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New FERC Aggregation Order for Distributed Energy Resources: Qualifications, ISOs/RTOs Directives, State-Opt Outs

THURSDAY, DECEMBER 10, 2020

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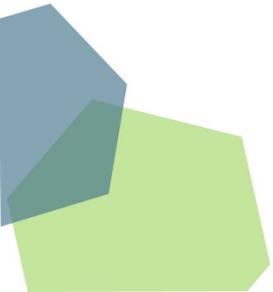
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NEW FERC AGGREGATION ORDER FOR DISTRIBUTED ENERGY RESOURCES: QUALIFICATIONS, ISOs/RTOs DIRECTIVES, STATE-OPT OUTS



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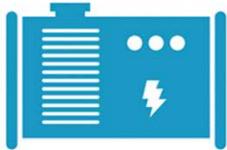
Morgan Lewis BRACEWELL

BACKGROUND AND FERC RULING

WHAT IS DER?

- Federal Energy Regulatory Commission (FERC) Definition of Distributed Energy Resources (DER):
 - DER is “any resource located on the distribution system, any subsystem thereof or behind a customer meter.” This definition is broad and includes both in-front and behind-the-meter resources that could be utility owned, customer owned, or third-party owned.
 - DER is often small and includes electric storage resources, distributed generation, demand response, energy efficiency, thermal storage, and electric vehicles and their supply equipment.
 - The definition is “technology-neutral,” however, smaller energy systems that use renewable energy sources, such as rooftop solar, and behind-the-meter storage may greatly benefit from this final rule.
- DER, thus, refers to resources that provide electricity near the point of use as opposed to centralized generation sources from utility-scale power plants that are often interconnected directly to the transmission system.

TYPES OF DER



GENERATORS



CURTAILED LOAD



BATTERY STORAGE



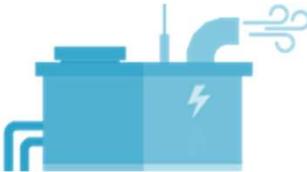
SOLAR PANELS



WIND



EV CHARGERS



CO-GENERATION



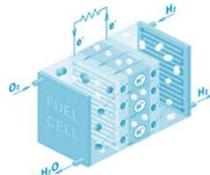
FLYWHEELS



THERMAL STORAGE



HYDRO ELECTRIC



FUEL CELLS

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DER GROWTH

- The desire to go “green” or growing frustrations with unexpected outages, planned rolling blackouts, and increases in power costs coupled with the increasing availability and cost-effectiveness of DER is causing more customers to turn to DER as an option for their homes and businesses.
- The recent growth in DER, in particular distributed solar systems, is anticipated to continue in the future despite COVID-19 with some experts projecting growth to nearly double in the next 5 years.
 - DER capacity will reach 387 gigawatts by 2025, according to a new Wood Mackenzie report
 - The DER mix is evolving quickly away from nonresidential load management, which made up two-thirds of all DER capacity in 2015 but will make up less than half by 2025
 - Solar, electric vehicle infrastructure and residential load management will account for more than 90 percent of DER capacity installed between 2016-2025

DER GROWTH

- Economic opportunities through tax credits, retail programs and sales in the wholesale markets are further fueling the growth of DER
 - Does FERC Order No. 2222 enhance the economic opportunities for DER?
- Growth in type and size of DER varies by state/region
 - Some states, like Hawaii, have been dominated by deployment of small residential and commercial rooftop solar systems (typically 1–200 kW in size)
 - Others, like North Carolina, have seen more large, ground-mounted solar systems ranging in size from several hundred kW to several MW that are not primarily sited to serve a given load or co-located with a load
 - Very little behind-the-meter wind and energy storage capacity is installed to-date, a trend that is expected to change, particularly with energy storage and the technological advances being made
 - State policy and incentives (such as tax credits) have incented growth of DER that is not solely driven by market forces or the efficiency of the resource

