

In the Matter of the Establishment of a Working Case Regarding FERC Order 2222 Regarding Participation of Distributed Energy Resource Aggregators in Markets Operated by Regional Transmission Organizations and Independent Systems Operators

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

FILE NO. EW-2021-0267

COMMENTS OF CPOWER REGARDING MODIFICATION OF TEMPORARY BAN ON AGGREGATORS

Pursuant to the Public Service Commission's ("Commission") Order in the above-captioned docket dated May 24, 2023,¹ Enerwise Global Technologies, LLC, d/b/a CPower ("CPower"), submits public comments in response to the Commission's questions concerning demand response ("DR") aggregation for the record of this proceeding.

1. Introduction

CPower is a leading provider of demand side energy solutions throughout North America. Although CPower is a Midcontinent Independent System Operator ("MISO") market participant as an Aggregator of Retail Customers ("ARC"), it does not currently operate as an aggregator of DR resources in Missouri because of the temporary ban.

CPower serves as a DR aggregator for numerous customers with facilities in Missouri operating in most other markets in North America in which there are no bans or other barriers to participation. While CPower provides limited services to our Missouri customers, our customers and many other customers lack meaningful opportunities to optimize load flexibility through DR participation.

CPower remains very interested in working with the Commission, Missouri utilities, and with customers to provide innovative and useful demand-side services. However, innovative energy

¹ File No. EW-2021-0267, Order Regarding Opportunity for Additional Comments, Order Scheduling Workshop, and Notice of LBNL Report, *Iss'd* May 24, 2023 ("May 24 Order")

technology companies such as CPower that are not regulated utilities can only consider making investments in Missouri if there is a constructive regulatory environment. Today, with a *de jure* ban on our business, CPower and many other advanced energy solutions companies find Missouri unattractive for investment to bring energy solutions to customers. CPower applauds the Commission for taking steps to explore modifying or removing the ban on ARCs.

2. Responses to Commission Questions

The comments below are in response to the questions posed by the Commission in the May 24 Order. The questions have been fully restated for context to the responses offered. Where no responses were provided, the questions were either not applicable to CPower or there wasn't sufficient information available to provide a response.

A. Size Limitations for Demand Response (DR) eligibility:

Previous comments proposed various size limitations for commercial and industrial (C&I) customers to participate in wholesale DR either directly or through third-party ARCs. Proposals ranged from no size limit, to thresholds of 10kW, 100kW, 300kW, or a modification limited to large customers. In addition, the Michigan Public Service Commission approved 1MW as the threshold for ARC participation in its jurisdiction.

- 1. What impact could any of these limits have on implementation of a modified opt-out as applied to C&I customers in terms of reliability, participation or the need for additional regulations?*

Should the Commission decide to modify its ban on ARCs, CPower cautions that implementing a threshold will naturally limit participation by C&I customers to those that meet the threshold to participate in DR programs via an ARC. If the Commission does decide to implement a threshold, CPower respectfully requests that the threshold be as small as possible to maximize the number of customers eligible to work with ARCs.

Regarding the Michigan Public Service Commission's ("MPSC") approval of a 1MW threshold,² it is important to clarify a few points to provide context as to why a size threshold was implemented as opposed to completely removing the opt-out. First, the 1MW threshold is based upon the non-coincident peak demand of each prospective customer account over the past three years. Additionally, customers that have multiple locations that alone do not satisfy the threshold are eligible if they have at least 1MW of non-coincident peak demand in aggregate. Second, the 1MW threshold was adopted in part to ensure that customers that choose to work with ARCs are savvy about energy and capable of understanding the nuances of participation in DR programs and the agreements between customers and ARCs to be able to protect themselves from any potential "bad actor" ARCs without the need for additional regulations to be in place while the MPSC and utilities gain additional experience working with ARCs. The MPSC established this threshold as a starting point and has expressed interest in opening up bundled service utility customers to ARC participation to smaller customer classes.

Should the Commission decide to implement a threshold like the one adopted by the MPSC, it should do so only as an intermediate step and work expeditiously with stakeholders to arrive at the appropriate rules or regulations that will ensure concerns around consumer protections are addressed. For further reference, CPower published a whitepaper in December 2022, attached here as Appendix A, that provides a framework for Midwestern state regulators on how they can approach regulation of ARCs to reap the benefits of enabling ARC participation while working within the context of the flexibility allowed under the Federal Energy Regulatory Commission Orders 719.³ Of the various models

² *In the matter, on the Commission's own motion, to open a docket for load serving entities in Michigan to file their capacity demonstrations as required by MCL 460.6w*, order of the Public Service Commission, entered December 21, 2022 (Case Nos. U-21099 et al.); *In the matter, on the Commission's own motion, to open a docket for load serving entities in Michigan to file their capacity demonstrations as required by MCL 460.6w*, order of the Public Service Commission, entered February 23, 2022, (Case Nos. U-21099 et al.) (jointly referred to herein as the "MPSC Orders").

³ Order No. 719 Wholesale Competition in Regions With Organized Electric Markets, 73 Fed. Reg. 64,100, 64,107 (October 28, 2008) (codified at 18 C.F.R. §35.28(g)(1)(iii) (2022)), P 47.

and approaches discussed in the whitepaper, CPower suggests the DR Feed In Tariff or DR Power Purchase Agreements with Utilities as two options that the Commission could consider that would enable ARC participation while allowing for appropriate regulatory oversight, as well as allow the resource adequacy benefits resulting from the capacity registered with the respective ISO/RTO.

Lastly, on the question of reliability, DR provided by all customer classes has proven to be a reliable resource time and time again when the grid is stressed and enters emergency operations where DR programs are called upon.⁴ ARCs work with customers to identify load flexibility opportunities and develop curtailment plans to be executed when called upon to perform. ARCs also provide customers with technology and software to visualize their performance during events, and where possible, also can help customers to automate their systems and processes to help ensure that customers perform with minimal impacts to their employees while maintaining health and safety, as well as preventing damage to customer equipment and products.

2. Should the Commission establish different size limits for different utilities based on customer classes?

No, if the Commission decides to implement any size limits, they should be consistent across all Commission-jurisdictional utilities. Applying different customer eligibility requirements to work with ARCs will only increase the complexity of implementation and may cause unnecessary confusion, particularly with multi-site customers that may have facilities in multiple utility territories.

⁴ See, *Overview of Winter Storm Elliot December 23, 2022 Maximum Generation Event*, MISO (January 17, 2023), at p. 12, available at: <https://cdn.misoenergy.org/20230117%20RSC%20Item%2005%20Winter%20Storm%20Elliott%20Preliminary%20Report627535.pdf>; see also, *Demand Response Activity December 23 and 24, 2022*, PJM (May 22, 2023), at pp. 5-9, available at: <https://www.pjm.com/-/media/markets-ops/demand-response/estimated-demand-response-december-23-24-2022.ashx>.

3. *Should these size limits apply to a single location, or should a single customer be permitted to aggregate multiple locations to meet the threshold?*

If the Commission decides that a minimum size be implemented, similar to the Michigan Order, the Commission should not limit only customer locations that meet the minimum size threshold, and instead allow customers that have multiple sites that in aggregate meet the threshold should be eligible to participate with an ARC if they choose to do so.

4. *How many in terms of numerical value and as a percentage of the C&I customer classes and any specific sub-classes and what types of customers (with and without aggregated load) would be included within the proposed thresholds?*
5. *Should there be a maximum aggregated size limit?*

No, there should not be a maximum aggregated size limit for DR participation. MISO's and SPP's existing market rules, as well as those proposed by MISO and SPP for compliance under FERC Order 2222, do not limit the maximum size of aggregations. Imposing a maximum aggregated size limit may have unintended consequences and artificially limit the potential of DR aggregation in Missouri.

B. Dispute Resolution:

A. As to utilities with affiliates in states that allow ARCs:

1. *How are relationships between utilities and ARCs managed?*
2. *What types of disputes arise, and how frequently?*
3. *How are disputes resolved?*

B. As to the ARCs:

1. *How do they manage relationships with utilities?*

ARCs manage relationships with utilities through various types of interactions to facilitate customer participation in wholesale DR programs. ARCs must obtain customer account information,

such as account and meter numbers, interval usage data, and other information necessary to complete the registration requirements of the ISO/RTO programs in which the customers will participate, as well as any updates to this information and ongoing access to customer interval data to assess performance during events and support settlements.

