UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators	))))))	Docket No. RM16-23-000

Comments of the Harvard Environmental Policy Initiative

The Harvard Environmental Policy Initiative[1] submits these comments on legal aspects of the Commission's November 17, 2016 Notice of Proposed Rulemaking (NOPR) and respectfully requests that the Commission consider them. Since the comment due date, the Commission announced a technical conference on "State Policies and Wholesale Markets."[2] In the technical conference notice, the Commission explains that "there is an open question of how the competitive wholesale markets . . . can select resources of interest to state policy makers while preserving the benefits of regional markets and economic resource selection." The question raises issues of market design, and proposed solutions are likely to provoke debate about the scope of the Commission's jurisdiction.

Although likely not the focus of the technical conference, distributed energy resources (DERs) are also "resources of interest to state policy makers" in many states. Allowing aggregations of distributed energy resources (DERs) to participate in wholesale markets can facilitate the achievement of state policies in RTO/ISO markets. But a few commenters in this docket raise the possibility that DER aggregation threatens to preempt state policies. As the Commission is broadly considering the interaction between markets and state policies, we submit this comment in order to

1. affirm that the Commission has legal authority to require wholesale market operators to enable participation of aggregators of DERs, and argue that prohibiting a resource from participating in both state-level and RTO/ISO programs is not legally necessary;
2. rebut Xcel Energy's claim that the proposal "exceeds the Commission's authority and improperly intrudes on matters reserved to the states" and demonstrate that the "fundamental questions" posed by the Edison Electric Institute (EEI) reveal no legal barriers to the Commission's rule; and
3. suggest that the Commission articulate a new approach to its jurisdiction over DERs, by asserting jurisdiction over sales by DER aggregators to RTO/ISOs while leaving states with authority over sales by individual DERs.

[1] The Harvard Environmental Policy Initiative is an independent policy organization that produces legal analysis on a range of environmental and energy issues. We are focused on adapting the law to meet new realities in four issue areas, including regulation of the electricity sector. The Policy Initiative informs public debate and promotes a practical approach to legal issues, always looking to ensure that policies work harder for people, communities, and the environment.
[2] Notice of Technical Conference, Docket No. AD17-11-00 (Mar. 3, 2017).

I. The Commission Has Legal Authority to Require RTO/ISOs to Enable the Participation of DER Aggregators

The Legal Basis for the Commission's Proposed Action

In the NOPR, the Commission proposes to take action under section 206 of the Federal Power Act (FPA) to ensure that the RTO/ISO tariffs are just and reasonable and not unduly discriminatory or preferential. FERC's proposed action would require each RTO and ISO to revise its tariff and "establish distributed energy resource aggregators as a type of market participant and allow the distributed energy resource aggregators to register distributed energy resource aggregations under the participation model in the RTO/ISO tariff that best accommodates the physical and operational characteristics of the distributed energy resource aggregation."[3]

The NOPR defines DERs as "a source or sink of power that is located on the distribution system, any subsystem thereof, or behind a customer meter. These resources may include, but are not limited to, electric storage resources, distributed generation, thermal storage, and electric vehicles and their supply equipment."[4]

FERC justifies its proposed action by "preliminarily find[ing] that the barriers to the participation of distributed energy resources through distributed energy resource aggregations in the organized wholesale electric markets may, in some cases, unnecessarily restrict competition, which could lead to unjust and unreasonable rates. . . . [and that] removing these barriers will enhance the competitiveness, and in turn the efficiency, of organized wholesale electric markets and thereby help to ensure just and reasonable and not unduly discriminatory or preferential rates for wholesale electric services."[5] With regard to undue discrimination, FERC states that "electric storage resources and other resources connected to the distribution system should be able to participate in all of the organized wholesale electric markets in which they are technically capable of participating and that barriers that unnecessarily prevent distributed energy resources from providing certain services may be caused by market rules that are unduly discriminatory."[6]

Further Legal Support for FERC's DER Aggregation Requirements

This section addresses a threshold jurisdictional question about sales of energy or sink-related services from DERs aggregators,[7] and then elaborates on the FPA's "just and reasonable and not unduly discriminatory" standard as well as FERC's legal authority under FPA § 206 to order changes to RTO/ISO tariffs.

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[3] NOPR at P 5.
[4] NOPR at P 1 n. 2
[5] NOPR at P 14.
[6] NOPR at P 114.
[7] In general, the Commission may not approve an RTO tariff that includes a market mechanism that is beyond the Commission's jurisdiction. *See* Detroit Edison Co. v. FERC, 334 F.3d 48 (D.C. Cir. 2003) (holding that Commission approval of an RTO tariff that allowed unbundled retail customers to take distribution service under the tariff exceeded the Commission's authority because FERC did not have jurisdiction over unbundled retail distribution service). So, for example, the Commission may not regulate under the FPA "markets in all electricity's inputs—steel, fuel, and labor most prominent among them." FERC v. Electric Power Supply Association, 136 S.Ct. 760, 774 (2016) (*EPSA)*. As discussed above, this limitation is not applicable to the NOPR because the Commission has jurisdiction over sales by DER aggregators to RTO/ISOs.

FERC Has Jurisdiction to Regulate RTO/ISO Tariffs that Facilitate Sales from DER Aggregators

FPA § 201 provides FERC with jurisdiction over "the sale of electric energy at wholesale in interstate commerce." By definition, a sale of electric energy by an aggregator to an RTO/ISO is a "sale . . . at wholesale in interstate commerce." There is no doubt that a sale from an aggregator to an RTO/ISO is a "wholesale sale." The FPA defines a "wholesale" sale as "a sale of electric energy to any person for resale." RTO/ISOs resell all power purchased from DER aggregators to load-serving entities and other market participants. All sales to an RTO/ISO, including from an aggregator of DERs, are also "in interstate commerce" because RTO/ISOs resell the purchased power across state lines through interstate markets.

It is immaterial that DERs themselves are state-regulated and are connected to the state-regulated distribution system. The Commision does not have jurisdiction over any "facilities used for the generation of electric energy,"[8] regardless of their size or location. FERC "exert[s] jurisdiction over transactions based on the transactions' satisfaction of the Act's jurisdictional criteria."[9] Commission jurisdiction over a transaction turns on whether it is "a wholesale sale in interstate commerce" or whether it "directly affects" a jurisdictional rate, and not on "whether a facility as such should be classified as jurisdictional or not."[10]

The Commission also proposes to assert jurisdiction over DER aggregators' sale of sink-related services to RTO/ISOs.[11] Assuming support in the record, the sale of "sink services" to an RTO/ISO would fall under FERC's jurisdiction under the test applied by the Supreme Court in *FERC v. Electric Power Supply Association* (EPSA). The Court explained that FERC's "justifications for regulating demand response are all about, and only about, improving the wholesale market."[12] The Court upheld FERC's assertion of jurisdiction in *EPSA*, finding that demand response "directly affects" wholesale rates. Similarly, if the Commission concludes that aggregated sink services "directly affect" wholesale rates, its duty to ensure just and reasonable and not unduly discriminatory *wholesale rates* would enable it to regulate wholesale sales of aggregated sink services.