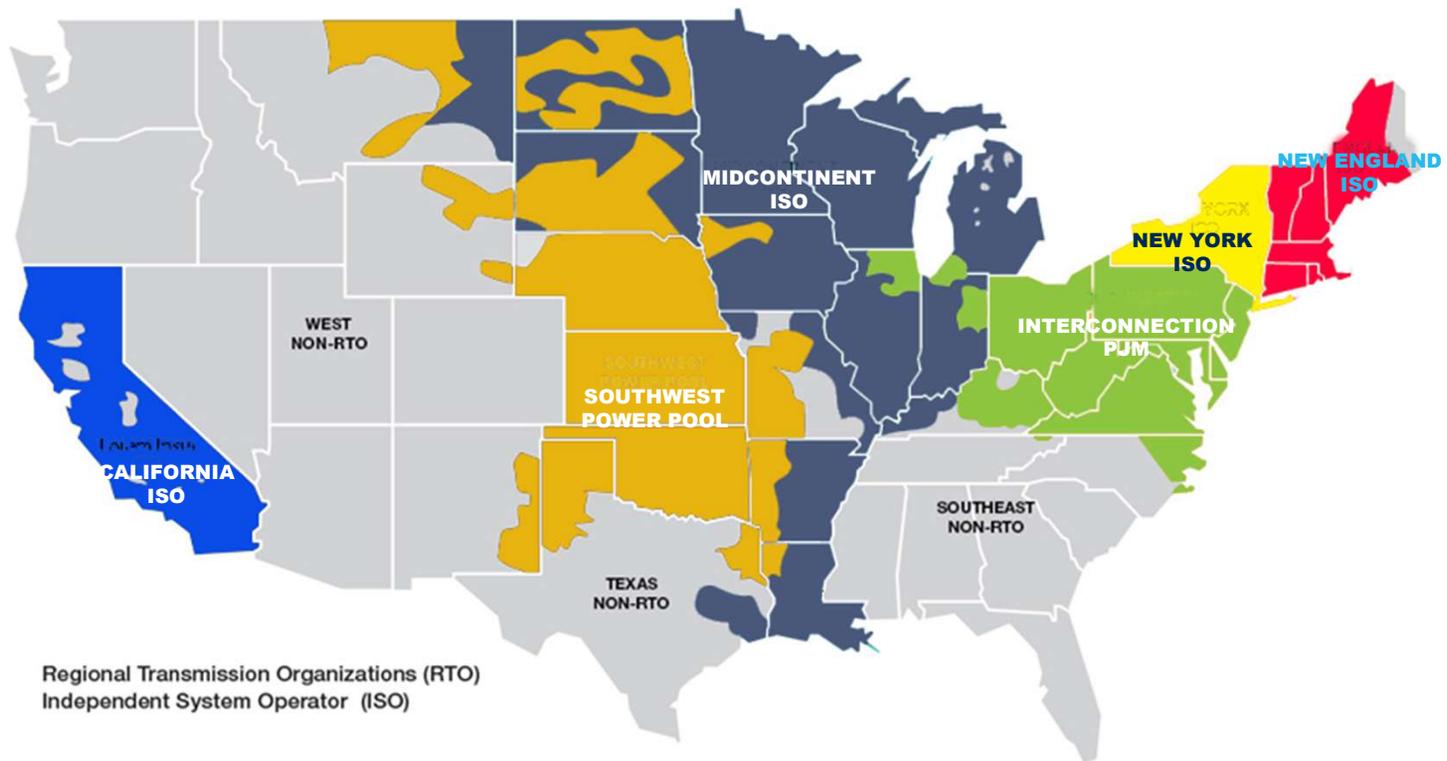
ORDER No. 2222: OVERVIEW

- On September 17, 2020, FERC issued a landmark final rule pertaining to the participation of DER in wholesale markets. *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).
- The aim of Order No. 2222 is to remove barriers for DER to participate in wholesale markets regulated by FERC through aggregators and thereby enhance competition in those markets. Through this additional market opportunity, the hope is that this order will further incentive development and technology advances of DER.
- Current rules in FERC-regulated wholesale markets restrict most DER from participating due to their smaller size and have been limited to state-approved retail programs such as net metering or participating as a demand response resource in wholesale markets.

ORDER No. 2222: OVERVIEW

- FERC found that existing wholesale market rules are unjust and unreasonable in light of barriers that they present to the participation of DER aggregations in the markets, which reduce competition and fail to ensure just and reasonable rates.
- Order No. 2222 builds on the Commission's efforts in Order No. 841, FERC's seminal order on energy storage recently upheld by the D.C. Circuit in July of 2020.
 - Order No. 841 directed Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) to revise their tariffs to establish a new participation model that recognizes the physical and operational characteristics of electric storage resources.
 - In particular, FERC ordered a minimum size threshold above 100 kW for electric storage participation in the centralized markets.
 - Order No. 841, however, deferred establishing any requirements in connection with aggregation of DER that the RTOs and ISOs may consider to be "too small" to participate in the wholesale markets directly and, instead, issued a Notice of Technical Conference to support FERC's consideration of possible future reforms for DER aggregation.

ORDER No. 2222: SCOPE OF IMPACT



HOW DO DERs ACCESS THE MARKETS?