2. What types of disputes arise, and how frequently?

Disputes arise between ARCs and utilities in markets where ARCs have participated for over a decade, disputes between ARCs and utilities are rare. When they do arise, they generally concern customer account eligibility. If a customer is enrolled in a utility program that would be considered double counting if the customer also were to be registered with an ARC, then there would be a dispute over which market participant (the utility or the ARC) is able to register the customer. CPower's comments below in response to Question C.1 on how the Commission should direct jurisdictional utilities to revise their tariffs to clarify eligibility to work with ARCs would be very helpful to avoid such disputes.

3. How are disputes resolved?

Typically, these disputes are resolved through the existing registration review processes in place at the ISO/RTOs. MISO and SPP each have formal dispute resolution processes⁵ should market participants not agree on the outcome of a decision during the registration review process.

C. As to MISO and SPP:

1. What types of disputes arise related to third-party demand response, and how frequently?

⁵ See, MISO, Alternative Dispute Resolution Business Practice Manual, BPM-023, is available at <https://www.misoenergy.org/legal/business-practice-manuals/> (accessed on June 21, 2023).

2. *How are those disputes typically resolved?*
3. *What disputes, if any, have been resolved by the state utility commission or other state regulatory authority?*

C. *Double Counting/Dual Participation:*

1. *Should the Commission clarify whether a C&I customer can participate only in the wholesale market or only in the retail market? How should this clarification be made?*

Yes. As a first step following modification of the opt-out, the Commission should direct all jurisdictional utilities to file revised tariffs with language that makes clear to those reading the tariff whether or not a customer taking service under a particular rate schedule is eligible to work with an ARC to participate in DR programs in the wholesale markets. Following MISO's implementation of the seasonal capacity market construct, if particular rates or programs available to customers would preclude ARC participation in specific seasons, this too should be explicitly clear within the tariff.⁶ If there are comparable rate schedules offered by the utility that would not otherwise conflict with an ineligible tariff, we recommend that the utility include references to the rates to which a customer may switch to in order to work with an ARC. We have offered some proposed language for consideration by the Commission below that could be used to achieve the clarification necessary to avoid confusion regarding customer eligibility to work with an ARC.

"Customers enrolled in MISO or SPP demand response programs through an Aggregator of Retail Customers are not eligible to participate under this tariff-based program."

⁶ While not explicitly clear within the current MISO tariff and BPMs, CPower has conferred with MISO staff to clarify that while MISO does not allow the same utility account number to be registered to participate in its DR programs by different market participants, under the seasonal construct, different market participants may represent the same utility account number in different seasons within a given Planning Year.

This language will help make clear to all parties involved whether a customer is eligible to work with an ARC under its current rate structure, or whether they would need to select another rate they are eligible to take service under in order to participate with an ARC.

2. *If dual participation in the wholesale and retail markets for different services is allowed, how would improper double counting be identified and avoided?*

All efforts to enable dual participation should be pursued in order to maximize customers' capabilities at both the wholesale and retail level. CPower recommends that the Commission look at existing tariffs and programs that may bundle retail and wholesale services and direct utilities to file revised tariffs that split apart each of these services. The purpose of this would be to enable customers to elect to participate in, either through an ARC or the utility, each of the compatible services based upon their capabilities to provide them. This allows customers to maximize their participation and stack multiple services with their provider of choice. Additionally, this would provide an easy way to identify where particular services would constitute double counting and define eligibility to participate in other tariffs or programs simultaneously, either through an ARC or the utility, within the tariff language for each of the applicable services.

3. *What specific internal processes and procedures would utilities need to implement to address double counting under the requirements and procedures imposed by MISO or SPP?*

MISO's Business Practice Manuals detail the procedures currently in effect⁷ that provide sufficient mechanisms to allow review by the applicable Relevant Electric Retail Regulatory Authority

⁷ See, MISO, Demand Response Business Practice Manual, BPM-026, p. 30, is available at <https://www.misoenergy.org/legal/business-practice-manuals/> (accessed on June 21, 2023); see also, Resource Adequacy Business Practice Manual, BPM-011, pp. 64-65, is available at <https://www.misoenergy.org/legal/business-practice-manuals/> (accessed on June 21, 2023).

("RERRA"), Local Balancing Authority ("LBA"), and Load Serving Entity ("LSE") of DR registrations submitted by an ARC to confirm account eligibility and ensure double counting is not occurring.

The specific processes would involve utilizing utility resources to review the ARC registration information provided by MISO or SPP to check that the account information is correct, and confirming whether the account is taking service under a tariff or participating in a utility program that would constitute double counting if the registration were to be approved. Missouri utilities could seek input on how best to structure and implement processes to review from utilities or affiliate companies that have operations in states that do allow for ARC participation that currently perform these registration reviews.

The processes which will be required of utilities in SPP to address potential double counting depends upon the FERC's disposition of SPPs Order No. 2222 compliance filing. FERC has not yet ruled upon that filing so the processes required of utilities are not yet finalized. However, SPPs filing does require the following of utilities:

The LSE should affirm that the DER included in the DER Aggregation is not participating in a retail program for the same service that the DER would provide to the wholesale market under the DER Aggregation, and;

the LSE and the Distribution Utility has affirmed that the DER capacity will not simultaneously reduce the LSE's purchase obligation, or any other LSE's obligation, at the same time the capacity is being offered in SPP's wholesale markets.⁸

In addition, distribution utilities shall assess the safety and reliability impacts of any distributed resources and may develop an operational coordination process which allows the distribution utility to

⁸ Compliance filing of SouthWest Power Pool, ER22-1697, at page 22, (April 28, 2022).

override the dispatch of the DER Aggregation in order to maintain the safe and reliable operation of the Distribution Network.⁹

D. Data Governance:

1. Do existing utility tariffs include provisions related to customer data privacy?

Based upon CPower's review of select jurisdictional tariffs, there is no explicit language that relate to the sharing or privacy of customer data with third parties of any kind.

i. What revisions related to third-party demand response aggregation, if any, would be necessary?

Tariffs could be modified to address data sharing practices and procedures by which ARCs can request access to customer information necessary to facilitate participation in DR programs, including such items as how customers may provide consent to share their utility account information, and how the data will be transmitted by the utility to the requesting ARC. Additionally, establishing reasonable data security and privacy practices that adhere to industry standards to keep non-public data private and secure could be included.

2. What customer information is generally shared between the utility and the ARC?

In addition to customers' utility bills that will typically be shared between customers and an ARC, the following pieces of information must be shared between a utility and ARC: customer account number(s), meter number(s), Commercial Pricing Nodes (for MISO registrations), tariff/rate class (if not already available on customer bill copies), and interval usage data.

i. What information, if any, is public information?

3. How do ARCs protect customer information?

⁹ Id. At 24.

CPower cannot speak on behalf of all ARCs. However, CPower maintains a robust set of security policies and procedures that meet or exceed industry standards to ensure that all customer data transferred between all parties involved is secure both in transit and at rest. Should the Commission be concerned about the data security practices of ARCs, it may consider incorporating data security requirements into either the utility tariffs, as was discussed above, or alternatively incorporating standards through another mechanism, such as establishing an ARC registration procedure.

4. *How do ARCs protect their systems from cybersecurity threats?*

CPower cannot speak on behalf of all ARCs, but as stated above, CPower's IT and security policies and procedures meet or exceed industry standards to protect against cybersecurity threats.

4. *Would adoption of Green Button or similar alternative facilitate timely and accurate demand response registration?*

Yes, adoption of Green Button or a similar alternative would aid ARCs in obtaining timely access to the data necessary to complete wholesale market DR registration and support the settlement process. However, while Green Button is a standard, utilities often have significant flexibility in how they implement the standard that can result in variances in how third parties may access data from these systems. Even minor variances mean that third parties seeking to work with multiple utilities that are Green Button-enabled must still develop bespoke systems and processes to access customer data with each utility. This results in additional and unnecessary costs to integrate with each new utility territory ARCs intend to work within. Should the Commission decide to direct jurisdictional utilities to implement Green Button-compliant data access systems, we strongly urge the Commission to standardize requirements and implementation of these systems as much as possible to avoid unnecessary variances.

a. *Are there any implementation constraints related to adopting Green Button or similar alternative?*

D. *Regulatory Gaps*

1. *If the Commission modifies its opt-out to permit third-party demand response for C&I customers, what regulatory gaps, if any, exist under MISO and SPP rules governing demand response?*

To the best of CPower's knowledge, there are no regulatory gaps in MISO or SPP's rules governing demand response that would need to be addressed by the Commission should it modify the opt-out for ARCs.

3. Conclusion

WHEREFORE, CPower respectfully requests that the Commission repeal the temporary ban and direct jurisdictional utilities to pursue discussions with DR aggregators about opportunities to work cooperatively for the benefit of customers and reliability and efficiency of the electric grid.

