D.C. Circuit Affirms Distributed Storage Access to Wholesale Markets

August 2020

NARUC v. FERC: D.C. Circuit Case No. 19-1142
Status: Decided

On July 10, 2020, the U.S. Court of Appeals for the District of Columbia Circuit upheld FERC Order 841, denying petitions to overturn the Order. The Court found that FERC’s directives to allow distributed storage participation in wholesale electricity markets did not violate the Federal Power Act’s jurisdictional line separating FERC’s authority over those markets and states’ authority over local distribution facilities. Therefore, RTOs/ISOs will continue to implement rules and processes by which distributed storage may participate in wholesale markets.

Background

In February 2018, the Federal Energy Regulatory Commission (FERC) unanimously approved a landmark ruling, Order 841, to remove barriers to energy storage in organized wholesale markets. As part of its directives, FERC required Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) to create rules and processes for energy storage resources directly connected to distribution systems and sited behind electric customer meters to participate in wholesale markets. The National Association of Regulatory Utility Commissioners (NARUC) and other parties objected to this aspect of Order 841 and requested that FERC reconsider it. In 2019, FERC declined to revisit Order 841 on grounds that it acted consistently with the Federal Power Act and its duties to ensure just and reasonable rates.

Case Summary

In 2019, two related petitions challenging Order 841—one from the National Association of Regulatory Utility Commissioners (NARUC) and one from a coalition including the Edison Electric Institute (EEI), American Public Power Association (APPA), National Rural Electric Cooperative Association (NRECA), and American Municipal Power (AMP)—were filed at the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). While each petition made somewhat different arguments, both argued that FERC overstepped its authority under the Federal Power Act by regulating the use of local distribution facilities via Order 841.

The two petitions made three main arguments:


- FERC exceeded its jurisdiction by barring states from broadly prohibiting distributed storage participation in RTO/ISO markets;
- FERC impinged on state authority by not providing a means for states to opt out of allowing distributed storage resource participation in RTO/ISO markets; and
- FERC acted in an arbitrary and capricious manner by not allowing such an opt out (which had been previously provided for demand response resources in Order 719).

In response, FERC and intervenors including the U.S. Energy Storage Association (ESA), argued that FERC was using its appropriate authority under the Federal Power Act, namely:

- FERC has authority to regulate wholesale market transactions and may prohibit states from imposing bans on distributed storage market participation (consistent with the Supreme Court precedent in the 2016 case *EPSA v. FERC*);
- FERC has not modified states’ authority to regulate the distribution system, including the terms of access of distributed storage; and
- Allowing states to prohibit distributed storage access to wholesale electric markets would be inconsistent with FERC’s statutory duty to ensure rates, terms, and conditions are just, reasonable, and not unduly discriminatory or preferential.

On July 10, 2020, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) denied the petitions to overturn Order 841, ruling that it did not violate the Federal Power Act’s jurisdictional line which separates FERC’s authority over organized wholesale markets from states’ authority over local distribution facilities. Observing that Energy Storage Resources (ESRs) are “quickly becoming industry disrupters because they obliterate a foundational notion underpinning our electrical systems,” the D.C. Circuit concluded:

- FERC may prohibit states from banning market participation of energy storage, since:
  - It directly affects wholesale rates;
  - It does not unlawfully regulate matters left to the States; and
  - The Supremacy Clause of the U.S. Constitution allows FERC to pre-empt state regulations aimed at prohibiting wholesale market participation.
- States retain their authority to impose safety and reliability requirements without interference from FERC, and distributed storage must still obtain all requisite permits, agreements, and other documentation necessary to participate in federal wholesale markets; and
- States retain their authority to prohibit distributed storage from participating in retail programs and wholesale markets simultaneously.

Notably, the ruling observed: “Even NARUC acknowledges that local ESR participation in federal wholesale markets could have benefits. If ‘directly affecting’ wholesale rates were a target, this program hits the bullseye.”

The D.C. Circuit did note it was ruling only on the abstract challenge to Order 841 and left open the possibility that states may challenge Order 841 at a later time, provided that states can identify specific harms: “Our decision today does not foreclose judicial review should conflict arise between a particular state law or policy and FERC’s authority to regulate the participation of [energy storage resources] in the federal markets.”
Implications

The D.C. Circuit re-affirmation of Order 841 ensures that RTOs/ISOs will set up rules and processes that allow distributed storage to participate in their markets. As Order 841 is in various stages of implementation across the RTOs/ISOs, this work will continue uninterrupted. Several states, such as in California, New York, and Massachusetts, have indicated a proactive interest in “multiple-use” storage, i.e., simultaneous wholesale market participation and distribution and/or end-user services. However, other states have yet to determine whether and to what extent distributed storage will be required to choose between either wholesale market participation or retail service.

It is possible that a state or distribution system operator may at a later date choose to challenge Order 841 if it identifies specific harms to its ability to oversee safety and reliability or the specific terms of retail service. Moreover, distribution system operators may more directly influence the wholesale market participation of distributed storage resources on their systems via interconnection processes and wholesale access charges - both of which are outside of the scope of Order 841.

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