- Unlike Order No. 841 that removed barriers for electric storage to directly participate in the centralized markets, Order No. 2222's reforms are limited to removal of barriers for aggregators of DER to participate in these markets.
 - Thus, DER that is “too small” to directly participate in the markets pursuant to one of the participation models will need to rely upon an entity that aggregates various DER together.
 - Through this aggregation, the aggregator can then bid the DER in its portfolio as a package to the market.
 - Aggregators could be the Load Serving Entity (LSE) to which the DER is interconnected or possibly a third party.

REFORMS DIRECTED TO REMOVE BARRIERS TO WHOLESALE MARKETS

- Specifically, FERC orders each RTO/ISO to revise their tariffs to:
 1. Allow DER aggregations to participate directly in RTO/ISO markets and establish DER aggregators as a type of market participant;
 2. Allow DER aggregators to register DER aggregations under one or more participation models that accommodate the physical and operational characteristics of DER aggregations;
 3. Establish a minimum size requirement for DER aggregations that does not exceed 100 kW;
 4. Address locational requirements for DER aggregations;
 5. Address distribution factors and bidding parameters for DER aggregations;
 6. Address information and data requirements for DER aggregations;

REFORMS DIRECTED TO REMOVE BARRIERS TO WHOLESALE MARKETS

7. Address metering and telemetry requirements for DER aggregations;
8. Address coordination between the RTO/ISO, the DER aggregator, the distribution utility, and the relevant electric retail regulatory authorities;
9. Address modifications to the list of resources in a DER aggregation;
10. Address market participation agreements for DER; and
11. Accept bids from a DER aggregator if its aggregation includes distributed energy resources that are customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year.



NOTABLE ISSUES TO CONSIDER

FERC REGULATION OF DER AGGREGATORS

- Which DER aggregators did FERC say would be subject to FERC regulations?
 - FERC expressly excluded aggregators of:
 - Demand resources such as demand response and energy efficiency; and
 - Net metering program
 - DER aggregators that make sales of electric energy into RTO/ISO markets will be considered a public utility subject to the Commission’s jurisdiction
 - Perhaps breaking with prior FERC and court precedent, FERC maintained that it was not extending its jurisdiction over the individual resource holders and that “an individual distributed energy resource’s participation in a distributed energy resource aggregation would not cause that individual resource to become subject to requirements applicable to Commission-jurisdictional public utilities.”

FERC REGULATION OF DER AGGREGATORS

- Order No. 2222 clarifies that DER aggregators selling into RTO/ISO markets will be FERC-jurisdictional public utilities and, therefore, must fulfill certain responsibilities set forth in the Federal Power Act (FPA) and FERC's rules and regulations, including:
 1. Filing rates under FPA Section 205 and having FERC make such rates effective prior to making any such sales into RTO/ISO markets – a requirement that could be satisfied by FERC accepting a DER aggregator's market-based rate schedule and request for market based rate authority;
 2. Filing Electric Quarterly Reports;
 3. Submitting FPA Sections 203 and 204 filings related to corporate mergers and other activities; and
 4. Fulfilling FPA Section 301 accounting obligations and FPA section 305(b) interlocking directorate obligations.

NET METERING

- Many distribution utilities currently have retail net metering (and demand response programs) built into their retail tariffs that were approved by state regulators
 - A common net metering program requires the utility to pay the DER participant the retail price of any electricity sold back to the utility based on either a fixed, stated rate or variable rate (may include a cap on sales not to exceed purchases)
 - It is unclear how significant a driver wholesale market participation may be where the value of wholesale sales may not often exceed the retail rate
- Some retail tariffs mandate DER participation through the interconnected utility and often include interconnection procedures that govern the interconnection of DER to the distribution system

NET METERING

- Order No. 2222 rejected blanket prohibition, but found that RTOs/ISOs should adopt narrowly tailored restrictions to prevent double counting of services
 - Resources registered to provide same services individually or as part of other RTO/ISO market participant
 - Included in retail program to reduce utility's or other load serving entity's obligations to purchase services from RTO/ISO
- Restrictions recognized that there may be instances where a resource may be able to provide multiple, distinct services at wholesale and retail levels

WHAT ABOUT AN OPT-OUT?

- FERC refused to provide a broad opt-out in Order No. 2222, but has taken a slightly different approach than it did in Order No. 841 (where it also refused an opt-out) in recognition of the potentially greater burden the rule may impose on smaller utility systems.
- Specifically, FERC directed RTOs/ISOs to prohibit bids from DER aggregators if the aggregation includes DERs that are customers of small utilities (i.e., those that distributed 4 million MWh or less in the previous fiscal year), unless the relevant electric retail regulatory authority has permitted such participation under FERC's rule.