Respectfully submitted,

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Appendix A



Regulating Demand Response and Aggregators in the Midwest While Safeguarding Local Jurisdiction:

**A Guide for State Regulatory Commissions, Electric
Cooperatives and Municipal Electric Utilities**

by Peter Dotson-Westphalen and Kenneth D. Schisler

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Introduction

This whitepaper addresses the long-standing reluctance of Midwestern state regulatory commissions, electric cooperatives and municipal electric utilities to permit Aggregators of Retail Customers (“ARCs”) to provide demand response (“DR”) services in Regional Transmission Organization/ Independent System Operator (“RTO/ISO”) markets and utility programs. State utility regulators and the boards or councils that typically self-regulate electric cooperatives¹ and municipal electric utilities have long been concerned about whether they possess the authority to regulate ARCs. These entities are collectively referred to by the Federal Energy Regulatory Commission (“FERC”) as the Relevant Electric Retail Regulatory Authority, and more commonly are referred to by the acronym “RERRA,” which will be utilized here throughout.

RERRAs have a legitimate responsibility to ensure that ARC activities do not interfere or conflict with regulated utility service and are consistent with the regulatory model and policies of the state or jurisdiction the RERRAs regulate. This whitepaper approaches the question of RERRA jurisdiction head on and provides a framework for RERRA regulation of ARCs. This analysis

will also correct inaccurate assertions that allowing ARC participation will bypass retail regulation.

The intent here is that Midwestern RERRAs will feel empowered to adopt policies to leverage ARCs in a way that is fully compatible with state and local policies of utility regulation and good utility practice. As experts in demand-side flexibility and customer-facing energy management, ARCs work with utilities and customers to increase the efficiency and reliability of the grid and enhance resource planning and can promote competitiveness and economic well-being across the Midwest through advanced technologies and innovations.

1. For ease of reference in this whitepaper, the terms “utility” and “customer” used throughout this whitepaper are meant to include electric cooperatives and members of electric cooperatives, respectively.



Executive Summary

ARCs represent DR and other Distributed Energy Resources (“DER”) participation in most wholesale electricity markets in North America and throughout the world. ARCs operate in states and regions served by all models of utility regulation, including traditional rate-of-return regulation of investor-owned utilities, cooperatives and municipal utilities, and areas where retail supply competition is permitted for some or all customers.

However, ARCs are not as prevalent in the Midwestern United States in the Midcontinent Independent System Operator, Inc. (“MISO”) and Southwest Power Pool (“SPP”) market regions. This whitepaper discusses the reasons for this distinction, which are as much historical as regulatory, and details how RERRAs in the Midwest can leverage the efficiency and reliability benefits and technology innovation that ARCs bring to electricity markets, while at the same time safeguarding and respecting state commission regulatory jurisdiction and the self-regulation policies of municipal utilities and electric cooperatives.

A typical concern of regulators and cooperative and municipal utility leaders with respect to ARCs involves whether and to what

extent ARCs may be regulated by state and local regulators. Another concern is whether ARC activities, if permitted to operate in a utility territory, will conflict with utility resource planning activities or otherwise interfere with rate regulation and unfairly shift costs to other customers. All of these are legitimate questions that are explored in this whitepaper to demonstrate how ARCs may cooperate with utilities in ways that promote efficiency, resiliency and innovation and support a clean-energy future.

RERRAs have several avenues available to regulate ARCs that provide services to retail customers and the relationship between ARCs and electric utilities subject to RERRA jurisdiction. This paper discusses how RERRA regulatory jurisdiction is accommodated and supported under federal law and regulation, as well as the basis for state and local regulation of ARCs. It also provides a helpful framework for how Midwestern RERRAs can facilitate the benefits that ARCs offer by increasing DR participation, while also addressing RERRAs’ primary concerns.

Resource Adequacy and Preparing for the Future Grid

The grid-supply mix is changing — and at an increasingly rapid pace — as intermittent energy resources become more common and energy consumption patterns shift more dramatically.

ARCs can play an important role in developing portfolios of DR resources that meet resource adequacy requirements. When there is not adequate supply to meet system needs, this can lead to high clearing prices in capacity markets as well as threaten grid operators' ability to maintain reliability. This was clearly evident in MISO's 2022/23 Planning Resource Auction, in which the North and Central regions were 1.23 GW short of meeting the Planning Reserve Margin Requirements established for the auction.² This shortfall resulted in prices in these regions clearing at the Cost of New Entry, the administratively set price of how much it would cost to build a new generator. For utilities and customers exposed to these high prices, the auction results came as a shock. It can take several years to have new generation facilities sited, interconnected and approved to operate in the market. By contrast, ARCs all over the world have demonstrated the ability to develop significant DR resource portfolios that meet resource adequacy needs very quickly — often in a matter of months.

The need for fast-acting, flexible resources to help grid operators maintain system balance will

become increasingly important and valuable as intermittent supply resources more frequently replace traditional generation. ARC-enabled DR, particularly where automation is enabled, is able to respond quickly and reliably, and can provide cost-effective ancillary services to RTOs/ISOs.

Additionally, RERRAs located in RTO/ISO regions must prepare for the implementation of wholesale market participation models that include DER aggregations pursuant to FERC Order 2222,³ which requires each RTO/ISO to develop a wholesale market participation model that allows DER and DR aggregations to provide and be compensated for wholesale market services. DR is often cited as the largest potential DER on the grid.⁴ It is also the easiest DER to develop and integrate into the grid. Enabling ARC DR participation now, in advance of the implementation of the wholesale DER model, can provide Midwestern RERRAs and utilities with a valuable on-ramp to gain experience with ARCs and DERs. Increasing ARC participation in the Midwest will also have the added benefits of assisting in meeting reliability needs and reducing costs.

2. See, MISO 2022/23 Planning Resource Auction (PRA) Results (April 14, 2022), available at: <https://cdn.misoenergy.org/2022%20PRA%20Results624053.pdf>.

3. Order No. 2222, 172 FERC ¶ 61,247 (2020); Codified at 18 C.F.R. §35.28(g) (12) (2022).

4. See, Brattle Group, The National Potential for Load Flexibility: Value and Market Potential through 2030, (2019), p.18, available at: https://www.brattle.com/wp-content/uploads/2021/05/16639-national_potential_for_load_flexibility_-_final.pdf



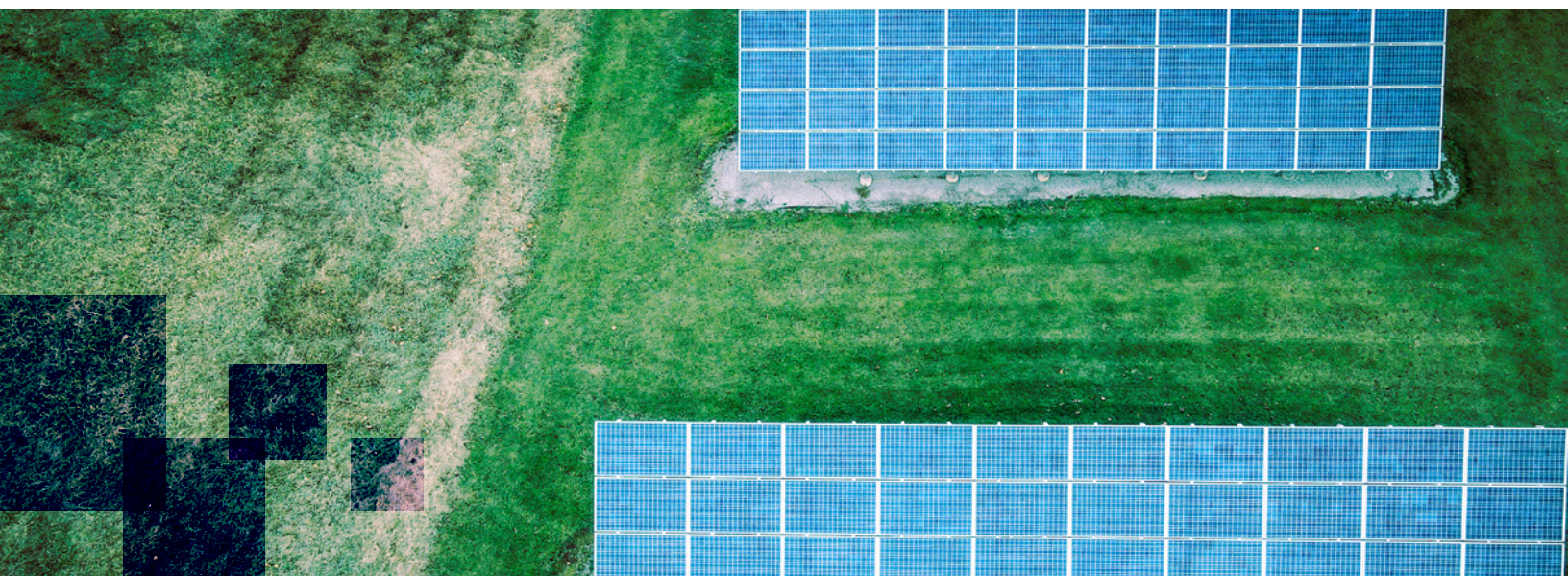
Changing Models for Harnessing Flexibility Through Load Management

Conventional mass market utility load management applications rely on assets such as binary, on/off air conditioning control switches, thermostats and pool pump controls. These typically homogeneous approaches can serve many customers but provide little flexibility for customers to customize participation based upon lifestyle, schedules or preferences.

