ORAL ARGUMENT NOT YET SCHEDULED

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

No. 19-1147
Consolidated with 19-1142

AMERICAN PUBLIC POWER ASSOCIATION, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, EDISON ELECTRIC INSTITUTE, and AMERICAN MUNICIPAL POWER, INC., PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

OPENING BRIEF FOR PETITIONERS, AMERICAN PUBLIC POWER ASSOCIATION, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, EDISON ELECTRIC INSTITUTE, and AMERICAN MUNICIPAL POWER, INC.

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October 30, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners file this certificate regarding parties, rulings and related cases.

A. Parties, Intervenors and Amici.

1. The Petitioners appearing in this Court are American Public Power Association, National Rural Electric Cooperative Association, Edison Electric Institute, and American Municipal Power, Inc.

2. To counsel's knowledge, the following parties have intervened or sought to intervene in this proceeding:

Advanced Energy Economy
Energy Storage Association
Environmental Defense Fund,
Midcontinent Independent System Operator, Inc.
Natural Resources Defense Council
NextEra Energy Resources, LLC
Solar Energy Industries Association
Southern California Edison Company
. Transmission Access Policy Study Group
Vote Solar

3. To counsel's knowledge, the following parties appeared in the Federal Energy Regulatory Commission proceeding below:

Advanced Energy Economy
Advanced Energy Management Alliance
Advanced Microgrid Solutions
Advanced Rail Energy Storage, LLC
AES Corporation
AES Distributed Energy
AES Energy Storage, LLC

AES ES Tait, LLC
AF Mensah Inc.
Affirmed Energy LLC
Amanda Drabek
American Electric Power Service Corporation
American Public Power Association
American Municipal Power, Inc.
American Wind Energy Association
Antonio P. Anselmo
Arkansas Public Service Commission
Avangrid, Inc.
Beacon Power, LLC
Benjamin Kingston
Brookfield Renewable Energy Group
Brookfield Renewable Partners L.P.
California Department of Water Resources
California Energy Storage Alliance
California Independent System Operator Corporation
California Municipal Utilities Association
California Public Utilities Commission
Center for Biological Diversity
Central Hudson Gas & Electric Corporation
City of Anaheim, CA
City of Azusa, CA
City of Banning, CA
City of Colton, CA
City of New York, New York
City of Pasadena, CA
City of Riverside, CA
Connecticut Department of Energy & Environmental Protection
Connecticut Public Utilities Regulatory Authority
Consolidated Edison Company of New York, Inc.
Consumers Energy Company
CT Department of Energy & Environmental Protection
Dayton Power and Light Company
Delaware Public Service Commission
DER and Storage Developers
Dominion Resources Services, Inc.
DTE Electric Company
Duke Energy Corporation

E.ON Climate & Renewables North America, LLC
E4TheFuture
Eagle Crest Energy Company
Edison Electric Institute
Efficient Holdings, LLC
Electric Power Research Institute
Electric Power Supply Association
Electricity Consumers Resource Council
Ellison Schneider & Harris LLP
Enel Green Power North America, Inc.
Energy Storage Association
Exelon Corporation
FirstLight Power Resources Management, LLC
FirstLight Power Resources, Inc
Fluidic Energy
Fresh Energy
Genbright LLC
GridWise Alliance
Harvard Environmental Policy Initiative
Ice Energy, Inc.
Imperial Irrigation District
Independent Energy Producers Association
Indianapolis Power & Light Company
Institute for Policy Integrity, New York University School of Law
International Transmission Company, et al.
Invenergy Storage Development LLC
IPKeys Technologies LLC
ISO New England Inc.
Lyla Fadali
Magnum CAES, LLC
Manitoba Hydro
Maryland Public Service Commission
Massachusetts Dept. of Public Utilities
Massachusetts Institute of Technology
Massachusetts Municipal Wholesale Electric Company
Matthew D'Alessio
Melissa Gough
Midcontinent Independent System Operator, Inc.
Midwest Energy, Inc.
Minnesota Energy Storage Alliance

