragraph 158 of Order No. 719, for example, states that "Demand response bids from an ARC must not be treated differently than the demand response bids of an LSE…," suggesting that an LSE bidding the demand response of the retail load for which it is responsible in RTO markets may be distinct from ARCs. *See also* Order No. 719-A, P 36 (noting "that many public power systems and cooperatives have effectively acted as ARCs for their retail customers," suggesting such LSEs are not ARCs). However, the ARC definition from footnote 3 of Order No. 719—which is quoted in the first sentence of our proposed definition of "aggregator of retail customers"—is very broad and appears to include LSEs within its scope.

The problem is that if an LSE aggregating the demand response of the retail load for which it is responsible in the RTO market is considered to be an ARC, then LSEs that want to continue or enhance their existing demand response programs (by bidding their own demand response into RTO markets) may have to secure laws and regulations expressly permitting such aggregation from the RERRA for each affected small system. Thus, to continue or enhance existing LSE demand response programs—as the Commission plainly envisions and intends—may entail the burdensome legislative process that Order No. 719-A's small system compromise was specifically designed to avoid. This problem is compounded if the LSE is a JAA for scores of individual

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[9] Although municipal JAAs and G&T Cooperatives typically do not directly serve retail customers, it is the JAA or G&T Cooperative that bears responsibility for its member distribution utility's retail loads in RTO markets. The retail distribution member typically has nothing to do with the RTO. The JAA's and G&T Cooperative's role as LSE in this context is recognized in Federal Power Act Section 217's provision for assigning long-term transmission rights, Order No. 681's implementation of Section 217(b)(4) in organized markets, and in myriad market rules. Thus, our use of the term "[LSE] responsible for that retail customer's load in such organized markets" is expressly intended to encompass JAAs and G&T Cooperatives.

municipal utility members, or a G&T Cooperative that provides electricity to many distribution cooperative members.

To avoid creating a new obstacle to the demand response programs of such entities, FERC should adopt regulatory language clarifying that LSEs (including JAAs and G&T Cooperatives) with responsibility in the RTO market for the retail customer load of small utilities may, as an adjunct to their load-serving obligations, continue their demand response programs and enhance them by bidding in the demand response of those retail customers without requiring each RERRA to adopt permissive legislation or regulations. Specifically, as shown in the blacklined text on page 5 above, Section 35.28(g)(1)(iii) should be revised, so that for small systems, a "demand response bid [] submitted by the load-serving entity responsible for that retail customer's load in such organized markets" can be accepted by an RTO without the RERRA for each affected small system first enacting a law or regulation to permit continuation or enhancement of the LSE's demand response program.[10]

The requested clarification would promote demand response. It would avoid the need to educate small utilities and their RERRAs about the need to take such legislative action to avoid the risk of RTO rejection of their demand response bids. The clarification would also put LSEs responsible for retail load of small utilities in the same shoes as LSEs serving retail customers of large utilities as to continuing or expanding LSE demand response programs, thereby reducing barriers to demand response.

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[10] In the alternative, the proposed definition of "aggregator of retail customers" could be modified to clarify that "A load-serving entity or its designee bidding the demand response of the retail customer loads for which the load-serving entity is responsible in the RTO's organized markets, shall not be considered an aggregator of retail customers." This exclusion would ensure that the LSE's demand response resource bids would be accepted under Section 35.28(g)(1)(i)(A), and not restricted by Section 35.28(g)(1)(iii)'s

This approach also minimizes administrative burden for RTOs. RTOs are already well aware of which LSE is responsible for which retail customer load (*e.g.*, for market settlement or resource adequacy purposes), so no complex certification process would be required to implement this change. While market rules and terminology may differ, for organized markets to function, each LSE is registered for, submits load bids for, and/or schedules energy to specified retail loads; only *one* entity is responsible to the RTO for the core market functions of any given retail load. This approach would also encompass JAAs and G&T Cooperatives, as they are generally well-established as the entity responsible for their distribution members' retail loads in the RTO markets.