Furthermore, some traditional utility load control programs are becoming obsolete and are unable to meet the grid's need for greater flexibility. Ironically, the pace at which utility load management programs are becoming obsolete is accelerating as customer appliances are becoming smarter and more advanced. As an example, central air conditioning systems widely sold in the market to residential customers today have variable speed modes of operations that “learn” to operate through artificial intelligence and change modes to optimize energy efficiency. Conventional utility load control programs that only cycle power on and off do not work very well with this newer innovation — and can potentially void warranties of customers' appliances. Though the smart appliances themselves can be efficiently and reliably controlled remotely through digital communications, they are not designed to have the power cut off repeatedly as a load control strategy — they are smarter than that.

Even if participation in a utility load control program does not void customer warranties, externally operated on/off load control switches override advanced features that dynamically operate units to optimize performance and efficiency. Increasingly, customers with these advanced appliances cannot be served by utility load control programs, but they can be served by ARCs who can have custom integrations with manufacturers and can digitally control appliances in a way they are designed to be controlled.

Traditional programs designed for commercial and industrial customers also face challenges and are not able to develop the latent DR potential that exists. Commercial and industrial interruptible load management programs under utility tariffs have standard rules around availability, duration, number of dispatches and penalties for non-performance. The standard rules may work for some businesses, but not all. For example, while a car wash and a grocery store use energy very differently, they typically must adapt to the same standard tariff framework. While some businesses can adapt to the standard framework, those that cannot are often left without options.



Consider the requirements for participation as a DR capacity resource in the MISO market as a Load Modifying Resource (“LMR”). Customers participating as LMRs must be available to be called upon at least 16 times per year⁵ for at least four consecutive hours during each event.⁶

Though some customers can meet these requirements, not all can do so. A customer that has significant load flexibility capabilities but cannot meet all the MISO requirements would likely not enroll in the utility program and expose itself to penalties for non-performance. On the other hand, ARCs can harness the load flexibility of customers even if they are unsuitable for the utility program. This is because RTO/ISO rules permit performance aggregation, in which overperformance by some customers is netted against underperformance of others.⁷ ARCs can build portfolios of customers with diverse capabilities in order to meet the requirements rather than requiring each customer to meet every requirement.

While the rules vary from region to region, performance aggregation is a feature of every RTO/ISO market and managing portfolios to optimize performance is a core competency and value proposition of ARCs. ARCs have aggregation capabilities that are superior to regulated utilities because ARCs can customize participation arrangements and terms for

customers, but utilities are legally prevented from doing so. The flexibility that ARCs possess enables them to not only serve more diverse customers, but also to perform consistently at a very high level of reliability under widely varying conditions.

Also, utility load management programs, whether designed for residential, commercial or industrial customers, must operate as a one-size-fits-all to avoid customer cross-subsidization and free ridership as well as ensure non-discriminatory service to customers. Public utilities, by virtue of being a monopoly service provider, face regulatory challenges administering programs that meet the diversity of dynamic energy management options available to customers. Most utilities have only one or a very small number of utility load management options, if they have an option at all.

To be clear, there are successful utility demand-side programs, and utilities are working with technology providers to continue to develop innovative load-management applications. There is, however, an emerging reality that utility DR programs alone cannot suit the diversity of today’s technologies and customer preferences. Nor will they be able to meet the increasingly complex future for the grid.

5. While LMR availability and testing requirements have increased in recent years, following FERC’s recent acceptance of MISO’s proposed changes to move from an annual to seasonal capacity market, beginning with the 2023-24 MISO Planning Year LMRs must be available for at least 16 events per year if they participate in all four seasons. See, Midcontinent Indep. Sys. Operator, Inc., 180 FERC ¶ 61,141 (2022); see also, MISO, FERC Electric Tariff, Module E-1, § 69A.3.5 (42.0.0).

6. id.

7. See, Section 6.2, MISO, Manual No. 26, Business Practices Manual – Demand Response, Rev. 9 (October 1, 2022).



ARCs Operating Under All Regulatory Structures

ARCs can and do operate flexibly under a variety of regulatory and market models and have proven adept at managing the diversity of energy management technologies available to customers today. ARCs are traditionally not regulated as public utilities and do not face the same challenges and impediments in providing

energy management services to a diverse group of customers. Indeed, a hallmark of the ARC business model is the ability to manage performance risk across a diverse group of customers by aggregating customers into groups that are appropriate for specific needs or services.

Additionally, ARCs have:

- Gained significant experience in helping customers identify and execute load flexibility strategies.
- Enabled customers to participate in DR programs that allow them to provide valuable grid services that can be monetized at both the bulk power system and distribution system levels.
- Built and continue to innovate technologies that help customers view and manage their energy usage and monitor their performance during DR events in real-time.
- Developed and deployed capabilities for two-way communications and controls.
- Automated load reduction and DER optimization strategies to reduce the impacts to customers' daily operations or comfort.
- Established relationships with commercial and industrial facilities in markets where ARCs are currently allowed to operate. These relationships can be leveraged to quickly scale up participation in DR programs when new programs allow for ARC participation, thereby bringing new resources to market faster than it would take for a new generator to be built from the ground up.

The ARC Dilemma and a RERRA Solution

ARCs have participated in RTO/ISO wholesale electricity markets in the US since the 2000s. ARCs were a new type of agent — they were neither a utility nor wholesale supplier,⁸ but were nevertheless subject to regulation⁹ by FERC. “ARC” did not exist in the regulatory lexicon in any widespread use until FERC adopted the term in 2008. Today, ARCs are known by several terms, such as curtailment service providers, responsible interface parties, or DR/DER aggregators or providers.

Although FERC asserted jurisdiction over ARC participation in wholesale markets from the beginning, questions lingered in the 2000s over whether FERC regulation preempted state and local jurisdiction and the extent to which RERRAs could also regulate ARCs. In an attempt to clarify

the jurisdictional question, FERC codified new regulation in what came to be known as the “Opt-Out/Opt-In Rule” in Order 719 in 2008.¹⁰

In an effort to clarify that FERC was not trying to usurp state and local regulation, FERC provided that RERRAs would have the ability to determine retail customer eligibility to participate in wholesale market DR. The regulation establishes that RERRAs have the authority to opt out in the case of large utilities or opt in in the case of smaller utilities.

The timing of ARCs' debut and Order 719 was unfortunate, coming not long after the crisis created by Enron. As a result, a perception grew in some circles that ARCs, while not competitive retail suppliers, were part of the utility deregulation movement, which had been rejected

8. ARCs only engaged in providing DR services make no sales for resale and are not a public utility required to have a tariff rate on file with the Commission. EnergyConnect, Inc., 130 FERC ¶ 61,031 at P 30 (2010).

9. Id. at P 32.

10. Order No. 719, 125 FERC ¶ 61,071 (2008); Codified at 18 C.F.R. §35.28(g)(1)(iii) (2022).

in the majority of Midwestern states. It could be said there was concern that ARCs were the proverbial “camel’s nose under the tent” for promoting retail competition policies in states that had not deregulated retail supply of electricity or were otherwise inconsistent with traditional utility regulation.

Unfortunately, the structure of the Opt-Out/ Opt-In Rule also led to early incorrect interpretations that the RERRA’s authority was a binary decision to allow or disallow ARCs to participate, and that if permitted, the RERRA could not regulate ARC activities. In response to the assertion that ARCs were related to utility deregulation that was disfavored in many Midwestern states, and perceiving an “all or nothing” choice, many Midwestern RERRAs with traditional regulation passed temporary or permanent restrictions on ARC participation. Although there have been a few changes, most of the restrictions adopted by RERRAs in the late 2000s remain today.