MISO Transmission Owners
Missouri Public Service Commission
Monitoring Analytics, LLC
Mosaic Power, LLC
Motorola Solutions
National Association of Regulatory Utility Commissioners
National Grid USA
National Hydropower Association
National Rural Electric Cooperative Association
New England Power Pool Participants Committee
New England States Committee on Electricity
New Jersey Board of Public Utilities
New York Battery and Energy Storage Technology Consortium
New York Independent System Operator, Inc.
New York Power Authority
New York State Electric & Gas Corporation
New York State Energy Research & Dev. Authority
New York State Public Service Commission
NextEra Energy Resources, LLC
Niagara Mohawk d/b/a/ National Grid
North American Electric Reliability Corporation
North Carolina Utilities Commission
NRG Energy, Inc.
Ohio Consumers' Counsel
Open Access Technology International, Inc.
OpenADR Alliance, Inc.
Orange and Rockland Utilities, Inc.
Organization of MISO States
Ormat Nevada, Inc.
Pacific Gas and Electric Company
Pennsylvania Public Utility Commission
PJM Interconnection, L.L.C.
Power Applications and Research Systems, Inc.
Power Supply Long Island
PSEG Energy Resources & Trade LLC
PSEG Power LLC
Public Service Commission of Wisconsin
Public Service Electric and Gas Company
Public Utilities Commission of Ohio
Quanta Technology

R Street Institute
Robert Borlick
Rochester Gas and Electric Corporation
San Diego County Water Authority
San Diego Gas & Electric Company
Schulte Associates LLC
Solar Energy Industries Association
Solar Grid Storage
SolarCity Corporation
Southern California Edison Company
Southwest Power Pool, Inc.
Starwood Energy Group Global, L.L.C.
Steffes Corporation
Stem, Inc.
Sunrun
Sustainable FERC Project
TechNet
TeMix Inc.
Tesla, Inc.
Trans Bay Cable LLC
Transmission Access Policy Study Group
Union Of Concerned Scientists
University of Delaware
Utility Intervention Unit, New York State Department of State
Viridity Energy, Inc.
Xcel Energy Services Inc.

B. Rulings Under Review.

1. *Elec. Storage Participation in Markets Operated by Regional Transmission Org. and Indep. Sys. Operators*, Docket Nos. RM16-23-000; AD16-20-000; Order No. 841, 162 FERC ¶ 61,127 (Feb. 15, 2018); and

2. *Elec. Storage Participation in Markets Operated by Regional Transmission Org. and Indep. Sys. Operators*, Docket Nos. RM16-23-001; AD16-20-001; Order No. 841-A, 167 FERC ¶ 61,154 (May 16, 2019).

C. Related Cases.

On July 17, 2019, the Petitioners' petition for review, No. 19-1147, was consolidated with the petition for review filed by the National Association of Regulatory Utility Commissioners, No. 19-1142, seeking review of the same Federal Energy Regulatory Commission orders at issue in the instant matter.

s/ Dennis Lane
Dennis Lane

October 30, 2019

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, American Public Power Association, National Rural Electric Cooperative Association, Edison Electric Institute, and American Municipal Power, Inc. state as follows:

American Public Power Association is a not-for-profit national service organization representing interests of not-for-profit, community owned electric utilities throughout the United States. It has no parent company, subsidiaries or affiliates. American Public Power Association has no outstanding shares or debt securities in the hands of the public, and no publicly-owned company has a 10% or greater ownership interest in American Public Power Association.

National Rural Electric Cooperative Association is the national trade association representing the nation's nearly 900 local, not-for-profit electric cooperatives. It has no parent company, no outstanding shares or debt securities in the hands of the public, and no publicly-owned company has a 10% or greater ownership interest in National Rural Electric Cooperative Association.

