In a decision that affirmed FERC and is a supportive development for the energy storage industry, on July 10, 2020, the U.S. Court of Appeals for the D.C. Circuit upheld the Federal Energy Regulatory Commission’s landmark rule, Order No. 841. The decision confirmed FERC’s position in Order No. 841 that it could preempt state interference with energy storage resources trying to reach the wholesale market and rejected arguments that the rule unlawfully intrudes upon state electricity authority.

The National Association of Regulatory Utility Commissioners (NARUC) and utility industry groups argued that a portion of Order No. 841 contravenes the Federal Power Act (FPA) by unlawfully intruding on state electricity authority. The state regulators and utilities claim the FPA gave states exclusive jurisdiction over local distribution systems and retail electricity sales and that FERC’s jurisdiction is
limited to the interstate grid and wholesale markets.

In Order No. 841, FERC acted to remove barriers to entry for energy storage resources and allow them to participate on equal terms with traditional generation resources in the capacity, energy, and ancillary service markets operated by regional grid operators (RTOs and ISOs). Order No. 841 ordered RTOs and ISOs to revise their tariffs to establish market rules that ensure “reasonable” rates, terms, and conditions of service for energy storage resources and “properly recognize” the physical and operational characteristics of electric storage sources like batteries and pumped hydroelectric power.

FERC argued its rule does not take authority away from states. According to FERC, Order No. 841 only asserts FERC’s exclusive jurisdiction over wholesale markets and does not impose any actual obligations on state or local electricity regulators.

The D.C. Circuit Court agreed, holding that Order No. 841: (1) solely targets how energy storage resources participate in wholesale power markets; and (2) “keep[s] the gates open” to all types of energy storage resources, regardless of where they connect to the grid, to ensure that wholesale markets and rates can benefit from new energy storage technologies. The D.C. Circuit Court reasoned 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.

This decision clears the way for grid operators to finalize their Order No. 841 implementation plans, which has been a long process. The RTOs and ISOs have implemented FERC Order 841 by submitting tariff revisions to FERC. PJM Interconnection, for example, submitted proposed revisions in October 2019 and FERC accepted those revisions subject to further compliance filings. FERC is currently conducting proceedings to determine whether PJM’s proposed minimum run-time and other rules are reasonable as applied to all resources, including battery storage resources.

The decision also eliminates jurisdictional barriers to FERC’s efforts to regulate the participation of a wider range of distributed energy resources (DER) in the wholesale market. For example, FERC issued a notice of proposed rulemaking on distributed energy resource aggregation in 2016, but has not yet issued a final order. Many categories of distributed energy resources and technologies, such as electric vehicles and thermal storage, do not participate in the wholesale market. Setting rules for aggregators will allow them to optimize DERs according to system needs, allow DERs to participate in the wholesale market, and feed the growing appetites of corporations setting ambitious renewable energy goals.

The D.C. Circuit’s rejection of the challenges to Order No. 841 is the start, not the end, of understanding the battery storage market. Advocates celebrated Order No. 841 in part because it opened the possibility of creating multiple revenue streams for energy storage projects. Developers are eager to be able to participate in both market revenues for wholesale behind-the-meter projects and retail sales from distribution-connected storage projects. The line between those two markets remains unclear, however, and FERC only has jurisdiction in wholesale power
markets, limiting its ability to interfere with State regulations imposing conditions on participation in the interstate and intrastate markets. The D.C. Circuit Court of Appeals insomuch as invited states to challenge Order No. 841 as it applies to particular state programs or conditions.

On July 16, 2020, FERC issued another noteworthy decision. FERC dismissed a petition for declaratory order seeking FERC’s statement that it has exclusive jurisdiction over wholesale energy sales from behind the meter generation such as solar DER. The New England Ratepayer’s Association (NERA) had argued that full retail net metering ignores the federal/state jurisdiction bright line under the Federal Power Act.

NERA’s petition, filed in April, called for FERC to consider all behind-the-meter generation a wholesale sale, giving federal regulators exclusive jurisdiction. It largely targeted the policy of net metering, which compensates rooftop solar owners and other owners of DER for the electricity sent back to the grid. NERA argued that the electricity exceeding the customer’s demand is sold to a utility for resale to customers. Therefore, NERA argued, such sales are wholesale sales and, thus, subject to FERC’s jurisdiction. Forty-five states have a form of distributed energy compensation in place.

The Commission stated that declaratory orders are discretionary and chose to not address the issues presented because the NERA petition did not set forth any “specific controversy or harm.” This dismissal was welcomed by solar advocates, but did not resolve the issue NERA raised. States have historically overseen net metering programs, helping the residential and commercial solar industry grow over the past decade by offering full retail net metering as an incentive, and FERC’s order left the door open to future challenges to that structure.

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