In *EPSA*, the Court rejected petitioners' arguments that FERC regulation of wholesale demand response intruded on state authority, instead finding that the Commission aimed to "enhance the wholesale, not retail, electricity market."[13] And while the rule undoubtedly had effects on state-regulated retail sales, those effects were "of no legal consequence."[14] FERC "follow[ed] the dictates of its regulatory mission to improve the competitiveness, efficiency, and reliability of the wholesale market."[15] Just as the Commission was not impermissibly "luring" retail customers into the

[8] 16 U.S.C. 824(b)(1).
[9] NARUC v. FERC, 475 F.3d 1277, 1282 (D.C. Cir. 2007).
[10] *Id.*
[11] Demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy. 18 CFR 35.28(b)(4) (2010).
[12] *EPSA*, 136 S.Ct. at 776.
[13] *Id.* at 780.
[14] *Id.* at 775.
[15] *Id.* at 780.

wholesale market,[16] its regulation of aggregated DERs is likewise not forcing, compelling, or otherwise improperly inducing individual DERs to participate in a wholesale market.

Similarly, the Commission has jurisdiction over wholesale demand response but not over individual demand response resources' sales to an aggregator. In this NOPR, the Commission does not assert jurisdiction over sales by individual DERs but proposes to exercise exclusive jurisdiction over sales by DER aggregators to RTO/ISOs.

FERC Has Authority under FPA § 206 to Require RTOs to Enable the Participation of DER Aggregators

FPA § 206 provides the Commission with a duty to remedy any jurisdictional rate "or that any rule, regulation, practice, or contract affecting such rate" that it concludes is "unjust, unreasonable, unduly discriminatory or preferential." In order to demand any change to an existing tariff, the Commission must meet a "dual burden."[17] It must find both that the existing tariff results in unjust, unreasonable, or unduly discriminatory rates and that its proposed changes are just and reasonable.[18] This section briefly highlights relevant law on the FPA's "unjust, unreasonable, unduly discriminatory or preferential" standard in order to reinforce the legal basis for the Commission's proposed action under FPA § 206.

The Supreme Court has instructed that "[t]here is only one statutory standard for assessing wholesale-electricity rates, whether set by contract or tariff—the just-and-reasonable standard."[19] The Court has recognized in recent cases that "enhancing competition" is the Commission's primary tool for ensuring that rates are just and reasonable.[20] In Order No. 745, the Commission explained that "[e]ffective wholesale competition," furthers its core mission of consumer protection[21] by "among other things, providing more supply options, encouraging new entry and innovation, and spurring deployment of new technologies."[22]

The FPA's prohibition against unduly discriminatory rates is historically rooted in concerns about a utility's anticompetitive practices, such as reduced rates to preferred customers.[23] Traditionally, rates were considered unduly discriminatory if they did not reflect the costs of serving those

[16] *Id.* at 778.
[17] FirstEnergy Services Co. v. FERC, 758 F.3d 346, 353 (D.C. Cir. 2014).
[18] *Id.*; Atlantic City Elec. v. FERC, 295 F.3d 1, 10 (D.C. Cir. 2002) ("The courts have repeatedly held that FERC has no power to force public utilities to file particular rates unless it first finds the existing filed rates unlawful.").
[19] Morgan Stanley Capital Group v. Public Utility Dist. No. 1 of Snohomish Cnty., WA, 554 U.S. 527, 545 (2008).
[20] *EPSA*, 136 S.Ct. at 768 (quoting *Morgan Stanley*, 554 U.S. at 538)); Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288, 1292 (2016) (citing *EPSA)*; Oneok, Inc. v. Learjet, 135 S.Ct. 1591, 1597 (2015) (recognizing that "FERC adopted an approach that relied on the competitive marketplace, rather than classical regulatory rate-setting, as the main mechanism for keeping *wholesale* natural-gas rates at a reasonable level").
[21] "A major purpose of the [FPA] is to protect power consumers against excessive prices." Pa. Water & Power Co. v. Fed. Power Comm'n, 343 U.S. 414, 418 (1952).
[22] FERC Order No. 745, 134 FERC ¶ 61,187 at P 48 (2011); NOPR at P 14 (2016) ("Effective wholesale competition encourages entry and exit and promotes innovation, incentivizes the efficient operation of resources, and allocates risk appropriately between consumers and producers.").
[23] *See* Joel Eisen, *FERC's Expansive Authority to Transform the Electric Grid*. 49 U.C. DAVIS L. REV. 1783, 1799-1802 (2016) (tracing the prohibition against undue discrimination to turn-of-the-century railroad regulation and summarizing that early cases understood discrimination to refer to unlawful practices or advantages).

ratepayers.[24] In the mid-1990s, the Commission broadened the scope of its undue discrimination analysis to include industry-wide anticompetitive practices.[25] Reviewing Order No. 888, the D.C. Circuit concluded that the FPA's "ambiguous antidiscrimination provisions . . . giv[e FERC] broad authority to remedy unduly discriminatory behavior."[26] The Commission has since acted several times to "promulgat[e] generic rule[s] . . . to remedy practices throughout the industry that may be causing jurisdictional rates to be excessive or unduly preferential."[27] The D.C. Circuit recently affirmed FERC's reliance on "'generic' or 'general' findings of a systemic problem to support imposition of an industry-wide solution."[28]

In Order No. 764, for example, the Commission required transmission providers to amend their tariffs in order to remove barriers to the integration of variable energy resources (VERs). The Commission's "primary goal" in that order was to "remove obstacles that can have a discriminatory impact on the ability of VERs to compete in the marketplace and that can otherwise result in unjust and unreasonable rates for all market participants."[29] Similarly, in Order No. 719, FERC required RTO/ISOs to amend their tariffs to allow for the participation of demand response resources. FERC stated that its "goal" was to "eliminate barriers to the participation of demand response in the organized power markets by ensuring comparable treatment of resources." Its policy "reflects its responsibility under sections 205 and 206 of the FPA to remedy any undue discrimination and preference in organized markets."[30]

That RTO/ISOs do not currently have participation models for DER aggregators (with the exception of California), demonstrates that undue discrimination against DER aggregations is "systemic." Once the Commission finalizes that conclusion, its "broad authority to remedy unduly discriminatory behavior"[31] requires it to take action. The Commission's proposed remedy — to require RTO/ISOs to amend their tariffs to allow DER aggregators to participate — can remedy the unduly discriminatory tariffs and result in just and reasonable rates by "enhancing competition." Courts afford the Commission great deference in its policy judgments and rate decisions.[32] "[T]hose

[24] ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, VOL. 1, 63 (1970) ("The rule that individual rates not be unduly discriminatory similarly has been defined in terms of the respective costs of various services."); Electricity Consumers Resource Council v. FERC, 747 F.2d 1511, 1515 (D.C. Cir. 1984) (citing Alabama Elec. Co-op., Inc. v. FERC, 684 F.2d 20, 27 (D.C. Cir. 1982)).