This perception that ARC participation was inconsistent with traditional regulation, and that therefore regulated states should prohibit ARCs, did not take hold in other parts of the US. For example, Vermont, Virginia and West Virginia are traditionally regulated states in which DR

participation through ARCs has always been permitted. California, which largely re-regulated its retail utility market following the Enron crisis, not only continued to permit ARCs, but leveraged ARCs to implement important demand-side innovations in partnership with regulated utilities.

States with traditional utility regulation, as well as electric cooperatives and municipal electric utilities, have a particular interest in protecting their regulatory authorities.

To the extent that ARCs are permitted to operate in a utility subject to a RERRA’s jurisdiction, RERRAs want to see that ARC activities are coordinated with that utility’s resource planning and operations of the local utility.

RERRAs also have ratemaking considerations. RERRAs want to make sure that DR participation does not create cross-subsidies or cost shifting or other distortions of retail rate design. These are valid issues for RERRAs, and any policy permitting ARC participation should be in full harmony with retail regulatory models at the state and local level. The remainder of this whitepaper is devoted to explaining why RERRAs do not need to cede jurisdiction to FERC if ARCs are permitted, and outlines why RERRAs have ample authority to create or impose regulatory requirements they deem appropriate.

RERRAs Have Plenary Jurisdiction to Regulate ARCs Under the Opt-Out/In Rule

While RERRAs have several avenues for asserting jurisdiction over ARCs and ARC activities pursuant to traditional regulatory authorities under state laws, the Opt-Out/Opt-In Rule itself is a powerful tool for RERRAs to exercise jurisdiction to regulate ARCs authorized under federal law. RERRA jurisdiction under the Opt-Out/Opt-In Rule is analyzed below, followed by RERRA jurisdiction pursuant to state and local law in the following section.

While the Opt-Out/Opt-In Rule gives RERRAs the authority to simply opt out or opt in, it also

creates authority for states to establish conditions and limitations on ARC participation. These conditions and limitations include requirements that ARCs comply with requirements established by the RERRA. In other words, the Opt-Out/Opt-In Rule provides RERRAs regulatory jurisdiction to establish the criteria and requirements for ARCs to provide services to retail customers in RTO/ISO markets.

FERC emphasized in Order 719 that its decision to require RTO/ISO markets to permit DR aggregators was to be implemented in a way that

11. *EPSA v. FERC*, 136 S. Ct. 760, slip op. at 25 (2016) (referring to the ability of a RERRA to opt out or not opt in.)

“Wholesale demand response as implemented in the Rule is a program of cooperative federalism, in which the States retain the last word.”

– U.S. Supreme Court in “*EPSA v. FERC*”¹¹



would allow states to exercise retail regulatory jurisdiction, including the ability to regulate ARCs and DR aggregation. In Order 719, FERC indicated that it was giving a very broad deference to states.¹² FERC made this point even more

succinctly in Order 719-A (which was approved by FERC following requests for rehearing of Order 719): “[W]e leave it to the appropriate state or local authorities to set and enforce their own requirements.”¹³

¹² *Id.* at P 155.

¹³ *Order 719-A*, 128 FERC ¶ 61,059 at P 54 (2009).

Not An All-or-Nothing Decision

Despite its deferential language, FERC did not articulate what, if any, conditions states could impose if they decided to opt in. FERC’s language in Order 719 was ironically too broad in that it did not clearly articulate that states could place whatever conditions they wanted on allowing DR aggregation. This unfortunately left state regulators with the mistaken impression that permitting DR aggregation may be an “all or nothing” proposition. This incorrect view held that states could either 1) opt out and preserve all retail regulatory jurisdiction over DR, or 2) opt in and cede such authorities to FERC. In the face of this false choice, several Midwestern states opted out.

FERC later cleared up this issue by making clear that it intended broad deference to states. As part of the PJM Interconnection, LLC (“PJM”) compliance proposal pursuant to the then newly adopted Opt-Out/Opt-In Rule, PJM originally proposed an “all or nothing” approach that would not permit RERRAs to attach conditions or requirements to an opt-in to allow DR aggregation.¹⁴ Noting that “Order No. 719-A [] clarified that [RERRAs] retain substantial flexibility in establishing requirements for eligibility of retail customers to provide demand response,” FERC rejected PJM’s approach and required the RTO to submit revisions on compliance that would permit retail regulatory authorities to condition eligibility of retail customers to participate in PJM’s DR programs.¹⁵

PJM subsequently revised its proposal to permit

RERRAs to establish conditions for ARC participation. In its second order accepting the revisions, FERC stated:

We will accept PJM’s compliance filing as it relates to eligibility determinations. PJM’s proposed revisions appropriately recognize the right of a retail regulatory authority to condition the eligibility of retail customers to participate in PJM’s [DR] Programs.¹⁶

This clarification in 2010 was unfortunately too little, too late. By the time that FERC’s exceptionally deferential approach to RERRA jurisdiction was fully clarified, the die was cast. Many Midwestern states had already opted out or otherwise did not pick up on this clarification resulting from a proceeding applicable to a different region.

Finally, perhaps the only remaining loose end with respect to RERRA flexibility under the Opt-Out/Opt-In Rule relates to whether a RERRA can change its mind once it opts in, with or without conditions. Can a RERRA revoke or modify a decision to opt in? FERC has addressed that issue as well, and the answer is a resounding yes. In the same PJM compliance case discussed above, FERC was confronted with the question of what to do if a RERRA revokes its opt-in while a resource is actively participating in an RTO/ISO capacity market during a delivery year. FERC determined that a revocation of an opt-in by a RERRA will be applied prospectively. Any ARC resource that was committed under an annual program would be permitted to fulfill its

¹⁴ *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,238, at P 15 (2009).

¹⁵ *Id.* at P 22.

¹⁶ *PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,069, at P 23 (2010).



commitment in the current delivery year when the opt-in was in effect. However, such resources would be subject to the new RERRA determination for any future participation.¹⁷

In light of FERC's deferential approach to RERRA jurisdiction, a total or near total ban on DR aggregators is not necessary to protect RERRA

jurisdiction. Quite the contrary, the Opt-Out/Opt-In Rule establishes the right of RERRAs to establish and enforce their own regulatory requirements. A far more constructive approach to RERRA regulation is to allow ARC participation subject to requirements that RERRAs deem appropriate, adapted to local needs and preferences.

17. *Supra*, note 8, at P 35.

Regulating ARCs Under the State Regulatory Authorities

In addition to the Opt-Out/Opt-In Rule, RERRAs have tools and authorities to regulate ARCs pursuant to state law and policy. RERRAs are created or authorized under statutes or state constitutions, which typically establish the powers and duties of a state commission or the authority of electric cooperatives or municipal electrical utilities (typically under local regulation or self-regulation provisions). Statutes must be analyzed on a state-by-state basis, but the statutory grant of authority may include authority to directly regulate entities, such as ARCs providing energy services in the state.

Even without a statute that authorizes direct regulation of ARCs, RERRAs have broad jurisdiction to regulate utilities, and therefore can regulate ARCs through the utilities they regulate. The Missouri Public Service Commission Staff has recommended precisely such an approach to ensuring that the retail regulatory jurisdiction is retained.¹⁸

RERRAs rely upon their direct regulatory jurisdiction over utilities to regulate all manner of utility business practices. Since ARCs need to do business with and otherwise need the cooperation of utilities in a variety of ways, RERRAs can regulate ARCs by regulating the utility's relationship with ARCs.

This type of regulation of businesses doing business with regulated utilities is commonplace. RERRAs do not directly regulate banks or tree-trimming companies, or any number of other businesses that work with utilities. Yet, because RERRAs do regulate the utility and can regulate the arrangements that a utility makes with vendors and others, RERRAs can impose requirements that banks, tree-trimming companies and all manner of vendors must comply with if they want to do business with the utility. Similarly, if ARCs want to do business with utilities, RERRAs can require that ARCs play by the rules they establish.

Some have suggested that ARCs may be regulated as public utilities. For a variety of reasons, this approach is impractical, and no state currently regulates ARCs as public utilities. ARCs do not sell electricity or distribute power or operate poles, wires or substations. Nor do ARCs require a franchise to operate or have a monopoly over a service territory or have an obligation to serve customers as utilities typically do. From a federal regulatory standpoint, FERC assiduously avoided ARCs participating in DR as public utilities under the Federal Power Act.¹⁹

18. Missouri Public Service Commission Staff, Staff Report on Distributed Energy Resources, Mo. P.S.C. File No. EW-2017-0245, at p19-22 (April 5, 2018).

