

[ORAL ARGUMENT NOT YET SCHEDULED]

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT**

NATIONAL ASSOCIATION OF)	
REGULATORY UTILITY COMMISSIONERS,)	
)	
AMERICAN PUBLIC POWER ASSOCIATION,)	
NATIONAL RURAL ELECTRIC)	
COOPERATIVE ASSOCIATION,)	
EDISON ELECTRIC INSTITUTE, and)	
AMERICAN MUNICIPAL POWER, INC.,)	
)	
Petitioners,)	
)	No. 19-1142
v.)	No. 19-1147
)	
FEDERAL ENERGY REGULATORY)	(CONSOLIDATED)
COMMISSION,)	
)	
Respondent.)	

**MOTION OF ENERGY STORAGE ASSOCIATION TO INTERVENE IN
SUPPORT OF RESPONDENT**

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the Energy Storage Association (“ESA”) hereby moves for leave to intervene in support of Respondent Federal Energy Regulatory Commission (“FERC”) in the above-captioned consolidated cases. These cases concern a Final Rule and Order on Rehearing and Clarification issued by FERC that revised its regulations to remove barriers to the participation of electric storage resources in FERC-jurisdictional

wholesale electricity markets. *See Electric Storage Participation In Markets Operated By Regional Transmission Organizations and Independent System Operators*, Order No. 841, Docket Nos. RM16-23-001 and AD16-20-00, 183 Fed. Reg. 9580 (Mar. 6, 2019), 162 FERC ¶ 61,127 (Feb. 15, 2018) (“Order No. 841”), *order on reh’g and clarification*, Order No. 841-A, Docket Nos. RM16-23-001 and AD16-20-001, 84 Fed. Reg. 23,902 (May 23, 2019), 167 FERC ¶ 61,154 (May 16, 2019).

This motion is timely. The Petition for Review in No. 19-1142 was filed on July 11, 2019, and the Petition for Review in No. 19-1147 was filed on July 15, 2019. This motion is being filed within 30 days of the first petition for review. *See* Fed. R. App. P. 15(d).

ESA participated fully in the proceedings before the agency, and its interests would be significantly and adversely affected by a decision in favor of the petitioners. Accordingly, this Court is respectfully requested to grant ESA’s motion to intervene. ESA’s counsel has conferred with counsel for the Respondent and is authorized to state that the Respondent has consented to ESA’s intervention in this docket.

I. BACKGROUND

A. Description of the Energy Storage Association

ESA is the national trade association charged with working toward a more resilient, efficient, sustainable and affordable electricity grid. With more than 170 members, ESA represents a diverse group of companies, including independent power producers, electric utilities, energy service companies, financiers, insurers, installers, manufacturers, component suppliers and integrators involved in deploying energy storage systems in accordance with the rules and regulations at issue in these dockets and therefore, seeks to ensure that the Commission's rulings with respect to electric storage resources are allowed to take effect, as written by FERC. ESA was an active participant in the FERC rulemaking proceeding below, and in support of FERC's findings on the requests for rehearing of Order No. 841.

ESA members will be affected by actions taken by this Court and thus have clear and substantial interests in this proceeding that cannot be represented by any other party. ESA's participation in these dockets would be in the public interest.

B. FERC Order Nos. 841 and 841-A

The Federal Power Act vests FERC with the responsibility to regulate “the transmission of electric energy in interstate commerce” and “the sale of electric energy at wholesale in interstate commerce.” 16 U.S.C. § 824(b)(1). FERC must ensure that all rates and charges for these services, and “all rules and regulations

affecting or pertaining to such rates or charges,” are “just and reasonable” and not unduly discriminatory or preferential. 16 U.S.C. § 824d(a)-(b). The Federal Power Act “limits FERC’s regulatory reach” to these matters and carves out a “zone of exclusive state jurisdiction” over local distribution and retail sales of electricity to end users. *FERC v. Electric Power Supply Assn*, 577 U.S. ____ (2016) (“*FERC v. EPSA*”) (slip op., at 3); 16 U.S.C. § 824(b)(1).

In today’s complex electric power markets, FERC “undertakes to ensure ‘just and reasonable’ wholesale rates by enhancing competition—attempting . . . ‘to break down regulatory and economic barriers that hinder a free market in wholesale electricity.’” *FERC v. EPSA*, 577 U.S. ____ (slip op., at 4), *citing Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U. S. 527, 536 (2008). As part of that effort, FERC has encouraged the formation of voluntary non-profit organizations, called Regional Transmission Organizations and Independent System Operators (“Transmission Organizations”). These entities independently administer and operate interstate transmission facilities and conduct competitive auctions and other competitive processes to set wholesale rates for electric energy and related wholesale services (including capacity and ancillary services). FERC approves the market rules under which Transmission Organizations conduct these competitive auctions and processes. Approximately two-thirds of the country’s

electricity demand is in regions served by Transmission Organizations. *See FERC v. EPSA*, 577 U.S. ____ (slip op., at 4).

On February 15, 2018, pursuant to its authority under Section 206 of the Federal Power Act, 16 U.S.C. § 824e, FERC promulgated Order No. 841, a Final Rule adopting regulations that require the six FERC-jurisdictional Transmission Organizations to open the markets they administer to participation by electric storage resources. FERC found that existing Transmission Organization market rules were “unjust and unreasonable in light of barriers that they present to the participation of electric storage resources,” which it concluded were “reducing competition and failing to ensure just and reasonable rates.” Order No. 841, [P 19]. The regulations adopted in Order No. 841 require each Transmission Organization to revise its FERC-approved market rules to establish a participation model for electric storage resources that recognizes their unique physical and operational characteristics and facilitates their participation in the Transmission Organization’s markets. *Id.*, [P 3].