[25] Am. Electric Power Serv. Corp., 67 FERC ¶ 61,168, 61,490 (1994) (citing New England Power Pool, 67 FERC ¶ 61,042 (1994)).

[26] Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 684 (D.C. Cir. 2000); *see also* Federal Energy Regulatory Commission, Order No. 888, 61 Fed. Reg. 21,540 (1996) ("Non-discriminatory open access to transmission services is critical to the full development of competitive wholesale generation markets and the lower consumer prices achievable through such competition.").

[27] FERC Order No. 764, 139 FERC ¶ 61,246 at P 46 (2012).

[28] South Carolina Pub. Serv. Auth. v. FERC, 762 F.3d 41, 65 (D.C. Cir. 2014) (citing Interstate Natural Gas Ass'n of Am. v. FERC, 285 F.3d 18, 37 (D.C. Cir. 2002)).

[29] *FERC Order No. 764* at P 48.

[30] FERC Order No. 719, 125 FERC ¶ 61,071 at PP 16–17.

[31] *Transmission Policy Access Group*, 225 F.3d at 684.

[32] *Morgan Stanley*, 554 U.S. at 532 (citing FPC v. Texaco Inc., 417 U.S. 380, 389 (1974); Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968); *EPSA* at 782–84; Elec. Consumers Res. Council v. FERC, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (quoting Pub. Util. Comm'n of the State of Cal. v. FERC, 254 F.3d 250, 254 (D.C. Cir. 2001)); Town of Norwood v. FERC, 962 F.2d 20, 22 (D.C. Cir. 1992).

who would overturn [FERC's] judgment undertake 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.'"[33]

The FPA does not limit the Commission's jurisdiction so as to prevent it from regulating sales by DER aggregators to RTO/ISOs. To the contrary, an imagined jurisdictional bar would "read the FPA, against its clear terms, to halt a practice that so evidently enables the Commission to fulfill its statutory duties."[34] In a case about the Commission's authority under the Natural Gas Act,[35] the Court explained that it was, "in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes."[36] The Commission "must be permitted, consistently with obligations of due process, to adapt rules and policies to demands of changing circumstances."[37]

<u>There Is No Legal Barrier That Prevents DERs from Participating in Both State and FERC Programs</u>

The Commission proposes to find "that it is appropriate for each RTO/ISO to limit the participation of resources in the organized wholesale electric markets through a distributed energy resource aggregator that are receiving compensation for the same services as part of another program." More specifically, under the terms of the NOPR, DERs "that are participating in one or more retail compensation programs such as net metering or another wholesale market participation program will not be eligible to participate in the organized wholesale electric markets as part of a distributed energy resource aggregation."[38] This limitation is not legally required under the FPA. In the final rule, the Commission could allow each RTO/ISO to determine how to allow DERs to participate in both state-level and wholesale programs.

In upholding the Commission's jurisdiction to regulate compensation for demand response in wholesale markets, the Supreme Court concluded that Commission regulation enabled a "program of cooperative federalism."[39] The FPA, according to the Court, "makes federal and state powers 'complementary' and 'comprehensive.'[40] In fact, state-level and FERC-jurisdictional demand response programs have been operating in tandem for years.[41] Similarly the Commission's regulation of DER aggregation could be a program of cooperative federalism.

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[33] *Permian Basin Area Rate Cases*, 390 U.S. at 767 (quoting FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944)).

[34] *EPSA*, 136 S.Ct. at 782.

[35] Because the core provisions of the FPA and Natural Gas Act "are in all material respects substantially identical," FPC v. Sierra Pacific Power Co*.*, 350 U. S. 348, 353 (1956), the Supreme Court has "an established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576 n. 7 (1981).

[36] *Permian Basin Area Rate Cases*, 390 U.S. at 780.

[37] *Id.* at 784.

[38] NOPR at P 134.

[39] *EPSA*, 136 S.Ct. at 780; *see also Hughes*, 136 S.Ct. at 1300 (J. Sotomayor, concurring) ("In short, the Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence.").

[40] *EPSA*, 136 S.Ct. at 780 (quoting FPC v. Louisiana Power & Light 406 U.S. 621, 631 (1972)).

[41] *See, e.g.,* Anne Hoskins and Paul Roberti, *The Essential Role of State Engagement in Demand Response*, HARVARD ENV. L. REV. (2016), http://harvardelr.com/wp-content/uploads/2016/04/Hoskins-Roberti.pdf (describing how Maryland DR programs complement demand response in PJM markets and how Rhode Island programs interact with ISO-NE).

The Commission recently concluded that wholesale DR programs operated by NYISO "serve different purposes, provide different benefits, and compensate distinctly different services" from state-level programs regulated by the Public Service Commission.[42] At issue in that proceeding were New York ISO capacity market buyer-side market power mitigation rules. The Commission agreed with the complainants that rules limiting demand response participation rendered the tariff unjust, unreasonable, unduly discriminatory or preferential, under section 206 of the FPA. The legal issues in the complaint are distinct, but as relevant to the NOPR protesters IPPNY/EPSA could not identify any jurisdictional barrier that prevents demand response resources from participating in both retail and wholesale programs.[43]

That DER aggregations may, at times, sell energy at wholesale in interstate commerce and therefore may be legally distinct from demand response resources whose sales "directly affect" jurisdictional energy sales rates does lead to a different legal conclusion. The FPA does not prevent resources from selling energy at times in intrastate commerce pursuant to state law (such as through a state-regulated net metering tariff[44]) and at other times in interstate commerce under the Commission's authority. While the arrangement may be operationally complex, it would be within the Commission's authority to approve an RTO/ISO tariff that would facilitate it.

