

## INSIGHTS

## Challengers to FERC's Storage Order File Briefs with the D.C. Circuit

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On November 6<sup>th</sup>, the last of three challengers to the Federal Energy Regulatory Commission's ("FERC's" or "Commission's") Storage Order, Orders No. 841 and 841-A<sup>[1]</sup>, filed briefs with the D.C. Circuit seeking to vacate the Commission's determination that states may not issue blanket prohibitions on energy storage resource participation in wholesale markets. The challengers filed three briefs. A group of utilities ("Utilities") and the National Association of Regulatory Utility Commissioners ("NARUC") each filed as petitioners. The Transmission Access Policy Study Group ("TAPS") filed a brief as intervenor in support of petitioners.

The narrow focus of the challenge before the D.C. Circuit is the Commission's determination that states may not prohibit energy storage resources from participating in wholesale markets. <sup>[2]</sup> Challengers provide three reasons supporting vacatur of this portion of the Storage Order: (1) the Commission exceeded its statutory authority under Section 201 of the Federal Power Act ("FPA") by limiting states' ability to regulate storage assets located either behind-the-meter or on distribution systems ("distributed storage resources"), (2) the Storage Order is arbitrary and capricious because it departs from Commission precedent, namely from its demand response ("DR") proceedings, of allowing states to opt out of permitting asset participation in wholesale markets, and (3) the Storage Order unconstitutionally commandeers state officials in achieving federal policy objectives.

### Jurisdictional Challenge

Of the three reasons challenging the Commission's determination that states may not prohibit energy storage resources from participating in wholesale markets, the briefs present the jurisdictional argument most persuasively. The challengers allege that the Commission ran afoul of the FPA's "bright line" rule<sup>[3]</sup> limiting the Commission's jurisdiction to wholesale markets while keeping jurisdiction over retail sales with the states. According to the challengers, the Storage Order limits states' ability to regulate distributed storage resources in two ways: first, the states may not issue "blanket prohibitions" on the resources' participation in wholesale markets and second, the states may only issue regulations that are "reasonably related" to operational and safety concerns. Both limitations, in their view, amount to an "encroachment" on the states' jurisdiction over retail sales. Additionally, they argue that FERC's new "reasonably related" test is an impermissible substitute for the FPA's "bright line" rule that will lead to "controversy, litigation, and delay."<sup>[4]</sup>

The crux of the jurisdictional fight amounts to a difference in framing what is being regulated. In the challengers' view, FERC's limitations are aimed at assets located either on the

distribution system or behind the meter, both of which are firmly contained within states' exclusive jurisdiction. In the Commission's view, it is not seeking to curb state jurisdiction over these local systems but instead it is regulating access to wholesale markets.<sup>[5]</sup> In other words, the Commission's position is that it is merely prohibiting states from discriminating against wholesale markets in situations where states have already allowed storage assets to participate at the retail level.<sup>[6]</sup> The court's determination regarding which framing is correct will likely be dispositive for the outcome of the jurisdictional question.

### **"Arbitrary and Capricious" and Commandeering Challenges**

Challengers' remaining two arguments are more difficult to make. For the claim that the Storage Order is arbitrary and capricious, challengers focus on the Commission's demand response Order No. 719<sup>[7]</sup> which was the subject of the Supreme Court's decision in *EPSA*.<sup>[8]</sup> Challengers believe that because the Commission, in that case, allowed states the ability to "opt out" of allowing DR resources access to wholesale markets, that its decision not to provide such an "opt out" in the storage order marks a departure from precedent triggering additional scrutiny under the Administrative Procedure Act. Whether the challengers succeed on this claim will likely depend on their ability to persuade the court on the level of abstraction necessary to evaluate FERC precedent. In other words, the challengers' view is that since both the DR order and the Storage Order "address distribution utility customers that seek to participate in wholesale markets," that the Commission should have created the same jurisdictional boundaries in both cases.<sup>[9]</sup> To succeed, the challengers will have to overcome the burden of proving that the many physical differences between DR and distributed storage, including most notably that distributed storage is capable of engaging in sales for resale by injecting energy back into the grid, are immaterial.

Lastly, NARUC argues that the Storage Order amounts to an unconstitutional commandeering of state officials by placing a limitation on how states regulate resources that "traditionally" fall within the purview of state regulation.<sup>[10]</sup> The brief is not entirely clear about how the Commission's rule disallowing states from erecting barriers to participation on interstate markets amounts to a command "to administer or enforce a federal regulatory program."<sup>[11]</sup> Perhaps this issue could be better addressed by whether FERC has jurisdiction in the first place. If it does, then states cannot erect barriers hampering federal policy, but if it does not then the states should be free to regulate distributed storage as they wish.

FERC's brief is due in January, at which point intervenors supporting the Storage Order (including MISO, the Energy Storage Association and several environmental NGOs) will also be filing their responses. We will continue to monitor developments and look forward to providing an update on the responses by late January.

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<sup>[1]</sup> *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).

<sup>[2]</sup> See Order No. 841-A, *supra* note 1, at P 41.

<sup>[3]</sup> 16 U.S.C. § 824(b)(1) (2018).

[\[4\]](#) Opening Brief for Petitioners at 32, *Am. Pub. Power Ass'n v. FERC*, No. 19-1147 (D.C. Cir. Oct. 30, 2019).

[\[5\]](#) See Order No. 841-A, *supra* note 1, at P 41.

[\[6\]](#) See *id.*

[\[7\]](#) *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009)

[\[8\]](#) *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016).

[\[9\]](#) Brief of Intervenor at 16, *Am. Pub. Power Ass'n v. FERC*, No. 19-1147 (D.C. Cir. Nov. 6, 2019).

[\[10\]](#) Opening Brief of Petitioner at 30, *Am. Pub. Power Ass'n v. FERC*, No. 19-1147 (D.C. Cir. Oct. 30, 2019).

[\[11\]](#) *Printz v. United States*, 521 U.S. 898, 935 (1997).