Importantly, in Order No. 841 FERC defined an “electric storage resource” for purposes of the revised regulations as “a resource capable of receiving electric energy from the grid and storing it for later injection of electric energy back to the grid.” Order 841 [P 29], *codified in* 18 C.F.R. 35.38(b) (2019). FERC explained that this definition includes within the scope of the rule all electric storage resources that are technically capable of providing wholesale services regardless of the technology

they use or whether they are located on the transmission grid, local distribution system, or behind the customer's meter. Order 841 [P 29].

On May 17, 2019, FERC issued Order No. 841-A, which denied requests for rehearing and denied in part and granted in part requests for clarification of Order No. 841. FERC reaffirmed its finding that “establishing the criteria for participation in the [Transmission Organization] markets of electric storage resources, including those resources located on the distribution system or behind the meter, is essential to the Commission’s ability to fulfill its statutory responsibility to ensure that wholesale rates are just and reasonable.” Order No. 841-A, [P 31]. In so doing, FERC rejected arguments that including electric storage resources connected to the distribution system or located behind a customer’s meter within the scope of Order No. 841’s requirements intruded on the states exclusive jurisdiction over local distribution facilities and retail sales. FERC concluded that the Federal Power Act vests it with exclusive jurisdiction to regulate wholesale market participation by all resources, including those located on the local distribution grid or behind the meter, and that states may not regulate wholesale market participation by such resources. Order No. 841-A, [P 38].

II. ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the ESA’s motions to intervene are proper and should be granted. Federal Rule of

Appellate Procedure 15(d) provides that a motion to intervene “must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.” Fed. R. App. P. 15(d). This rule “simply requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought.” *Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991).

ESA has a substantial interest in the substance of these proceedings. ESA has members that are developing electric storage technologies and/or using electric storage to serve their own electricity needs, to provide innovative and cost-effective energy services to customers, and to provide services in both FERC-regulated Transmission Organization markets and under state-regulated retail programs. These businesses are pursuing a range of innovative new services and business models enabled by the expanded availability and cost-effectiveness of electric storage technologies. These services and business models range from using large electric storage systems to provide services on a stand-alone basis; to electric storage systems paired with renewable energy resources to maximize plant output; and to the deployment of distributed electric storage in local areas and at commercial, industrial, and residential customer sites to improve the quality of their electricity supply and reduce their overall energy costs.

The ability of electric storage systems to access markets and provide multiple services at wholesale and retail are critical to the development of these service offerings and business models. As a result, ESA and its members have a strong interest in ensuring that the competitive wholesale electricity markets administered by Transmission Organizations allow all electric storage resources to compete to provide all of the wholesale services they are technically capable of providing, as FERC's Order No. 841 and Order No. 841-A requires. The regulations adopted in these orders requiring Transmission Organizations to establish just and reasonable and not unduly discriminatory or preferential criteria to allow all electric storage resources to participate in their markets – regardless of whether they are located on the transmission grid, the local distribution system, or behind the customer meter – resolve longstanding market barriers leading to unjust and unreasonable rates and provide needed certainty for ESA's members. Thus, ESA has a strong interest in the affirmance of Order No. 841 and Order No. 841-A in their entirety, including FERC's determinations regarding its authority to resolve unjust and unreasonable barriers in Transmission Organization market rules facing all electric storage resources, including those located on the distribution system or behind the customer's meter.

Moreover, the participation of ESA's members in wholesale electricity markets is governed by the market rules and tariffs promulgated by RTOs/ISOs and

approved by FERC. As explained above, whether or not these entities can compete in RTO/ISO markets *at all* is solely determined by RTO/ISO market rules and tariffs.

III. CONCLUSION

For the foregoing reasons, this Court should grant ESA's motion to intervene in support of FERC's Order No. 841 and Order No. 841-A. Pursuant to Circuit Rule 15(d), the Court should also allow ESA to intervene in "all cases before this court involving" Order No. 841 and Order No. 841-A.

ESA recognizes that Advanced Energy Economy ("AEE") and the Solar Energy Industries Association ("SEIA") will be moving to intervene in the above-captioned dockets in support of FERC's decisions in Orders 841 and 841-A. For administrative efficiency in these dockets, ESA's counsel will contact counsel for AEE and SEIA about our filing briefs and/or conducting oral argument jointly.

Dated: August 12, 2019

Respectfully Submitted,

/s/ Randall S. Rich
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Energy Storage Association hereby submits the following corporate disclosure statement:

The Energy Storage Association is a not-for-profit business association whose mission is to work toward a more resilient, efficient, sustainable and affordable electricity grid using energy storage technologies. ESA does not have any parent companies or issue stock, and no publicly held company has a 10% or greater ownership interest in ESA

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rules 27(a)(1)(4) and 28(a)(1)(A), Movant-Intervenor

the Energy Storage Association states that the parties in this Court are:

Docket No. 19-1142

Petitioner: National Association of Regulatory Utility Commissioners

Respondent: Federal Energy Regulatory Commission

Docket No. 19-1147

Petitioners: American Public Power Association; National Rural Electric Cooperative Association; Edison Electric Institute; and American Municipal Power, Inc.

Respondent: Federal Energy Regulatory Commission

Movant-Intervenor: Energy Storage Association

Other Intervenors: Transmission Access Policy Study Group

There are no amici at this time.

/s/ Randall S. Rich

Counsel for ENERGY STORAGE ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that I have on this 12th day of August, 2019, caused the foregoing motion to be electronically served through the Court's CM/ECF system on:

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