II. Assertions that the NOPR is Improper Lack a Legal Foundation

<u>Rebutting Xcel Energy's Arguments</u>

Xcel asserts that the NOPR 1) "exceeds the Commission's authority and improperly intrudes on matters reserved to the states" and 2) "fails to provide evidence substantial enough to support the requirement to facilitate DER participation in wholesale markets."[45] These statements are not supported by a legal foundation.

The NOPR Does Not Exceed FERC's Authority or Improperly Intrude on State Jurisdiction

Xcel asserts that the NOPR "pays too little regard to state sovereign rights" and "interferes with the state's preeminent authority over the distribution grid and retail programs. "[46] The NOPR would "repurpose [DERs] as wholesale resources, and then use the distribution system that the state regulates to deliver such resources into organized markets."[47] Xcel then concludes that the Commission "should not attempt to force state action by requiring DER aggregation."[48]

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[42] New York Public Service Commission v. NYISO, Inc., 158 FERC ¶ 61,137 at P 33 (2017) ("the payments SCRs receive from the retail-level demand response programs are actually for providing services that are separate and distinct from the payments that SCRs receive for participating in NYISO's ICAP market. While the wholesale- and the retail-level demand response programs may complement each other, they serve different purposes, provide different benefits, and compensate distinctly different services

[43] *Id*. at PP 16–21 (summarizing the joint protest); Joint Protest of IPPNY and EPSA, Docket No. EL16-92-000 (Jul. 21, 2016).

[44] *See* section III of this comment for discussion of state jurisdiction over sales by DERs.

[45] This comment does not address Xcel's argument that the Commission must "reevaluate its proposal to allow DER resources to charge at wholesale rates because that proposal does not comport with federal court decisions regarding purchases of station power at retail rates."

[46] Xcel Comment at 5, 6.

[47] *Id.* at 6.

[48] *Id.*

Although Xcel implies that the Commission has exceeded its legal authority under the FPA, the company fails to identify case law or statutory provisions that define a relevant limit to the Commission's jurisdiction, or the state authority that the rule risks preempting or otherwise invading. Xcel urges the Commission to adopt an opt-in approach to DER aggregation, but does not claim that it is legally necessary to do so.

Instead, Xcel's legal argument is that Commission's reliance on *EPSA* for authority over DER aggregations is misplaced. The company purports to find three distinctions between the NOPR and the Commission's regulation of demand response. As discussed below, Xcel fails to identify any legal barrier that would prevent the Commission from finalizing the NOPR.

First, Xcel finds it relevant that Orders No. 719 and 745 followed a Congressional statement in support of removing barriers to demand response. But the Court's decision in *EPSA* mentions Congress's policy declaration on demand response only in passing,[49] and it is clear that this provision of the Energy Policy Act of 2005 simply carries no weight in the *EPSA* decision. Congress need not issue a statement in support of DER aggregation to afford the Commission jurisdiction.

Second, Xcel argues that while in the case of wholesale demand response the Commission was initially reacting to RTO/ISO proposals, the NOPR proactively requires RTO/ISOs to enable DER aggregations even though only one ISO currently allows for their participation. But Xcel misreads *EPSA*; the Court's conclusion about the reach of the FPA did not rest on the Commission's earlier approvals of RTO/ISO tariffs. Having already concluded that the Commission has authority over wholesale demand response under FPA § 206 because it "directly affects" jurisdictional rates, the *EPSA* Court proceeds to evaluate the argument that Order No. 745 is nonetheless *ultra vires* because it impermissibly regulates retail sales. The Court found that there was no support for EPSA's "feverish idea that the Commission's interest in wholesale demand response emerged from a yen to usurp State authority over, or impose its own regulatory agenda on, retail sales."[50] "Contra EPSA," the Court said, "the Commission did not invent the practice" of demand response, but rather it emerged from RTO/ISO proposals.[51] The Commission's prior approvals of RTO/ISO tariffs thus served a narrow purpose in response to EPSA's "historical and purposive" argument that FERC's demand response rule intentionally subverted state policies.

Here, Xcel similarly asserts that the Commission is "attempt[ing] to force state action," but it falls short of articulating a "feverish" theory that FERC is doing so because it is dissatisfied with states' DER policies. There is no evidence in the NOPR or in the record to support such a theory. In any event, the fact that only the California ISO currently allows for DER aggregations is not a legal obstacle to FERC's NOPR.

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[49] *EPSA*, 136 S.Ct. at 770–71 ("Congress added to the chorus of voices praising wholesale demand response. . . . Spurred on by Congress, the Commission determined to take a more active role in promoting wholesale demand response programs.); *id.* at 779 ("And when, years later (after Congress, too, endorsed the practice), FERC began to play a more proactive role, it did so for the identical reason: to enhance the wholesale, not retail, electricity market.") *id.* at 781 ("FERC has amply explained how wholesale demand response helps to achieve those ends . . . Congress itself agreed, "encourag[ing]" greater use of demand response participation at the wholesale level.").
[50] *Id.*
[51] *Id.* at 779.

Xcel's third supposed distinction is that "[c]ustomer load reduction is entirely different from the situation where customers engage in bidirectional trafficking of energy across the distribution grid to sell in to wholesale markets and purchase power to charge storage devices from those wholesale markets."[52] The company claims that in order to facilitate DERs' participation, the utility will need to invest in distribution infrastructure and personnel, and the Commission's rule will thus "impose significant burdens on the distribution systems subject to state retail jurisdiction." Assuming that Xcel's claims are factually true, they do not constitute a legal barrier to Commission regulation of sales by DER aggregators. As the Supreme Court recognized in *EPSA*, "[w]hen FERC regulates what takes place on the wholesale market, as part of carrying out its charge to improve how that market runs, then no matter the effect on retail rates, § 824(b) imposes no bar."[53] That the Commission's rule may motivate Xcel to invest in distribution infrastructure and seek cost recovery and other regulatory permissions from a PUC is similarly "of no legal consequence."[54]

Commission orders regularly lead to state regulatory actions that cover matters far beyond FERC jurisdiction. For example, in 2010 the Commission approved a MISO tariff amendment that created a new category of transmission projects and allocated costs of those projects among MISO members.[55] That order had many consequences at the state level. For instance, a company building one of the MISO-identified transmission projects applied to the Missouri PSC for a certificate of public convenience and necessity (CPCN) so that it could construct the line.[56] Under Xcel's theory, the PSC was thus "forced" to evaluate that application, which it ultimately approved. The direct effects of the PSC's approval include impacts on wetlands, forests, and farms.[57] FERC has as much authority over granting a CPCN and land-use planning in Missouri as it does over Xcel's electric distribution system planning. But the fact that FERC's transmission order led directly to a PSC approval of a transmission project that will affect land use in Missouri is legally irrelevant to the question of FERC's jurisdiction over that order. Similarly, Xcel's distribution system investments, even if motivated by FERC's rule, are not evidence that FERC has overstepped its legal authority.[58]