19. EnergyConnect, Inc., 130 FERC ¶ 61,031, P 30-32 (2010).

Even if it may be possible to regulate ARCs as a form of public utility – it is not advisable to do so. Rate regulation does not serve the DR business well because customers are quite different in their abilities to perform as resources. The first problem with regulating ARCs as utilities is the non-discrimination obligation that typically comes with regulation of utilities. The value of the DR that each customer can provide can be quite different and therefore needs to be priced accordingly.

- Some customers may be able to respond very reliably, while others may be less so.
- Some customers can respond for a short duration, while others can respond for longer periods.
- Some customers can tolerate frequent dispatches, others not.
- Some can respond 24/7, while others can respond only during business hours.
- Some customers can respond on very short notice or automatically, while others need more advance notice of events.
- And the list goes on.

ARCs manage this diversity through a portfolio of resources, and contract with customers for the value they bring. Individual customers within an ARC's portfolio may receive different compensation depending upon the value that customer can provide.

By comparison to the ARC model, the typical approach that regulated utilities have taken to demand-side management programs as a regulated service is to provide a single, one-size-fits-all set of rules and requirements.

This approach avoids the non-discrimination problem, but it also means that a lot of latent DR capability will not be realized because customers who cannot fit the mold of the tariff are not able to participate. A major part of the value proposition of ARCs is that they can offer services to more customers with a diverse set of capabilities to participate in DR because they have flexibility of contract that is not easily achieved if ARCs are regulated as utilities.

Existing Models of ARC Regulation by RERRAs

As discussed in a prior section, the ability to impose conditions when a RERRA opts in to permit ARC participation is black letter law. There are a variety of examples of RERRAs adopting various local requirements under the Opt-Out/Opt-In Rule. Several RERRAs that permit ARCs have elected not to pursue ARC regulations or have adopted relatively light regulation. Several other RERRAs have adopted more comprehensive approaches that regulate the interactions between the ARC and utilities as well as ARCs and retail customers.

Perhaps the most comprehensive example of regulation relying upon the Opt-Out/Opt-In Rule for jurisdiction²⁰ has been adopted by the California Public Utilities Commission ("CPUC"). The ARC rules in California, known as Rule 24 (applicable to Pacific Gas & Electric²¹ and Southern California Edison²²) and Rule 32

(applicable to San Diego Gas & Electric²³) clearly define how ARCs may interact with utilities and customers. The rules exist in the form of tariffs approved by the CPUC for each of California's jurisdictional investor-owned utilities.

Rules 24/32 apply to any ARC seeking to aggregate a utility's customers for participation in either the utility's DR programs or programs in the California ISO market. The rule requires an ARC to have a service agreement in place with a utility and specifies the roles and responsibilities of ARCs as well as the utilities and meter data access requirements. The rule also requires ARCs to register with the CPUC, which allows regulatory oversight and provides consumer protections in the form of customer notification requirements, posting of a performance bond and complaint resolution and enforcement actions in the event of violations.

20. Order Instituting Rulemaking Regarding Policies and Protocols for Demand Response Load Impact Estimates, Cost-Effectiveness Methodologies, Megawatt Goals and Alignment with California Independent System Operator Market Design Protocols, California Public Utilities Commission, Decision 10-06-002 (June 2010) at page 23, Conclusion of Law 1.

21. See, Pacific Gas & Electric, Electric Rule 24 Direct Participation Demand Response, available at: https://www.pge.com/tariffs/assets/pdf/tariffbook/ELEC_RULES_24.pdf.

22. See, Southern California Edison, Rule 24 Direct Participation Demand Response, available at: <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M037/K189/37189001.pdf>.

23. See, San Diego Gas & Electric Company, Rule 32 Direct Participation Demand Response, available at: https://tariff.sdge.com/tm2/pdf/tariffs/ELEC_ELEC_RULES_ERULE32.pdf.

New York has adopted a similar framework of regulations for ARCs, the Uniform Business Practices for Distributed Energy Resource Suppliers (“NY UBP DERS”).²⁴ Technically, the New York rules are related to state jurisdictional retail DR programs rather than RTO/ISO programs. However, the rules are de facto applicable to ARCs participating in the New York Independent System Operator programs because New York’s utility DR programs that permit ARC participation are designed to work in harmony with NYISO participation. The state’s DR programs provide distribution-level services for utilities that are distinct and different from wholesale market products and allow for dual participation by retail customers in the NYISO’s market. ARCs in New York overwhelmingly seek to participate under both the utility programs and NYISO programs, and thus are subject to the NY UBP DERS. Like the California Rules 24/32, the NY UBP DERS rules may be instructive for any state seeking to adopt business rules for ARCs.

Several RERRAs have taken a lighter approach to regulation, mostly consisting of informational disclosures and registration by ARCs, and perhaps a bond requirement and periodic reporting. These regulations stop short of some of the more extensive requirements found in the California and New York examples. Ohio and Maryland are two states that require ARCs to register as energy brokers/retail suppliers and to comply with requirements applicable to retail suppliers. Although ARCs are not retail suppliers and do not sell electricity at wholesale or retail, these states have elected to apply the body of regulatory requirements applicable to retail suppliers to ARCs participating in the RTO/ISO markets.

RERRAs with jurisdiction over the smaller Opt-In utilities have also adopted regulatory requirements covering ARCs. For example, Cleveland Public Power (“CPP”) establishes qualifications for ARCs and requires CPP approval to operate.²⁵ The rules also place a 30 MW soft cap on participation that is waivable at the discretion of CPP, which does so on a case-by-case basis. In this way, CPP can keep track of the ARCs operating in its service territory and has contacts with each ARC in the event any concerns arise.

In addition to establishing rules for ARC participation, some RERRAs have elected to exercise jurisdiction to restrict participation to specific customers or customer classes. For example, the Michigan Public Service Commission (“MPSC”) is in the process of evaluating ARC participation in the Michigan market. As an initial step toward reversing its total restriction on ARC participation, the MPSC has allowed any customer that participates in retail competition to participate in DR through an ARC. This is the result of a modification of a prior decision that was a complete ban on aggregator participation. The decision to open DR aggregation to retail competition customers can best be viewed as a transitional step for Michigan. The MPSC has opened another proceeding to further review whether the restriction on all customers should be lifted.²⁶ Additionally, the Minnesota Public Utilities Commission (“MPUC”) is expected to soon initiate a docketed proceeding to explore several issues, including whether it should remove the Opt-Out from allowing ARCs to participate and what regulations should be in place to oversee ARC participation.²⁷

24. See, New York Public Service Commission, Case 15-M-0180, In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products, Order Establishing Oversight Framework and Uniform Business Practices for Distributed Energy Resource Suppliers (March 14, 2019), Appendix A.

25. City of Cleveland, OH, City Council Resolution No. 144-11, (2011).

26. See, MPSC Case No. U-20348.

27. See, MPUC Docket No. E002/M-21-101, Order Approving Modified Load-Flexibility Pilots and Demonstration Projects, Authorizing Deferred Accounting, and Taking Other Action (March 15, 2022), at p.28.





DR Procurement Models Conforming to Utility Requirements

DR Feed in Tariff - “The Indiana Model”²⁸

A DR Feed in Tariff (“DR FIT”) is an approach whereby the utility has a standard offer available through a tariff, under which it will purchase DR resources that qualify for participation as resources in RTO/ISO DR programs. The ARC registers its DR resources as a part of the utility’s resource portfolio with the RTO/ISO. The ability for the utility to obtain resource adequacy credit for the resources developed from the utility’s customers makes this approach particularly attractive from a resource planning perspective.

An early version of the DR FIT approach was adopted by the Indiana Utility Regulatory Commission (“IURC”) for Indiana Michigan Company customers for participation in PJM’s DR programs and is still in effect today.²⁹ The approach approved by the IURC functions well, but experience has demonstrated that it could be improved upon, as discussed below.

Under the DR FIT, the ARC works with a utility’s customers under a utility tariff that governs the relationship between the utility and the ARC as well as the ARC’s business practices. The terms of the utility tariff for DR participation mirror the requirements for participation as capacity under rules in the relevant RTO/ISO. When an ARC enrolls a customer, the ARC handles RTO/ISO registration requirements and assigns the

resource to the utility’s RTO/ISO account. The ARC, not the utility or the customer, is responsible to the RTO/ISO for performance and compliance obligations, including any penalties for non-performance. The utility pays the ARC according to the terms of the utility tariff, and the ARC pays the customer according to the contractual terms agreed to between the ARC and the customer.

