

July 15, 2020

Victory for Wholesale Energy Storage: Court Upholds FERC Order No. 841

In a landmark ruling on July 10, 2020, the U.S. Court of Appeals for the D.C. Circuit solidified the path for electric storage resources (ESRs) to participate in wholesale (*i.e.*, sales for resale) power markets that are aimed at promoting competition and lowering consumer prices. The D.C. Circuit, in *NARUC v. FERC* (No. 19-1142), found that the Federal Energy Regulatory Commission's (FERC) decision, in Order No. 841, to prohibit states from blocking ESRs' access to wholesale markets did not exceed its jurisdiction.

Order No. 841 seeks to revamp the established participation models of Regional Transmission Organizations' (RTO) and Independent System Operators' (ISO) markets. RTO/ISOs — independent, nonprofit companies that manage regions of the national power grid — were designed to provide a market for traditional generation resources, *e.g.*, power plants, that operate on the assumption that electricity consumption is instantaneous with its production and that electricity cannot be stored. ESRs, defined as resources capable of receiving electric energy from the grid and storing it for later injection back to the grid (*e.g.*, batteries), innovatively challenge that assumption. Through Order No. 841, FERC required each RTO/ISO to develop a revised participation model that ensures ESRs' ability “to provide all capacity, energy, and ancillary services that [they are] technically capable of providing in the RTO/ISO markets.”

Utility petitioners and state regulators challenged the order before the D.C. Circuit, arguing that FERC's order impinged on States' authority by preventing them from disallowing wholesale market participation by ESRs within their borders. FERC defended the order, emphasizing that barriers to ESR participation artificially constrain market competition because resources that are technically capable of participating are precluded from doing so since they cannot operate under models designed for different technologies.

In rejecting petitioners' claims that FERC exceeded its jurisdiction, the D.C. Circuit applied Supreme Court

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precedent, relying on a three-part test to examine: 1) whether the challenged practice directly affects wholesale rates; 2) whether FERC had regulated State-regulated facilities; and, 3) whether the court's determinations would conflict with the Federal Power Act's (FPA) core purposes of curbing prices and enhancing reliability in the wholesale electricity market. *FERC v. Elec. Power Supply Ass'n (EPSA)*, 193 L. Ed. 2d 661 (2016). As to the first and third, the court easily found that State-imposed participation bans directly affect wholesale rates, and that the challenged order squarely regulates matters concerning federal transactions, which are the subject of the FPA.

As for the second prong, the court found that FERC appropriately regulated State-regulated facilities because States retain their authority to impose safety and reliability requirements without interference from FERC, and ESRs must still obtain from States all requisite permits, agreements, and other documentation necessary to participate in federal wholesale markets. In fact, the court maintained that "States remain equipped with every tool they possessed prior to Order No. 841 to manage their facilities and systems," and even have avenues to still "lawfully hinder FERC's goal of making the federal markets more friendly to local ESRs." Finally, the D.C. Circuit found that the Supremacy Clause gives FERC the exclusive authority to determine who may participate in wholesale markets, and States may not close their region's distribution-level facilities to ESRs seeking to transport power to wholesale markets. The court noted, however, that its decision does not foreclose future judicial review should conflict arise between a particular state law or policy and FERC's authority to regulate the participation of ESRs in the federal markets.

This ruling is a victory for developers and advocates of ESRs because access to the wholesale market, for behind-the-meter storage and storage connected to the distribution grid, opens the door to new revenue streams for the fledgling industry. The pathway to wholesale markets created by Order No. 841 expands opportunities for ESRs beyond existing programs like demand response, and evens the wholesale market playing field in terms of competition between ESRs and traditional power plants. Developers of renewable resources are also winners because storage increases the capacity of renewables and decreases their variability, making them more reliable and thus valuable to the grid.

With the D.C. Circuit's affirmation of Order No. 841, RTOs and ISOs will be moving forward to establish tariff language and business practices/market rules to implement storage operation and market participation procedures. Issues to be addressed include whether storage can function as transmission assets, generation assets or both, and whether states will require storage to participate in intra-state only markets. To discuss the impact of the D.C. Circuit ruling, Order No. 841, and subsequent RTO/ISO requirements imposed on storage, and to develop a business strategy, please contact Uju Okasi, William Booth, Roxane Maywalt, or Eric Callisto.

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