The Commission Has Met Its Evidentiary Burden

Xcel makes two claims about the NOPR's factual basis, alleging that it: 1) "lacks any analysis of whether and to what degree participation in wholesale markets by aggregated DERs is necessary to ensure that RTO and ISO markets produce just and reasonable rates" and 2) "does not address in any meaningful fashion the reliability and cost implications associated with market participation by

[52] Xcel Comment at 8.
[53] *EPSA*, 136 S.Ct. at. at 776.
[54] *Id.*
[55] Midwest Independent Transmission System Operator Inc., 133 FERC ¶ 61,221 (2010).
[56] Missouri Public Service Commission, File No. EA-2015-0146, Report and Order (Apr. 27, 2016).
[57] *Id.*
[58] Note that the Missouri PSC's order required affected counties to approve the project before the developer could commence construction. As of March 2017, four of the five counties rejected the project and the other tabled the issue. The developer is currently in litigation against the counties. Jeffrey Tomich, "Clean Line Makes New Pitch for $2.8 B Midwest Power Line," E&E News (Mar. 21, 2017), http://www.eenews.net/energywire/2017/03/21/stories/1060051783.

aggregated DERs."[59] The company then asserts that because of these two failures the Commission has not "me[]t its burden to establish a reasoned basis for the proposal."

Xcel's first claim goes to the heart of the Commission's determination about whether rates are just and reasonable. It is well-established that "issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of [FERC's] regulatory mission."[60] The FPA's just and reasonable standard delegates wide discretion to the Commission, and courts respect the Commission's judgment.[61]

The Supreme Court has repeatedly reiterated that "'just and reasonable' is obviously incapable of precise judicial definition."[62] Contrary to Xcel's claim, the Commission has no legal obligation to show "to what degree" DER aggregation is necessary to maintain just and reasonable rates. A FERC-jurisdictional rate is either "just and reasonable" or not. There is no "degree" to which a rate can be found to be just and reasonable. As discussed above, the Commission's conclusion that facilitating the participation of DER aggregations will "enhance competition" demonstrates that the RTO/ISO tariff will result in just and reasonable rates.[63]

Xcel's second argument is that the NOPR does not address the "reliability and cost implications." The company describes a range of "potential [ ] detrimental impacts to service at the distribution level" and reasserts its claim described above that the NOPR will require distribution system investments and operational changes.[64] In support of its claims, Xcel cites the summary of a report sponsored by the Department of Energy's Lawrence Berkeley National Laboratory that is entitled "Distribution Systems in a High Distributed Energy Resources Future."[65] As the title of the paper suggests, the company appears to be describing changes to the distribution system that will be necessary to accommodate a ***high*** penetration of DERs. To be sure, Xcel is an expert at operating electric distribution systems and its statements must be considered, but it fails to even allege that Commission regulation of DER aggregations will result in the consequences that it describes.

Nonetheless, the company argues that the Commission ought to account for effects of the NOPR on its non-jurisdictional distribution system and weigh "the benefits that DER aggregations might bring to wholesale markets . . . in light of the costs imposed on the distribution system."[66] In

[59] Xcel comment at 9.
[60] Elec. Consumers Res. Council v. FERC, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (quoting Pub. Util. Comm'n of the State of Cal. v. FERC, 254 F.3d 250, 254 (D.C. Cir. 2001)); *see also EPSA*, 136 S.Ct. at 784 (explaining that with regard to the appropriate compensation for demand response resources, the "disputed question here involves both technical understanding and policy judgment"); Town of Norwood v. FERC, 962 F.2d 20, 22 (D.C. Cir. 1992)).
[61] *Morgan Stanley*, 554 U.S. at 532 (2008) (citing FPC v. Texaco Inc., 417 U.S. 380, 389 (1974); *Permian Basin Area Rate Cases,* 390 U.S. at 767 (1968) (stating that courts must "afford great deference to the Commission in its rate decisions.").
[62] *Id.* (citing FPC v. Texaco Inc*.*, 417 U.S. 380, 389, (1974); *Permian Basin Area Rate Cases,* 390 U.S. at 767).
[63] *See supra* notes 31–33 and associated text.
[64] Xcel comment at 10–11.
[65] Paul De Martini and Lorenzo Kristov, Lawrence Berkeley National Laboratory, "Distribution Systems in a *High* Distributed Energy Resources Future: Planning, Market Design, Operation, and Oversight," (Oct. 2015), https://emp.lbl.gov/sites/default/files/lbnl-1003797.pdf.
[66] Xcel comment at 11.

general, Commission rate decisions do not have to pass a cost-benefit analysis as Xcel suggests. Rather, in assessing whether a rate is just and reasonable the Commission must "balance[e] . . . the investor and the consumer interests."[67] More generally, the Commission "must be free, within limitations imposed by constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests."[68] In seeking to balance relevant interests, the Commission considers matters under its jurisdiction. Just as the Commission does not consider the effects of its rules on "markets in all electricity's inputs—steel, fuel, and labor most prominent among them,"[69] it also does not consider the effects on a utility's distribution system investments when it determines whether wholesale rates are just and reasonable.

Xcel's concluding point, that the Commission has "failed to meet its burden to establish a reasoned basis for the proposal," lacks a legal foundation. Summarizing the relevant case law, the Commission has concluded that its findings must be supported by "substantial evidence," which it explains:[70]

> is identical to the familiar arbitrary and capricious standard. The Commission thus must show that a 'reasonable mind might accept' that the evidentiary record here is 'adequate to support a conclusion,' that this Final Rule is needed to address barriers to the integration of [DER aggregations] by remedying challenges that may be causing undue discrimination and increased costs ultimately borne by consumers.[71]

As applied to the NOPR, the Commission must show that the record is adequate to support a conclusion that the rule is needed to address barriers to the participation of DER aggregations and that remedying those unduly discriminatory rules will enhance competition and result in just and reasonable rates. Xcel has not demonstrated that the Commission is unable meet this deferential standard based on the information in the NOPR and the record evidence.

<u>Addressing EEI's "fundamental questions"</u>

In its comments on the NOPR, EEI purports to identify three "fundamental questions" about FERC's jurisdiction. As discussed below, the first two questions misstate the law. The third question raises practical implementation issues that FERC has permissibly chosen to address in its review of RTO/ISO compliance filings.