Under the DR FIT approach, the utility is purchasing the DR capabilities of its customers represented by an ARC. The utility uses the credit that it receives for the capacity resource coming from the utility’s customers in satisfying its obligation as a load serving entity (“LSE”). In this way, the utility can incorporate the DR resources developed in its service territory in its short- and long-term resource plans.

ARC participation enables more robust participation and more and diverse customer participation by leveraging the resources and expertise of ARCs to market the program to customers, enable participation and complete enrollments. Utilities often have limited resources and personnel to address all the requirements of DR customer enablement to develop a robust participation level. For most ARCs, developing and managing DR and DER resource potential is all they do.

²⁸ The label “Indiana Model” was used in a Missouri PSC staff report that evaluated and recommended the approach for use in Missouri. See supra, note 9.

²⁹ Indiana Michigan Power Company tariff, Original Sheet No. 33, Rider D.R.S.1 (Demand Response Service – Emergency).

A particularly attractive feature of the DR FIT approach is that the utility is purchasing the resource at a price stated in the tariff rather than relying upon the RTO/ISO capacity auction, which is complex and can involve uncertainty at the time of enrollment and volatile pricing. As an example, take MISO's Planning Resource Auction, which is conducted a few months before the start of the planning year. Clearing prices in the auction have seen drastic swings in recent years.

The rules require that all participating resources register before the auction is conducted – before the price is known. However, customers are understandably reluctant to commit to an enrollment before they understand pricing components. This design component of the MISO capacity is much less favorable towards developing and maintaining robust DR participation when compared with a firm price that enables certainty for customers before they commit.

The Indiana Model was an important and constructive innovation that demonstrated that ARCs can and do work with and cooperate with utilities operating under a traditional regulatory framework. Experience with it has resulted in a couple of valuable lessons that could be improved upon in program design of future DR FIT approaches.

One feature of the Indiana Model that has proven challenging is that every individual customer under the program is required to make a minimum four-year commitment in order to begin participation, and to provide a three-year notice to discontinue participation. This is decidedly unattractive for customers. At the same time, it is understandable that the utility wants certainty regarding future years. This term could be corrected by requiring any required commitment periods to run to the ARC, rather than the individual customer. That way, an ARC could enroll a new customer if a customer wants to disenroll or reduce its level of participation.

Another challenge of the Indiana Model is that performance is measured and penalties, if applicable, are assessed at the individual customer level. This precludes an ARC's ability to engage in portfolio performance aggregation where overperformance of some customers may be netted against underperformance by other customers. Without the ability to manage performance at the portfolio level, the ARC must pass performance penalty exposure on to customers. Whereas, with portfolio performance aggregation, ARCs can insulate customers from penalties, which is a particularly attractive feature for customers. This challenge would also be easy to resolve by evaluating the performance of the ARC's enrolled customers at the portfolio level and allowing for aggregation.



DR PPAs with Utilities

Another way to integrate ARC activities with utility resource planning is to facilitate ARC eligibility to participate in utility procurements, either as part of an “all source” procurement or a procurement that is designed to either specifically procure DR or procure attributes that DR can provide. As part of the terms of participation in the procurement, the RERRA would conditionally opt in to allow ARC participation and include whatever regulatory requirements deemed necessary as part of the procurement.

One example of this approach is utilized by the Illinois Power Agency (“IPA”), which procures energy and capacity on behalf of several utilities. The IPA conducts a state-run procurement that is open to DR and ARCs as well as generation suppliers. The procurement is for resources to meet a utility’s resource adequacy obligations under the MISO Fixed Resource Adequacy Plan. If an ARC is awarded a contract pursuant to the IPA

procurement, the ARC enters into a power purchase agreement (“PPA”)-style agreement (such as a forward Zonal Resource Credit contract) with the utility. To fulfill the agreement, the ARC registers DR customers and transfers the associated credits to the utility’s MISO account to satisfy its resource adequacy requirements as a load-serving entity. Then the ARC is paid by the utility according to the agreement. As the market participant representing the resources, the ARC (and not the utility) is responsible and liable to MISO for all market participation requirements and subject to MISO charges and penalties, as appropriate.

The benefits of enabling the DR PPA approach include providing utilities and other LSEs with longer-term certainty of the resources they can rely upon in their resource plans, as well as providing price certainty to ARCs and customers providing these resources.

ARC-Facilitated DR Program Administration

DR program administration for utilities by ARCs entails utilities entering contracts with ARCs to design, implement and administer DR programs within a utility’s service territory. This approach is currently in use by several utilities in the Midwest and allows for regulatory oversight by a RERRA. The ARC is subject to applicable RERRA regulation because it operates as a vendor under contract to the utility.

Under the DR program administration approach, utilities can contract with one or more ARCs to run programs, thereby leveraging the experience and innovation of ARCs to enable customer participation within the DR program(s). The utility may utilize the DR programs as the utility and its regulator deems best. For example, the utility may register the DR program participants in one or more RTO/ISO DR programs and receive credit for the resources to offset its obligation to procure capacity, energy or ancillary services. Alternatively, the utility may operate the program outside of the wholesale market and deploy DR to peak shave or dispatch DR for economic or reliability reasons.

An advantage of the DR Program Administration model is that the RERRA and utility can more directly control the ARC managing the program to ensure that it is developing resource potential to its fullest. In rural areas where DR opportunities may be sparse, there may be few or no ARCs willing to invest resources to develop the limited DR potential unless they are working closely with the RERRA on an exclusive basis. Rather than risk that customers will miss out on opportunities to earn revenue to remain competitive and innovate, a better approach in such cases may be to contract with a single ARC that will focus on the utility’s customers or an electric cooperative’s members.

One drawback of the DR Program Administration approach is that it can limit the benefits that competition amongst ARCs can provide. It can also be cumbersome for companies with national footprints. Customers with hundreds or thousands of stores and facilities nationwide may prefer to work with a single ARC or only use a few who can help them participate in the many programs available where their stores or facilities are located.



Conditional Opt-In

This approach is appropriate for a RERRA that wants to allow customers to participate in DR but may not want to commit the utility to purchasing the DR from customers to meet the utility's resource needs or does not have the resources to devote to a DR program. The RERRA and the utility may nevertheless want to have a means to obtain information from the ARC about the activities of customers in the utility's service territory or for other reasons. Under this approach, the RERRA would opt in to allow participation of ARCs in an RTO/ISO program and attach conditions to the opt-in to ensure that ARCs are subject to appropriate requirements. Rule 24/32 in California discussed in the previous section is an example of a conditional opt-in.

The utility may purchase the credits associated with DR resources developed by the ARC but is not obligated to do so. The ARC may register resources in the RTO/ISO DR programs, and the resource credit would go to the utility (or other LSE) purchasing the credit. Although the utility will not receive credit for a resource if it is not the ultimate purchaser, the RERRA may nevertheless impose regulatory requirements upon ARCs as a condition of the opt-in election or pursuant to state jurisdiction. One advantage of this approach is that customers may still be able to participate in DR even if their own utility does not have a need for additional resources. Another advantage is that the ability to sell DR to other utilities or LSEs enhances the liquidity of the RTO/ISO market, which increases market efficiency and reduces costs for all customers.



Pros/Cons of Approaches to Regulating ARC Participation

While the section above lays out the options available for state regulators, it is important to discuss the merits and detractors when considering which approach may yield the most benefits. The table below offers some helpful context for balancing regulatory oversight, contribution of ARC-enabled participation towards resource adequacy (“RA”) and the full potential of benefits to the grid and all consumers.

ARC Participation Option	Allows Regulatory Oversight by RERRA	Contributes to Utility/LSE Resource Adequacy	Maximizes Latent DR Potential & Participation	Enables ARC-provided benefits	Allows Customer Selection of ARCs
DR Feed in Tariff	Yes	Yes	Yes	Yes	Yes
ARC DR PPAs	Yes	Yes	Yes	Yes	Yes
Conditional Opt In	Yes	Yes	Yes	Yes	Up to the RERRA
ARC-facilitated DR Program Administration for Utilities	Yes	Yes	No	Depends upon design	Typically, no
Traditional Tariff (w/o ARC participation)	Yes	Yes	No	No	No

Examples of ARC Participation in the Midwest

To provide further context of the approaches to enabling ARCs that RERRAs should consider, it's helpful to provide examples of these models in use today in areas of the Midwest.

DR Feed in Tariff:

Indiana Michigan Company DR Tariff

Indiana Michigan Company has a retail tariff in which customers can be enrolled to participate in the PJM demand response programs through the utility. The capacity credits from customers enrolled in the program are assigned to meet the utility's resource adequacy obligation. The price paid to customers for participation as a capacity

resource is based upon a trailing three-year average of the PJM capacity auction price. Customers are permitted to contract with, and enroll in the program through ARCs, although the tariff requirements run to each individual customer.