Edison Electric Institute is the national trade association representing all of the investor-owned electric utility companies in the United States. It has no parent company, subsidiaries or affiliates. Edison Electric Institute has no outstanding

shares or debt securities in the hands of the public, and no publicly-owned company has a 10% or greater ownership interest in Edison Electric Institute.

American Municipal Power, Inc. is a non-profit corporation that provides wholesale energy supply and related services to its municipal electric utility members in Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, and Maryland, and a joint action agency in Delaware. American Municipal Power, Inc. issues no stock, has no parent corporation, and is not owned in whole or in part by any publicly held corporation.

s/ Dennis Lane
Dennis Lane

October 30, 2019

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GLOSSARY

Act	Federal Power Act, 16 U.S.C. § 824 *et seq.*
Commission	Federal Energy Regulatory Commission
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act, 16 U.S.C. § 824 *et seq.*
ISO	Independent System Operator
RTO	Regional Transmission Organization

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JURISDICTIONAL STATEMENT

The Federal Energy Regulatory Commission ("Commission" or "FERC") issued the challenged Order, *Elec. Storage Participation in Mkts. Operated by Regional Transmission Orgs. and Indep. Sys. Operators*, 162 FERC ¶ 61,128 ("Order No. 841"), on February 15, 2018, based on its authority under sections 201 and 206 of the Federal Power Act ("FPA" or "the Act"), 16 U.S.C. §§ 824, 824e. American Public Power Association, National Rural Electric Cooperative

Association, and American Municipal Power, Inc. jointly filed a Request for Rehearing on March 19, 2018, and Edison Electric Institute filed a Request for Rehearing and Clarification on March 19, 2018. The Commission issued the challenged Order, *Elec. Storage Participation in Mkts. Operated by Regional Transmission Orgs. and Indep. Sys. Operators*, 167 FERC ¶ 61,154 ("Order No. 841-A") on May 16, 2019. Petitioners jointly filed a petition for review that was docketed as No. 19-1147 on July 15, 2019. This Court thus has jurisdiction to review the challenged Orders under FPA Section 313, 16 U.S.C. § 825*l*.

STATUTES AND REGULATIONS

Sections 201, 206, and 313 of the FPA, 16 U.S.C. § § 824, 824e, 825*l*, and section 35.28(a), (b), and (g) of the Commission's regulations, 18 C.F.R. §35.28(a), (b) & (g) (2019), are contained in the addendum to this brief.

STATEMENT OF THE ISSUES

1. Did the Commission exceed its statutory authority by ruling that states cannot broadly prohibit electric storage resources located on retail customers' premises or on local distribution systems to participate in wholesale electric markets?

2. Did FERC act arbitrarily and capriciously, abuse its discretion, or otherwise act not in accordance with the law by refusing to allow states to prohibit wholesale market participation by electric storage resources located on retail

customers' premises or on local distribution systems, when such participation may raise the cost and risk the safety and reliability of retail electric service?

STATEMENT OF THE CASE

The challenged Orders adopted regulations requiring Regional Transmission Organizations ("RTO") and Independent System Operators ("ISO") (collectively, "transmission organizations") to revise their tariffs to remove barriers to participation by electric storage resources in the wholesale electricity markets that they administer. Order 841 at P 1, JA . This was a "continuation of efforts" to open these wholesale markets to more resources, including demand response from retail customers in Order No. 719. *Id.* P 10, JA (citing *Wholesale Competition in Regions with Organized Elec. Mks.*, 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)). Order No. 719 contained an important proviso to those efforts: wholesale demand response participation is allowed "unless the laws or regulations of the relevant electric retail regulatory authority do not permit retail customers to participate." Order No. 719 at P 47;[1] *see also* 18 C.F.R. § 35.28(g)(1)(iii) (2019). That approach was upheld as "a

[1] "Relevant electric retail regulatory authority" means "the entity that establishes the retail electric prices and any retail competition policies for customers, such as the city council for a municipal utility, the governing board of a cooperative utility, or the state public utility commission." *Id.* P 158.