1. *"Whether the Commission . . . can force states to allow retail customers . . . to bypass the retail net metering . . . and instead participate directly in the wholesale market . . ."*

EEI does not identify precisely what actions states might be "forced" to take. In general, states do not have rules prohibiting DER owners from contracting with an aggregator. Nonetheless, it is possible that states will have to take regulatory action or even enact legislation to affirmatively

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[67] *Hope*, 320 U.S. at 603; *Morgan Stanley,* 554 U.S. at 532 (stating that FERC must choose a ratemaking "method that entails an appropriate 'balancing of the investor and consumer interests'").
[68] *Permian Basin Area Rate Cases*, 390 U.S. at 767.
[69] *EPSA* 136 S.Ct. at 774.
[70] *South Carolina Pub. Serv. Auth.*, 762 F.3d at 65 (citing 5 U.S.C. § 706(2)(E)).
[71] *FERC Order No. 764* at P 46 (citations omitted) (describing findings relevant to requiring transmission owners to remove barriers to integration of variable energy resources).

allow DER aggregation. As discussed above, the potential for state regulatory action in response to a FERC wholesale market rule does not create a legal bar that would deny the Commission authority to promulgate the rule.

Moreover, even if a change in state law were necessary to allow consumers to participate, the Commission's rule would not "force" states to do anything. The NOPR does not purport to require states to facilitate the development of DERs. A Commission order directed at RTO/ISOs that requires them to amend their tariffs does not have the preemptive effects that EEI suggests.

2. *"Whether states will lose jurisdiction over these resources as FERC has exclusive jurisdiction over sales for resale under the Federal Power Act"*

EEI confuses Commission jurisdiction over energy sales with state jurisdiction over generation facilities. Regardless of whether the Commission regulates sales by DER aggregators to RTO/ISOs, states will retain authority over the resources themselves. EEI also seems to blur sales from individual DERs with sales from DER aggregators to an RTO/ISO. This legal distinction is discussed in more detail in part III.

3. *"How the reliability of the distribution system would be maintained, as FERC does not have jurisdiction to generally regulate the distribution system while the NOPR seems to contemplate allowing the DERs to largely bypass such considerations"*

EEI's members have always been responsible for maintaining the reliable operations of their distribution systems, often subject to oversight by state regulators.[72] In questioning "how the reliability of the distribution system would be maintained," EEI imagines that the Commission's rule would "allow[] the DERs to bypass many of the[] basic prerequisites" of distribution system planning and funding "and to simply play directly in the wholesale markets."[73] This conclusion has little basis in the NOPR.

The NOPR states that the "market rules that each RTO/ISO adopts to facilitate the participation of distributed energy resource aggregations must address coordination between the RTO/ISO, the distributed energy resource aggregator, and the distribution utility to ensure that the participation of these resources in the organized wholesale electric markets does not present reliability or safety concerns for the distribution or transmission system."[74] The NOPR suggests neither that FERC will preempt state authority over distribution system planning, nor that it will create new authority for FERC to allow DERs to connect to a distribution system without a utility's approval or knowledge.

EEI then warns the Commission that it "has not addressed the[se] many significant complications and issues associated with the NOPR's proposals for them to avoid being found arbitrary and

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[72] A 2012 study found that "at least 35 state regulatory commissions in the US require distributors to routinely report their reliability performance." Serena Hesmondhalgh, William Zarakas, Toby Brown, The Brattle Group, *Approaches to Setting Electric Reliability Standards and Outcomes* (Jan. 2012), http://www.brattle.com/system/publications/pdfs/000/004/670/original/Approaches_to_Setting_Electric_Distribution_Reliability_Standards_and_Outcomes_Hesmondhalgh_Zarakas_Brown_Jan_2012.pdf?1378772119.

[73] EEI Comment at 24, n. 34.

[74] NOPR at P 153.

capricious." The seminal Supreme Court case on the arbitrary and capricious standard, which EEI relies on, concludes that a rule is invalid if an agency "*entirely* failed to consider an important aspect of the problem."[75] Coordinating wholesale market operator's dispatch signals with distribution system operations and planning may well present implementation challenges, but the Commission has not "entirely failed to consider" the issue. Instead, it proposes to allow RTO/ISOs to develop compliance plans to address these implementation issues and to defer any specific determinations about coordination until it reviews RTO/ISO plans.[76] This is a sensible and legal approach.

In reviewing Order No. 1000, the D.C. Circuit upheld aspects of the Commission's order that deferred on certain implementation details until the Commission had an opportunity to review RTO/ISO compliance filings. The court declined to address petitioners' *Mobile-Sierra* arguments because FERC's order made clear that the Commission would review that issue when it evaluated compliance filings. FERC was "free to treat a particular issue in a different proceeding where that proceeding would generate more appropriate information and where the agency was addressing the question."[77] The Commission may likewise address specific implementation issues when it evaluates RTO/ISO compliance filings. The final rule may not "entirely fail" to consider legitimate implementation issues, but it "need not solve every problem before it in the same proceeding."[78] In general, the Supreme Court has explained, the Commission "enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures."[79]

III. The Commission Should Establish a Jurisdictional Line that Distinguishes between Sales by DER Aggregators and Sales by DERs

In light of the proliferation of DERs, the Commission should articulate a legal standard that distinguishes between its jurisdiction over sales from DER aggregators to RTO/ISOs in interstate commerce (summarized in Part I) and legal authority to regulate sales from individual DERs. The scope of state jurisdiction over DER sales depends on how the Commission interprets FPA § 201(b). The Commission could determine that an energy sale from a DER is not a "wholesale sale in interstate commerce" but is instead "any other sale" under FPA § 201 and therefore not subject to Commission regulation. As discussed below, the Commission's legally permissible policy choices include allowing states to retain authority over a sale from a DER so long as the purchaser is the utility providing retail service, and allowing DERs, whether behind-the-meter or not, to sell under state-jurisdictional tariffs.

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[75] EEI Comment at 19 n. 26 (quoting *Motor Vehicles Mfrs. Ass'n. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983)) (emphasis added).
[76] NOPR at P 132 (requiring RTO/ISO tariff amendments to address eight issues).
[77] *South Carolina Pub. Serv. Agency*, 762 F.3d at 82 (quoting Mobil Oil Exploration & Producing Serv. Inc. v. United Distrib. Cos., 498 U.S. 211, 230 (1991) (FERC "has 'broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures" and [it] is free to treat a particular issue in a 'different proceeding' where that 'proceeding would generate more appropriate information and where the agency was addressing the question.'"))
[78] Mobil Oil Exploration & Producing Serv. Inc. v. United Distrib. Cos., 498 U.S. 211, 230 (1991).
[79] *Id.* (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

When the Commission declined to assert jurisdiction over bundled retail transmission in Order No. 888 and finalized a multi-factor jurisdictional test for distribution facilities, it concluded that its order would provide "jurisdictional certainty." It then stated:

> [A]s the electric industry and state regulatory authorities continue to develop new competitive market structures . . . we believe that the tests and mechanisms we have provided in this Rule will accommodate both Federal and state interests and will help provide jurisdictional certainty to market participants.[80]

Such jurisdictional certainty with regard to DERs would benefit the industry today. An overly broad, heavy-handed approach could freeze popular state programs while also unnecessarily sweeping millions of resources under Commission jurisdiction. Reading "any other sale" to include sales by DERs would allow for continued experimentation and relieve the Commission of potentially burdensome responsibilities.

