

Alert | Energy & Natural Resources



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DC Circuit Court Upholds FERC’s Order No. 841 Boosting Energy Storage in Wholesale Markets

On July 10, 2020, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court) issued a **decision** upholding FERC’s Order No. 841, handing an important win to the Federal Energy Regulatory Commission (FERC or the Commission) and electricity storage supporters over the claims of the National Association of Regulatory Utility Commissioners and the American Public Power Association, among others (Petitioners) seeking to opt out of the Order’s requirements. The D.C. Circuit Court concluded that Order No. 841 should stand because it solely targets the manner in which a storage resource may participate in wholesale markets. With its requirements upheld, Order No. 841 will likely entice storage resources to seek access to the wholesale marketplace, suggesting that the court views such FERC action as the type of permissible effect of direct federal regulation of wholesale sales allowed by the Federal Power Act (FPA). The D.C. Circuit Court indicated that because FERC has exclusive authority over wholesale market participation, the Supremacy Clause effectively bars states from interfering with that jurisdiction by banning electric storage facilities connected to state-jurisdictional distribution systems from participating in federally regulated wholesale markets.

As the D.C. Circuit Court stated in its Opinion, “the Court must once again referee the Federal Power Act’s jurisdictional line separating the Federal Energy Regulatory Commission’s jurisdiction over the federal wholesale market and the States’ jurisdiction over facilities used in local distribution.” In so doing, the D.C. Circuit has provided another instance of the use of the Supreme Court’s test for state versus federal jurisdiction from *EPSCA v. FERC* (136 S. Ct. 760 (2016)). The D.C. Circuit Court quickly found that two of the three prongs were satisfied– (1) whether the challenged practice of FERC directly affects wholesale

rates and (3) whether a determination in favor of FERC would not conflict with the core statutory purposes of the FPA – and then turned to the second prong: whether FERC’s action amounted to regulation of facilities over which jurisdiction had been granted to the states under the FPA. The court found that the Supremacy Clause, not Order No. 841, prevented states from interfering with FERC’s regulation of the interstate markets notwithstanding state jurisdiction over facilities connected to the distribution systems under their jurisdiction.

Petitioners had filed an appeal of Order No. 841 at the D.C. Circuit Court, arguing that Order No. 841 bars states from broadly prohibiting storage resource participation in wholesale markets, interfering with states’ right under the FPA to regulate their own local utility distribution systems. They also asserted that FERC acted arbitrarily and capriciously by refusing to allow states to opt out of the storage participation requirement. A [previous GT Alert](#) describes Order No. 841 and the related Order No. 841-A.

With respect to Petitioners’ claims that FERC’s actions were arbitrary and capricious, the D.C. Circuit Court again sided with FERC by finding that the agency provided a reasoned basis for deciding not to include an opt-out provision. In doing so, the court deferred to FERC’s reasoning that the benefits of broad storage access to wholesale markets – including increased competition, enhanced grid reliability, and lower rates – outweighed the costs to states. However, the court clarified that states will retain authority to prohibit local storage resources from participating in interstate and retail markets simultaneously, meaning regulators can force storage resources to choose between the two, and FERC cannot interfere with state-level safety and reliability requirements for storage resources.

FERC Chairman Neil Chatterjee said in a [statement](#) that Order No. 841 will be seen as the single most important act FERC could take to ensure a smooth transition to a new clean energy future, explaining that he is extremely pleased that the D.C. Circuit Court denied the petitions challenging Order No. 841 on jurisdictional grounds and upheld FERC’s rules on the merits.

This is a significant decision for electricity storage because it affirms that energy storage connected at the distribution level must have the option to access wholesale markets, allowing homes and businesses to contribute to the resiliency, efficiency, sustainability, and affordability of the grid. Moreover, as the U.S. electric system becomes more modernized and distributed, the regulatory frameworks at both the wholesale and retail levels are adjusting to that reality.

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