program of cooperative federalism, in which the States retain the last word." *FERC v. Elec. Power Supply Ass'n.*, 136 S. Ct. 760, 780 (2016) ("*EPSA*"). Here, however, FERC refused to allow states to broadly prohibit wholesale market participation by retail electric storage resources. Instead, every electric storage resource was given "a choice between participating in the retail market or wholesale market," and "states may not take away that choice by broadly prohibiting all retail customers from participating in RTO/ISO markets." Order No. 841-A at P 41, JA__.

The electricity industry has seen the growing deployment of electric storage resources (like batteries) that can store energy for later use. *See* Order No. 841 at PP 2, 7, JA .[2] While some electric storage resources connect to the interstate transmission system, others connect to local distribution systems or "behind the meter" (*i.e.*, on the premises of a retail customer).[3] This case challenges FERC's treatment of the latter group of electric storage resources (hereinafter "distributed storage").

Section 201(b)(1) of the FPA gives FERC authority over "the transmission of electric energy in interstate commerce and [] the sale of electric energy at wholesale

[2] "JA" refers to Joint Appendix; "P" refers to the paragraph number within a FERC order.

[3] *See, e.g., Detroit Edison Co. v. FERC*, 334 F.3d 48, 49-50 (D.C. Cir. 2003) (describing generation, transmission, and distribution functions).

in interstate commerce," but reserves for states regulation of retail electric service, including local distribution facilities. 16 U.S.C. § 824(b)(1).

The Commission proposed requiring transmission organizations to remove tariff barriers to participation by electric storage resources "located on the interstate grid or on a distribution system" in organized wholesale electricity markets. *Elec. Storage Participation in Mkts. Operated by Regional Transmission Orgs. and Indep. Sys. Operators*, 157 FERC ¶ 61,121, P 1 n.1 (2016) ("Storage NOPR"). The proposed tariff revisions would remove limitations on the services that electric storage resources (including distributed storage), with their unique characteristics may provide. *See id.* PP 1-2, JA .[4]

Petitioners generally supported FERC's proposal for resources directly connected to the transmission system, but identified potential reliability, safety, and cost impacts on local distribution systems if distributed storage participated in wholesale markets. Petitioners urged FERC to respect the jurisdiction over distribution facilities and retail service reserved to state and local authorities under Section 201(b)(1) of the FPA, 16 U.S.C § 824(b)(1). FERC, they argued, should

[4] The Storage NOPR also proposed rule changes addressing the participation of distributed storage and other energy resources in transmission organization markets on an aggregated basis. *Id.* PP 103-158, JA . Order No. 841 declined to take final action the proposal concluding "that more information is needed." Order No. 841 at P 5, JA , and instituted a new docket to develop a record.

adhere to the Order No. 719 framework and allow states to develop policies governing potential distributed storage participation in wholesale markets.

Order No. 841 found that rules in existing transmission organization tariffs were unjust and unreasonable because they presented barriers to participation by electric storage resources in wholesale markets. Order No. 841 at P 19, JA . To remove these barriers, FERC required transmission organizations "to revise [their] tariff[s] to establish market rules that, recognizing the physical and operational characteristics of electric storage resources, facilitate their participation in the RTO/ISO markets." *Id.* P 1, JA . The physical and operational characteristics of electric storage resources refers to "their ability to both inject energy to the grid and receive energy from it." *Id.* P 7, JA . Casting a wide net, the Commission defined an electric storage resource to "include[e] all electric storage technologies, and . . . resources that are interconnected to the transmission system, distribution system, or behind the meter to use the participation model for electric storage resources, [to ensure] that the market rules will not be designed for any particular electric storage technology." *Id.* P 29, JA ; *see* 18 C.F.R. § 35.28(g)(9) (2019) (listing requirements for market rules for storage resources).