FPA § 201(b) limits FERC's jurisdiction over energy sales to sales "of electric energy at wholesale in interstate commerce." The FPA's provisions do "not apply to any other sale of electric energy."[81] This limitation is generally understood to reserve to states authority over retail sales *from a utility to a customer*. However, neither the text of the FPA nor any judicial decision confines this carve-out so narrowly. "Any other sale" could be read to include an energy transfer from a retail ratepayer or other entity that owns a DER.

The Commission's long-standing position is that when a retail customer transfers self-generated energy to a utility and the transaction is effectuated through net energy metering (NEM) the Commission does not consider the transfer a jurisdictional sale.[82] The Commission has explained that net metering "is a method of measuring sales of electric energy. Where there is no net sale over the billing period, the Commission has not viewed its jurisdiction as being implicated."[83]

In its comments in this rulemaking, EEI asserts that net metering tariffs are "part of [a customer's] bundled retail service with its electric distribution utility."[84] With that understanding, any energy transfer effectuated on a retail bill could be considered part of state-regulated bundled retail service regardless of whether the retail customer is a buyer or seller. Allowing states to maintain jurisdiction over all aspects of bundled retail service is consistent with how the Commission has always implemented the Federal Power Act. Just as the Commission declined to assert jurisdiction over bundled retail transmission in Order No. 888, the Commission could likewise leave the net metering aspect of bundled retail service under state jurisdiction.

Alternatively, the Commission could clarify that DERs do not sell "in interstate commerce" and therefore "any other sale" would include energy sales from DERs. The Supreme Court's 1964 decision in *Southern California Edison* does not conflict with this reading. The Court concluded in

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[80] *Order No. 888* at p. 442.
[81] 16 U.S.C. 824(b)(1).
[82] SunEdison, 129 FERC ¶ 61,146 (2009); Order No. 2003-A, 106 FERC ¶ 61,220 at PP 744–47 (2004).
[83] *SunEdison* at P 18.
[84] EEI Comment at 26.

that case that the Commission has exclusive jurisdiction to regulate the rate of a wholesale sale in interstate commerce. The transaction at issue in the case was a sale from a California utility to a California municipality that included energy generated out-of-state.[85] The Supreme famously announced that "Congress meant to draw a bright line . . . between state and federal jurisdiction . . . by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce."[86] By its terms, the Court's holding defines Commission jurisdiction over "wholesale sales in interstate commerce." It clarifies that "interstate commerce" does not cease when purchased energy crosses into the state in which it consumed and then resold.

Southern California Edison does not foreclose a different result when the energy sale does not include out-of-state energy. To support its decision that the sale must be exclusively under federal regulation, the Court cited two earlier cases that held federal jurisdiction over "interstate sales" of natural gas encompassed intrastate sales when those sales included the sale of out-of-state gas.[87] In one of those cases, the Court held that jurisdiction under the Natural Gas Act "cut sharply and cleanly between sales for resale and direct sales for consumptive uses."[88] But the Court's holding in that case and in *Southern California Edison* were premised on top-down, centralized models of the electric and gas industries where power or gas flow in one direction from the interstate transmission grid to retail ratepayers. The holdings are therefore distinguishable from the issue of Commission jurisdiction over DER sales. *Southern California Edison* also sheds no light on whether a sale by a DER is "any other sale" and therefore subject to state jurisdiction.

In 2010, the Commission nonetheless rejected a request to clarify that "distribution-level facilities and distribution-level feed-in tariffs do not implicate Commission jurisdiction."[89] The Commission asserted in that order that its authority over wholesale sales in interstate commerce "is not dependent on the location of generation or transmission facilities, but rather on the definition of, as particularly relevant here, wholesale sales contained in the FPA." To support of its conclusion that a sale by a DER is "in interstate commerce," the Commission cited to three cases about electric transmission: *Florida Power and Light*, *Transmission Access Policy Group*, and *Detroit Edison*.[90] None of these cases preclude finding that DER energy sales are not "in interstate commerce" and reading "any other sale" as including sales by DERs.[91]

At issue in *Florida Power and Light* was whether the Commission could assert jurisdiction over the utility and impose its accounting standards. The Court affirmed the Commission's assertion of

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[85] *FPC v. Southern California Edison Co*., 376 U.S. 205, 208–09 (1964) (noting that the FPC concluded the sale included out-of-state energy and that the Ninth Circuit assumed that finding was supported in the record).
[86] *Southern California Edison Co*., 376 U.S. at 215.
[87] *Southern California Edison*, 376 U.S. at 214–15 (citing *Illinois Natural Gas Co. v. Central Illinois Public Service Co.,* 314 U. S. 498 (1942) and P*anhandle Eastern Pipe Line Co. v. Public Service Comm'n,* 332 U.S. 507 (1947)).
[88] *Panhandle Eastern Pipeline Co.*, 332 U.S. at 517.
[89] California Public Utilities Commission, 132 FERC ¶ 61,047 at P 72 (2010).
[90] *Id.* (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 695-96 (D.C. Cir. 2000), aff'd sub nom. *New York v. FERC,* 535 U.S. 1 (2002); *Detroit Edison Co. v. FERC*, 334 F.3d 48, 51 (D.C. Cir. 2003); *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972)).
[91] For additional discussion of these cases in context of state jurisdiction over sales by DERs, see Frank R. Lindh and Thomas W. Bone, *State Jurisdiction over Distributed Generators*, 34 ENERGY L. J. 499, 525-533 (2013).

jurisdiction based on the Commission's factual conclusion that power supplied by the utility "commingled" with out-of-state power on another Florida utility's connection point to an out-of-state system.[92] The Court immediately recognized the limits of the commingling test, noting that under the explicit terms of the FPA federal jurisdiction may not reach "facilities used in local distribution," regardless of whether there is commingling of interstate energy on those facilities.[93] Similarly, the commingling test could not provide FERC with authority over "any other sale" of electric energy.

