

# DC Circ. Ruling Boosts FERC's Authority On Energy Storage

By **Rabeha Kamaluddin, Gregory Lawrence and Jack Erffmeyer**

On July 10, in *National Association of Regulatory Utility Commissioners v. Federal Energy Regulatory Commission*, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision that upholds FERC's Order No. 841, which deals with the participation of energy storage in wholesale power markets.

This is an important win for FERC and electricity storage supporters, over the claims of the National Association of Regulatory Utility Commissioners, or NARUC, the American Public Power Association and others seeking to opt out of the order's requirements.

The decision is significant for companies in the electricity storage space 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. 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.

FERC issued Order No. 841 in February 2018, addressing the participation of electric storage resources in the capacity, energy and ancillary service markets operated by organized wholesale power markets, and seeking to more effectively integrate electric storage resources, enhance competition and help ensure that those markets produce just and reasonable rates.

FERC required each regional transmission organization and independent system operator under its jurisdiction to revise their tariffs to establish a participation model with market rules recognizing the physical and operational characteristics of electric storage resources, and facilitating their participation in their power markets.

In *NARUC*, the D.C. Circuit set out to "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." The 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, or FPA.



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The court indicated that because FERC has exclusive authority over wholesale market participation, the supremacy clause of the U.S. Constitution 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.

In reaching its decision, the D.C. Circuit applied the U.S. Supreme Court's test for state versus federal jurisdiction from *Electric Power Supply Association v. FERC*.<sup>[1]</sup> It found that two of the three prongs of this test were satisfied: whether the challenged practice of FERC directly affects wholesale rates, and whether a determination in favor of FERC would not conflict with the core statutory purposes of the FPA.

The court then turned to the remaining prong: whether FERC's action amounts to regulation of facilities over which jurisdiction had been granted to the states under the FPA. It found that the supremacy clause, not Order No. 841, prevents states from interfering with FERC's regulation of the interstate markets, notwithstanding state jurisdiction over facilities connected to the distribution systems under their jurisdiction.

The petitioners' appeal of Order No. 841 to the D.C. Circuit had argued that the order 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.

As the D.C. Circuit described it, the petitioners "do not question FERC's authority to require [energy storage resource]-specific participation models at the federal grid" but "argue that FERC has exceeded its jurisdiction by barring States from 'broadly prohibiting' local [electric storage resources] from participating" in regional transmission organization and independent system operator markets.

With respect to the petitioners' claims that FERC's actions were arbitrary and capricious, the D.C. Circuit again sided with FERC, by finding that the commission 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.

Quoting amici briefs in support of FERC, the D.C. Circuit noted that "[t]he same technological and economic forces that allow us to carry battery-powered computers in our pockets' are now able to efficiently store energy 'anywhere on the grid' and can wait to release the electricity when supply is scarce." Citing *Electric Power Supply Association v. FERC*, the court noted that "[energy storage resources] are quickly becoming industry disrupters because they obliterate a foundational notion underpinning our electrical systems — that electricity cannot be efficiently stored for later use."

After the D.C. Circuit's decision, FERC Chairman Neil Chatterjee stated 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. This is consistent with the views of leaders in the energy storage industry, including the Energy Storage Association's CEO, Kelly Speakes-Backman, who said:

This latest affirmation of Order 841 is especially important as it ensures energy storage can contribute all its values to the grid, regardless of its connection point. As our electric system becomes more modernized and distributed, we are seeing the regulatory frameworks at both the wholesale and retail levels adjust to that reality. ESA has long been an advocate for the whole of Order 841, and we celebrate this win for FERC, for the grid, and for consumers.

The NARUC decision sends a signal to the energy storage market that FERC has broad latitude to promote the participation of energy storage resources in wholesale electricity markets. And it affirms that FERC can prohibit states from interfering with the wholesale markets by barring local resource participation.

The industry will wait to see how FERC will apply NARUC's confirmation of its broad authority to prescribe rules and promote participation for other market participants, like distributed energy resources, in wholesale markets. In this regard, it is likely that FERC will open the gates to encourage broad market participation.

While neither NARUC nor the American Public Power Association has made any statements regarding their plans to seek certiorari from the Supreme Court by the time of publication of this article, either group or both could do so.

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[1] Electric Power Supply Association v. FERC, 136 S. Ct. 760 (2016).