Petitioners request clarification, or in the alternative rehearing, that the small system "permission" requirements of Section 35.28(g)(1)(iii) do not apply to demand response bids submitted by the LSE "responsible for that retail customer's load in such organized markets." If the Commission does not modify the regulatory language, it at least should clarify in the Preamble to Order No. 719-B that, when Order No. 719-A (P 67) provided assurance that "[t]he intent of the Final Rule is not to interfere with, undermine, or change existing demand response programs," the Commission intended to preserve the ability of LSEs—including JAAs and G&T Cooperatives—to aggregate the demand response of the retail customer loads for which they are responsible in the RTO markets, without first securing new legislation or regulations from the RERRA of each affected small system.

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limitations on ARC bids.

V. THE COMMISSION SHOULD FACILITATE THE DEVELOPMENT OF LSE DEMAND RESPONSE PROGRAMS BY ACCOMMODATING LSE DESIGNATION OF THIRD-PARTY EXPERTS

APPA, NRECA, TAPS, and AMP urge the Commission to further clarify the regulatory text and/or the Preamble language to ensure that the compromise correctly adopted by the Commission to protect small systems from undue burden does not create an unintended obstacle to LSEs enhancing the effectiveness of their demand response programs through designation of third-party providers of demand response aggregation services. We ask the Commission to include language that makes clear that an LSE responsible for retail customer load in the organized market may also designate third-parties with appropriate technical expertise to more efficiently and effectively provide the demand response, without going through the burdensome resolution process of, or securing new laws or regulations from, the RERRA of each affected small system.

A key goal of this rulemaking is eliminating barriers to demand response. *See*, *e.g.*, Order No. 719, PP 19, 48, 54, 274-75. As discussed in Part IV, to fulfill that objective, the Commission should make clear that the compromise language is inapplicable to the LSE responsible for the retail customers in the RTO market, thereby enabling the LSE to continue and enhance its existing demand response programs as Order No. 719-A expressly intended. As an adjunct to that clarification, the Commission also should make clear that LSEs may retain third parties to help them harness their retail customer demand response in the most effective and efficient way, without triggering the requirement to secure resolutions from the RERRAs of each participating small system to authorize such activities. This clarification would enable an LSE to contract with a third party having demand response experience to facilitate the LSE's own efforts to aggregate

retail customer demand response, without the RERRA of each affected small system having to go through a new legislative process (or be educated that it must go through such process). Such a clarification would ease the way to the engagement of such expert third parties, thereby reducing barriers to demand response.

A number of our members have contracted or are in the process of contracting with third-party service providers for that purpose. For example, Burlington, Vermont, which has about 12 percent of its load participating in ISO-New England's emergency demand response program,[11] contracted with EnerNoc to enhance and expand that program.[12] We are also aware that certain small APPA members in PJM are considering third-party arrangements that could be used to maximize demand response on their systems.

Petitioners believe that the Commission should want to encourage smaller public power systems and cooperatives to obtain expert assistance in aggregating their end use loads, without somehow triggering the need to pass a "law or regulation" (which can be substantially more onerous than a mere contract approval). The small system aggregation compromise rightly adopted by the Commission, as reflected in the regulatory language

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[11] As described in TAPS' April 21, 2008 Comments (at 15) (*available at* eLibrary Accession No. 20080421-5189), Vermont LSEs have had the contractual ability to call for load reductions for over 20 years. TAPS member Vermont Public Power Supply Authority similarly has over 10% of its load under such contracts.

[12] As explained in the minutes of the June, 2008 Board of Electric Commissioners meeting where the contract was approved (Minutes – June 2008, https://www.burlingtonelectric.com/page.php?pid=98&name=minutes_jun08 (last visited Aug. 17, 2009)): "The contract is designed to work in tandem with the existing ISO New England demand response program used for emergencies, but [will] be geared more toward utilizing demand response to reduce BED's peak loads rather than waiting until emergency conditions exist. BED will pay EnerNoc a fixed capacity payment each month as well as an energy payment for load actually curtailed. EnerNoc will contract with individual BED customers to provide the load reduction. Ken noted that this approach brings several benefits, including keeping payments local rather than purchasing capacity from regional marketers, expanding demand response efforts to smaller customers, and leveraging existing relationships to expand financial benefits to both BED and the customer."

set out in Order No. 719-A, however, could inadvertently create obstacles to small systems entering such contractual relationships that would enhance their demand response participation in RTO markets. That is, applying the compromise provision to the LSE's designee would unintentionally discourage such enhancement of demand response, because the RERRA of each affected small system would have to pass a law or regulation permitting the LSE's retention of such a third party. This process would be particularly burdensome for a JAA/G&T Cooperative with many small members.