Xcel Energy Peak Flex Credit Pilot (MN)

On March 15, 2022, the MPUC approved Xcel Energy's proposed Peak Flex Credit pilot program in Docket No. E002/M-21-101. The MPUC took the opportunity to explore aggregator participation and doubled the pilot size (in MW), creating two tranches of 43MW. One of the tranches is dedicated to participants directly enrolled through Xcel Energy, with a second tranche open to third-party aggregators. On Sept. 8, 2022, the MPUC approved Xcel Energy's final compliance filing, and the tariff became effective as of Sept. 12, 2022.

Interested aggregators must first be approved by Xcel to participate in the pilot by executing an Aggregator Agreement and satisfying the eligibility requirements. In addition to the base tariff provisions that outline the program parameters that will be applicable to all customers, the Aggregator Agreement contains additional requirements to which participating aggregators must adhere. As the pilot is to be administered via a utility tariff, there is regulatory oversight by the MPUC.

ARC DR PPA:

Illinois Power Agency Block Energy and Capacity Procurement (Ameren Illinois)

The Illinois Power Agency (“IPA”) each year administers one or more procurement events soliciting suppliers capable of delivering ZRCs in MISO Zone 4 for the prompt Planning Year (and sometimes for future Planning Year) on behalf of customers whose LSE is the Ameren Illinois Company (“AIC”). The procurement events are open to all entities capable of registering capacity resources, including LMRs, and converting the resources’ MWs into ZRCs in the MISO Module E Capacity Tracking (“MECT”) tool.

Successful bidders must execute a bilateral contract with the IPA and adhere to all provisions of the contract, which is subject to oversight and

approval by the Illinois Commerce Commission (“ICC”). Following contract execution and upon successful resource registration with MISO, the supplier must transfer the ZRCs to AIC within the MECT. AIC then uses the transferred ZRCs to meet its RA obligation as an LSE.

As the bilateral contracting structure is reviewed and approved by the ICC, the ICC as the state regulator can confirm that appropriate provisions are in place to ensure the delivery of ZRCs by the supplier, beyond the rules and regulations applicable to a MISO Market Participant, subject to jurisdiction by FERC.

ARC-Facilitated DR Program Administration:

Montana-Dakota Utilities DR Program

Since 2012, CPower has administered a turnkey DR program for commercial and industrial customers for Montana-Dakota Utilities (“MDU”). CPower has handled all customer recruitment (assisted at times by MDU account managers), load curtailment engineering plans, dispatch and

performance verification for participating customers. MDU registers the participants with MISO as LMRs and uses the Zonal Resource Credits (“ZRCs”) to meet resource adequacy requirements.

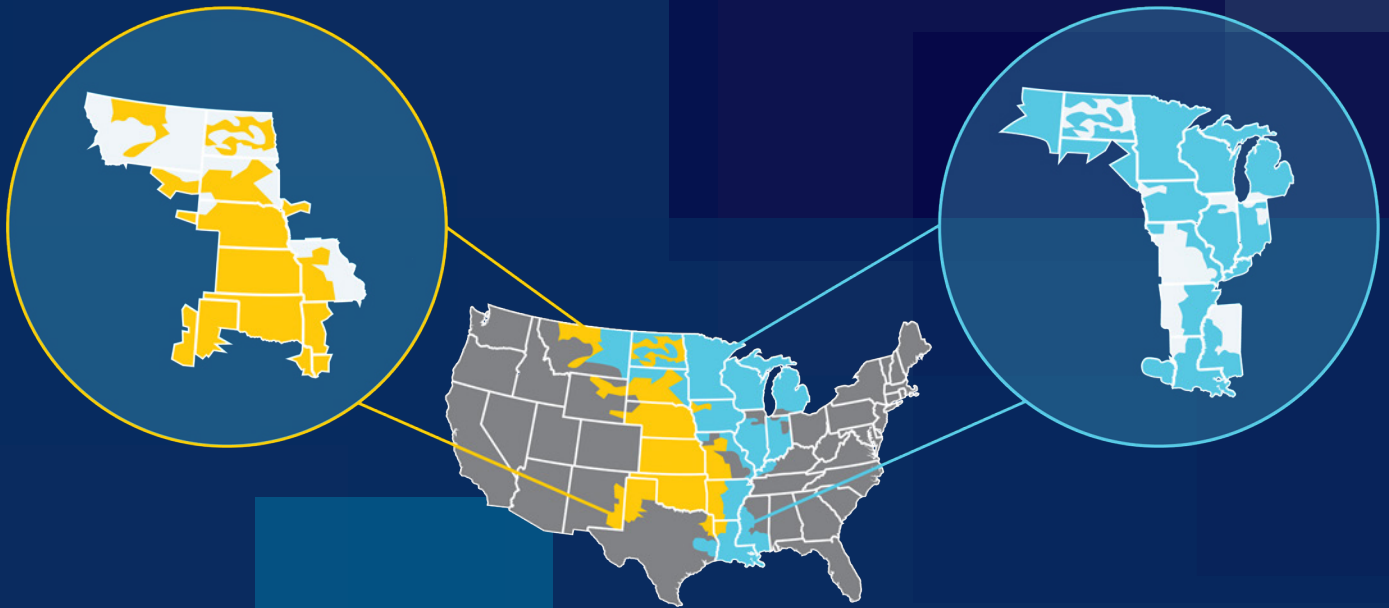


Conclusion

Hopefully, this whitepaper proves informative and useful to RERRAs and helps to dispel popular misconceptions about whether RERRAs may maintain regulatory oversight over ARCs should a RERRA choose to explore the enabling models described here. DR is a powerful tool that can be leveraged to meet resource adequacy needs, as well as to help reliability and provide flexibility as the grid transitions. ARCs are best positioned

to maximize the potential of DR through aggregating customers with differing capabilities and enabling ARCs through one of these models should be considered.

RERRAs and utilities are encouraged to consider the ideas and models adopted in various other regions and utilities discussed in this whitepaper.



Conclusion

For easy access, all the decisions, tariffs and documents cited in this whitepaper have been collected and are available for download:

<https://cpowerenergymanagement.com/midwest-dr-framework-sources>

The authors are also available to discuss any of the topics raised herein, and invite interested individuals to contact them:

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About the Authors



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Peter has 15 years of experience in the energy industry, primarily focused on Demand Response (DR), beginning at Constellation Energy and most recently with CPower Energy Management, one of the nation's leading providers of demand response (DR), distributed energy resources (DER) and energy management services. In his role as Sr. Director Market Development, he has advocated to advance DR/DER interests in ISO/RTO stakeholder groups and with state and federal regulatory bodies. He has also managed wholesale and retail DR portfolios across the CAISO, ERCOT, MISO and NYISO markets. He previously served as chair of NYISO's Price Responsive Load Working Group, vice-chair of ERCOT's Demand Side Working Group and chair of Advanced Energy Management Alliance's New York/ New England and Texas committees. Peter holds a BA in Environmental Studies from the University of Vermont and is a Certified Energy Manager.



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Ken brings nearly three decades of policy leadership on innovation in clean and advanced energy technologies. Ken leads CPower's regulatory and government affairs team, having previously served in similar roles at both Vicinity Energy and EnerNOC/ Enel. Ken collaborates with public officials, regulators, power exchange and system operators, academia and industry peers to unleash the potential of demand-side resources. In addition to work throughout North America's wholesale and retail electricity markets, Ken has extensive international experience in market development and public policy promoting distributed energy resource policies in South America, Asia and Europe. Ken served as chair of the Maryland Public Service Commission from 2003-2007 and as a member of the Maryland House of Delegates from 1991-2003. From 2012-2019, he was a guest lecturer on retail markets and demand-side management at the Summer School on Regulation of Electric Utilities, Florence School of Regulation, Florence, Italy. Ken graduated with honor from the University of Maryland School of Law and earned a B.S. in Biology and Chemistry from Salisbury University.



About CPower

CPower Energy is the national leader of grid balancing and reliability solutions, creating a Customer-Powered Grid™ that will enable a flexible, clean and dependable energy future. With 6.3 GW of capacity at more than 17,000 sites across the U.S., we unlock the full value of distributed energy resources to strengthen the grid when and where it's needed most. CPower is based in Baltimore, Maryland and is owned by LS Power, a development, investment, and operating company focused on the power and energy infrastructure sector. For more information, visit: www.cpowerenergymanagement.com.