DER INTERCONNECTION

- Order No. 2222 disclaims jurisdiction over the interconnection of DERs to distribution facilities for resources participating in RTO/ISO markets exclusively as part of distributed energy resource aggregation.
- Interconnection of DER for aggregation does not constitute “first use”
- Left it to the states to determine whether distribution interconnection procedures should be updated to reflect Order No. 2222

IMPLICATIONS FOR MARKET PARTICIPANTS

DER Resources and Aggregators

- Creates new commercial opportunities, particularly for small resources
- Potential limitation on ability of DERs to capture revenues associated with participation in state programs and RTOs/ISOs
- Limits ability of states to erect barriers to wholesale participation
- Regulatory status depends on durability of distinction between aggregators and DER resources

Distribution Utilities

- Likely to take lead role in screening DER for aggregation and for ensuring safe and reliable operation of the system
- Utilities may seek to charge a cost-based wholesale distribution charge to deliver power to grid originating from DER through FERC-approved rate
- Existing retail tariffs that facilitate aggregation may be rendered obsolete

CAPTURING FULL VALUE STACK

- FERC determined that DERs can and should be able to realize their full value and, in turn, capture their entire value stack so long as they are not double-compensated or double-counted (as noted earlier).
 - FERC found that the proposal was overly broad and, if adopted, would foreclose opportunities for DERs that were feasible and, in some instances, already occurring.
- DERs can participate in one or more retail programs as well as wholesale markets, and that DERs can provide multiple wholesale services. FERC is permitting organized market operators to establish “appropriate” restrictions on the DER participation if those restrictions are narrowly designed.

NEXT STEPS

LEGAL CHALLENGES ON ORDER NO. 2222

- One significant issue that FERC addressed in its final rule was whether it has jurisdiction to order the reforms of RTO/ISO markets pertaining to DER aggregation considering:
 - DER is not directly tied to transmission facilities over which FERC has jurisdiction; and
 - DER themselves are often associated with consumers that are traditionally regulated by states and local governments as opposed to the federal government.
- FERC found that its authority to issue regulations pertaining to DER aggregations “stems from both the Commission’s jurisdiction over the wholesale sales by [DER] aggregators into RTO/ISO markets and from its jurisdiction over practices affecting wholesale rates.”

LEGAL CHALLENGES ON ORDER No. 2222

- FERC's decision to limit the scope of the reforms to DER aggregators in RTO/ISO markets as opposed to more expansively attempting to regulate DER directly significantly strengthens the Commission's jurisdictional grounds based on recent precedent.
- FERC referenced the consistency of its holding with the U.S. Supreme Court's decision in *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. at 774-84, "which interpreted the FPA as providing the Commission with jurisdiction over the participation in RTO/ISO markets of demand response resources: a type of non-traditional resource that, by definition, is located behind a customer meter and generally is located on the distribution system."

LEGAL CHALLENGES ON ORDER NO. 2222

- Importantly, as Order No. 2222 emphasized:
 - “the reforms adopted in this final rule do not preclude or limit state or local regulation of: retail rates; distribution system planning, distribution system operations, or distribution system reliability; distributed energy resource facility siting; and interconnection of resources to the distribution system that are not subject to Commission jurisdiction,”
 - and electric retail regulatory authorities are “able to condition a [DER]’s participation in a retail [DER] program on that resource not also participating in the RTO/ISO markets.”

IMPLEMENTATION

- FERC’s ruling introduces tremendous complexity in the coordination efforts required for organized markets to achieve compliance. As adopted, organized markets must incorporate processes into their tariffs that concern: (i) review by a distribution utility, (ii) review by regulatory authority, and (iii) operational coordination.
- Potentially forecloses participation to DERs that are customers of “smaller systems.” In particular, FERC provides an opt-in for utilities that distribute less than 4 million MWh in the prior fiscal year. Barring the local or state regulator’s decision to opt-in, the utility’s DER customers will not be able to access the markets like others.

RETAIL IMPLEMENTATION

- RTO/ISO tariff reforms in compliance with Order No. 2222 likely will set the stage for the depth of reforms that are needed in impacted distribution utility retail tariffs and in state regulation pertaining to DER
- Will enhanced systems be required for screening of DER and on-going operations
- With limited exceptions for demand response, retail tariff provisions that limit or condition individual customers from participating in the wholesale markets through a DER aggregator may become obsolete and appropriate reforms may be needed
- Interconnection processes and related interconnection agreements for DER, which are subject to state regulation, may need updating to ensure no double-counting as well as safe and reliable operation of the distribution system
- Consider the scope of FERC jurisdiction over the interconnection of DER that satisfies FERC Qualifying Facility (QF) standards under the Public Utility Regulatory Policies Act of 1978, as amended
- Cost recovery mechanisms for the necessary coordination and wheeling over the distribution system by DER may be considered for wholesale and retail tariffs

THANK YOU

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