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D.C. Circuit Upholds FERC's Rules Encouraging Electric Storage Participation in Wholesale Markets

On July 10, 2020, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") denied challenges¹ to the Federal Energy Regulatory Commission's ("FERC" or "Commission") final rule on electric storage participation in Regional Transmission Organization ("RTO") and Independent System Operator ("ISO") markets ("Order No. 841").²

Order No. 841 aimed to facilitate the participation of electric storage resources ("ESRs") in RTO/ISO markets, with the goals of removing barriers to participation by ESRs, increasing competition within RTO/ISO markets, and ensuring just and reasonable rates. Specifically, FERC ordered RTOs/ISOs to establish participation models that recognize the physical and operational characteristics of and facilitate participation by ESRs.³

An ESR for these purposes is defined as "a resource capable of receiving electric energy from the grid and storing it for later injection of electric energy back to the grid,"⁴ and encompasses storage resources located on the interstate transmission system, on a distribution system, or behind the meter.⁵ Order No. 841 declined to allow states to decide whether ESRs located behind a retail meter or on a distribution system in their state could participate in RTO/ISO markets.⁶ On rehearing, the FERC reiterated that it would not provide state opt-out rights, arguing among other things that "establishing the criteria for participation in the RTO/ISO markets of [ESRs], including those resources

located on the distribution system or behind the meter, is essential to the Commission's ability to fulfill its statutory responsibility to ensure that wholesale rates are just and reasonable."⁷ FERC further concluded that it was not required under the Federal Power Act ("FPA") or relevant precedent to provide an opt-out from ESR participation.⁸

In *National Association of Regulatory Utility Commissioners v. FERC*, the D.C. Circuit denied petitions for review of Order Nos. 841 and 841-A that argued FERC exceeded its jurisdiction under the FPA by precluding states from prohibiting "local ESRs"⁹ from participating in RTO/ISO markets.

The court considered the following factors to determine whether FERC exceeded its jurisdiction: (1) whether the prohibition of state-imposed participation bans directly affected wholesale rates; (2) whether FERC has regulated state-regulated facilities; and (3) whether the court's determinations conflict with FPA's "'core purposes' of curb[ing] prices and enhanc[ing] reliability in the wholesale electricity market."¹⁰

The court determined FERC's jurisdiction encompasses the ability to prohibit any state-imposed participation ban on ESRs because these bans directly affect wholesale rates, noting Order No. 841 attempts to increase wholesale competition by removing barriers to participation. The petitioners argued that Order No. 841 regulates matters

which are left to the states, but the court disagreed, finding the Order does not directly regulate the states' distribution systems. Petitioners argued Order No. 841 removes states' ability to "close their facilities to local ESRs seeking to transport electric energy to the wholesale markets."¹¹ However, the court looked to the Supremacy Clause of the U.S. Constitution to conclude that, through field preemption, states may not interfere with FERC's exclusive authority to determine which facilities may participate in the wholesale markets. According to the court, nothing in Order No. 841 diminished a state's tools to manage their distribution systems. For example, the court noted states have the authority to prevent local ESRs from simultaneously participating in interstate and intrastate markets and to impose safety and reliability requirements. Noting that the instant petitions presented a facial challenge to FERC's ESR rules, the court left open the possibility that states may challenge the specific application of Order No. 841 to future state regulations.

The D.C. Circuit's decision confirms FERC's exclusive authority to decide who may participate in the wholesale electricity markets, opening the door to future distributed energy resource technologies. State regulation that has the effect of foreclosing participation in the wholesale markets by FERC-approved resources will likely be closely scrutinized.

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1. *Nat'l Assoc. of Reg. Util. Comm'rs v. FERC*, No. 19-1142 (D.C. Cir. July 10, 2020) [hereinafter *NARUC v. FERC*].

2. *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), order on reh'g, Order No. 841-A, 167 FERC ¶ 61,154 (2019).

3. Order No. 841 amended FERC's regulation to provide that each RTO/ISO must have tariff provisions providing a participation model for ESRs that:

- (A) Ensures that a resource using the participation model for electric storage resources in an independent system operator or regional transmission organization market is eligible to provide all capacity, energy, and ancillary services that it is technically capable of providing;
- (B) Enables a resource using the participation model for electric storage resources to be dispatched and ensures that such a dispatchable resource can set the wholesale market clearing price as both a wholesale seller and wholesale buyer consistent with rules that govern the conditions under which a resource can set the wholesale price;
- (C) Accounts for the physical and operational characteristics of electric storage resources through bidding parameters or other means; and
- (D) Establishes a minimum size requirement for resources using the participation model for electric storage resources that does not exceed 100 kW.

(ii) The sale of electric energy from an independent system operator or regional transmission organization market to an electric storage resource that the resource then resells back to that market must be at the wholesale locational marginal price." 18 C.F.R. § 35.28(g)(9).

4. *Id.* § 35.28(b)(9).

5. Order No. 841 at P 29.

6. *Id.* at 35.

7. Order No. 841-A at P 31.

8. *Id.* at P 32.

9. "Local ESRs" as referred to by the D.C. Circuit are those ESRs that "transmit their electric energy through state-regulated systems and facilities in order to reach the federal markets." See *NARUC v. FERC*, slip op. at 7.

10. *Id.* at 11-12.

11. *Id.* at 14.