Although the commingling test was not a basis for asserting jurisdiction over a particular sale, it is tempting to argue that the test should be extended to classify sales by DERs as "in interstate commerce" under the assumption that energy from DERs commingles with energy sold under Commission jurisdiction. But that assumption is not rooted in the facts. In a hypothetical system where power flows only in one direction, all energy on the distribution system is owned by the utility and resold to retail ratepayers at state-regulated rates. Although those retail sales may include energy that the utility purchased at wholesale in interstate commerce pursuant to FERC's authority, once the energy reaches the distribution system it is owned by the utility and resold pursuant to state law. On a one-way distribution system there is no commingling with energy sold under FERC jurisdiction. In a two-way system, the utility purchases power from DERs at each resource's point of interconnection to the distribution system. Any commingling between DER energy and energy sold at wholesale in interstate commerce occurs if energy from the distribution system flows up to the transmission system. But that commingling, to the extent it actually occurs, happens after the sale from the DER to the utility is complete and therefore cannot be a basis for retroactively concluding that the sale from the DER is "in interstate commerce." Moreover, such an expansion of the commingling test is not compelled by the *Florida Power and Light* decision.

The other two cases cited by the Commission in the 2010 order are about retail transmission. In the cited portion of *Transmission Access Policy Group*, the court approves of the Commission's seven-factor test that determines whether FERC has jurisdiction over a facility used for unbundled retail transmissions. Although the FPA prohibits FERC regulation of "facilities used in local distribution," the court notes that the statute does not define the term and instead leaves the task to the Commission.[94] (The statute also leaves "any other sale" undefined.) In *New York v. FERC*, the Supreme Court affirms the D.C. Circuit's decision, although does not address the specifics of the seven-factor test. More relevantly, the *New York* Court approved the Commission's decision not to regulate bundled retail transmissions, concluding that even if FERC had jurisdiction it also "had discretion to decline to assert such jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues."[95]

That logic applies with equal force to the Commission's understanding of its jurisdiction over "sales of energy in wholesale at interstate commerce" but not over "any other sale." While the words "in interstate commerce" arguably could encompass sales from a DER to a local utility, it would be a

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[92] *Florida Power & Light*, 404 U.S. at 461-69.
[93] *Id.* at 467.
[94] *Transmission Access Policy Study Group*, 225 F.3d at 696.
[95] *New York v. FERC*, 535 U.S. at 28.

"statutorily permissible policy choice"[96] for the Commission to disclaim jurisdiction over such sales. That Congress in 1935 had the power under the Constitution's Commerce Clause to provide FERC's predecessor with such expansive authority (as the Court concluded in *FERC v. Mississippi*[97]) does not mean that Congress actually did so. In its first major Federal Power Act decision, the Supreme Court remarked that "[t]he primary purpose of Title II of the 1935 amendments to the Federal Power Act . . . was to give a federal agency power to regulate the sale of electric energy *across state lines*."[98] It would be entirely consistent with that early case, and with later Supreme Court cases about the Commission's jurisdiction (*Southern California Edison*, *Florida Power and Light*, *New York v. FERC*) for the Commission today to interpret "in interstate commerce" and "any other sale" as reserving jurisdiction over sales by DERs to state regulators. The Commission's "statutorily permissible policy choice"[99] would be entitled to deference by a reviewing court.

The third case cited in the 2010 order is *Detroit Edison*, where the D.C. Circuit held that FERC did not have jurisdiction to approve an RTO tariff that allowed retail customers to take distribution service under the tariff because FERC did not have jurisdiction over unbundled retail distribution. Although the court observes that "FERC has jurisdiction over all interstate transmission service and *over all wholesale service*,"[100] the court's focus in that case was transmission. Its conclusory assertion about "wholesale service" is ambiguous and should not be read as a definitive statement about the scope of the Commission's jurisdiction over "wholesale sales in interstate commerce" or the meaning of "any other sale."

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[96] *Id.* (quoting *Transmission Access Policy Study Group*, 225 F.3d at 694-95).
[97] *See FERC v. Mississippi*, 456 U.S. 742, 757 (1982).
[98] *Jersey Central Power & Light Co. v. Fed. Power Comm'n*., 319 U.S. 61, 67 (1943); *see also Pub. Util. Comm'n. of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 86 (1927) ("The transmission of electric current from one state to another, like that of gas, is interstate commerce") (citing *Mill Creek Coal & Coke Co. v. Pub. Serv. Comm'n.*, 84 W. Va. 662 (W.V. 1919); Hearings on H.R. 5423 Before H. Comm. on Interstate and Foreign Commerce, 74th Cong. 384 (1935) ("The new Title II of the Act is . . . conceived entirely as a supplement to, and not a substitute for State regulation. Federal action is limited to those subjects that can effectively be handled only on a national scale . . . [including] regulation of the rates *of <u>bulk sales of energy in interstate commerce</u>*.") (emphasis added); H.R. Rep. No. 1318, 74th Cong., 1st Sess. (1935) ("The percentage of electric generated in the United States that was transmitted across State lines increased from 10.7 in 1928 to 17.8 in 1933 . . . Under the decision of . . . [*Attleboro*], the rates charged in interstate transactions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates"); Sen.Rep. No. 621, 74th Cong., 1st Sess. (1935) ("Facilities used only for *intrastate commerce or local distribution* are expressly excluded from the operation of the act.") (implying that intrastate commerce is distinct from local distribution); *see also* Frank R. Lindh and Thomas W. Bone, *State Jurisdiction over Distributed Generators*, 34 ENERGY L. J. 499, 502-508 (2013) (discussing Supreme Court cases decided prior to the enactment of the FPA).
[99] *New York v. FERC*, 535 U.S. at 28 (quoting *Transmission Access Policy Study Group*, 225 F.3d at 694-95.
[100] *Detroit Edison*, 334 F.3d at 51 (emphasis added).

Conclusion

The Commission has authority under FPA § 201 to assert jurisdiction over sales of energy and "sink services" from DER aggregators to RTO/ISOs. Assuming support in the record that DER aggregators are currently unable to participate and that facilitating their participation in organized wholesale markets will "enhance competition," the Commission has authority under FPA § 206 to require RTO/ISOs to amend their tariffs.

As the Commission now proposes to regulate aggregations of DERs, it should anticipate that the issue of sales from individual DERs will inevitably appear before it. The Commission should consider an approach that would have a minimal impact on the dozens of state programs that currently govern DER deployment. Central to any legal theory on the issue will be the Commission's interpretations of "in interstate commerce" and "any other sale." As discussed, it would be consistent with the FPA's text, history, and purpose and judicial precedent for the Commission to disclaim jurisdiction over sales by DERs.

Respectfully Submitted,

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