To avoid creating an unintended barrier to effective LSE demand response programs, the Commission should clarify the regulatory language to allow an LSE responsible in the RTO markets for serving the loads of the retail customers of small utilities to designate a third party to facilitate that demand response, without fashioning and enacting new laws and regulations. As quoted above, Petitioners propose that the Commission provide an exception to the small system aggregation clause both times it appears in Section 35.28(g)(1)(iii) (emphasis added): "where the demand response bid is submitted by the load-serving entity responsible for that retail customer's load in such organized markets *or such load-serving entity's designee*."

If the Commission does not accept the modified regulatory language, it should at least make clear in the Preamble of Order No. 719-B that it expects RTOs to cooperate with LSEs serving the loads of small utilities that have contracted with third parties to facilitate aggregation of the demand response of retail loads for which they are responsible. The Commission should make explicit that if a LSE notifies an RTO that it has contracted with a third party to provide or enhance demand response for the retail load for which the LSE is responsible in the RTO's markets, the RTO is expected to

respect and accommodate that relationship without insisting that the RERRA of each affected small system enact a law or regulation authorizing such action.

By adopting the revised language or including clarifications in the Preamble, the Commission will ensure that a municipal JAA or G&T Cooperative that serves many small member distribution systems, as well as individual small public power distribution systems and cooperatives, will have the ability to contract with third parties to secure expert assistance in aggregating retail demand response and to make that choice effective by notifying the RTO of the relationship, so that the RTO will accept bids from the designated ARC. Eliminating this barrier to demand response will not administratively burden the RTO because the authorization would come from the LSEs responsible for the retail customer load in the RTO market—the entities that the RTO is used to dealing with for market purposes.

CONCLUSION

For the reasons discussed above, APPA, NRECA, TAPS, and AMP urge that the Commission clarify its orders to make sure its wise adoption of the small system compromise is fully and appropriately effectuated in accordance with the Commission's expressed intent and that the potential for inadvertent creation of unintended barriers to effective LSE demand response programs is avoided. If, however, the Commission does not grant the clarifications we have proposed, then APPA, NRECA, TAPS, and AMP in the alternative seek rehearing. Absent such clarifications, the Order's reach beyond the Commission's FPA jurisdiction, and its unlawful intrusion into the terms and conditions of retail electric service regulated by the RERRAs of public power systems and cooperatives, will be thrown into high relief.

Respectfully submitted,

AMERICAN PUBLIC POWER ASSOCIATION

/s/ Susan N. Kelly
Susan N. Kelly
Vice President of Policy Analysis and General Counsel
Allen Mosher
Senior Director of Policy Analysis and Reliability

AMERICAN PUBLIC POWER ASSOCIATION
1875 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20009-5715

TRANSMISSION ACCESS POLICY STUDY GROUP

/s/ Cynthia S. Bogorad
Cynthia S. Bogorad
William S. Huang
Sharon Coleman

SPIEGEL & MCDIARMID LLP
1333 New Hampshire Ave. NW
Washington, DC 20036

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

/s/ Wallace F. Tillman
Wallace F. Tillman, General Counsel and V.P.
Richard Meyer, Senior Regulatory Counsel
Jay A. Morrison, Senior Regulatory Counsel
Paul McCurley, Manager, Power Supply

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203-1860

Sean T. Beeny
Kevin J. Conoscenti

MILLER, BALIS & O'NEIL, P.C.
Twelfth Floor
1015 Fifteenth Street, NW
Washington, DC 20005

AMERICAN MUNICIPAL POWER, INC.

/s/ Gary J. Newell
Gary J. Newell

THOMPSON COBURN LLP
Suite 600
1909 K St., NW
Washington, DC 20006

John W. Bentine
Matthew S. White

CHESTER WILLCOX & SAXBE
65 E. State Street
Suite 1000
Columbus, OH 43215

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