The Commission acknowledged that such participation would involve distribution utilities and their state and local regulators, and "emphasiz[ed] the ongoing, vital role of the states with respect to the development and operation of

electric storage resources." Order No. 841 at P 36, JA . Further, the Commission recognized that eligibility to participate in wholesale markets would depend on available contractual rights, such as rights under a distributed storage's interconnection agreement with a distribution utility. *Id.* P 33, JA . Despite this recognition, the Commission, without acknowledging Order No. 719's cooperative federalism approach, declined to "allow states to decide whether electric storage resources in their state[s] that are located behind a retail meter or on the distribution system are permitted to participate in the RTO/ISO markets through the electric storage participation model." *Id.*, P 35, JA .[5] *Compare* 18 C.F.R. § 35.28(g)(1)(iii) (demand response) *with* 18 C.F.R. § 35.28(g)(9) (storage).

On rehearing, the Commission, with one Commissioner dissenting, again declined to allow states to make broad participation decisions, maintaining that "it has exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets, including the wholesale market rules for participation of resources connected at or below distribution-level voltages" and "its understanding that numerous resources connected to the distribution system participate in the RTO/ISO markets today." Order No. 841-A at P 9, JA (citations omitted). While acknowledging states' authority to regulate distribution facilities

[5] By permitted to participate in the RTO/ISO markets, "the Commission was referring to the ability of electric storage resources to *sell* into the RTO/ISO markets." Order No. 841-A at P 60, JA (emphasis in original).

and retail service, FERC asserted that states could not "broadly prohibit[]" retail customers from participating in wholesale markets. *Id.* P 41, JA . FERC asserted that the state "opt-out" approach adopted in Order No. 719 had been discretionary, and declined to implement a similar framework here. *Id.* PP 32, 50-57, JA . Commissioner McNamee dissented on the instant jurisdictional questions. Order No. 841-A, Partial Concurrence and Partial Dissent of Commissioner McNamee at P 2, JA ("McNamee Dissent").

This petition followed.

SUMMARY OF ARGUMENT

Although this Court affords *Chevron* deference to FERC's assertion of jurisdiction, that deference must recognize the cooperative federalism framework in FPA Section 201 (b)(1) under which federal jurisdiction is complementary to state regulatory authority over: facilities used for generation or in local distribution and retail sales. The challenged Orders upset that framework by forbidding states from broadly prohibiting participation by distributed storage in wholesale markets and by declining to follow prior FERC policy that allowed states to choose whether retail demand response resources could participate directly in wholesale markets.

The challenged Orders assert that FERC's exclusive jurisdiction over the wholesale markets extends to deciding whether to allow distributed storage to participate in wholesale markets. While FERC has undoubted authority over the

rates, terms, and conditions applicable to interstate transmission and wholesale sales, FPA Section 201(b)(1) mandates it "shall not have jurisdiction" over facilities used in local distribution or retail sales.

The challenged Orders ignore this bright line between federal and state jurisdiction by limiting states to imposing conditions on individual interconnections needed distributed storage to participate in wholesale markets, but forbidding states from broadly prohibiting such participation. Nothing in FPA Section 201(b)(1) justifies restricting states' authority in this manner; rather, it allows states to take any action over local distribution facilities or retail sales without FERC interference.

The challenged Orders assert that a broad prohibition against distributed storage participation would be aimed directly at wholesale markets, and therefore the Commission can preempt state regulation to require such participation. Reliance for this assertion is placed on *EPSA*. But *EPSA* dealt exclusively with FERC's authority to regulate wholesale rates for the retail customers that states, which "retain the last word," allow into the wholesale markets. Further, *EPSA* recognized that FERC cannot breach statutory jurisdictional boundaries no matter how direct or dramatic the impact on wholesale rates.

FPA preemption cases examine whether state action actively imposes on wholesale market participants, in which case state action is preempted, or the state action imposes on facilities under state jurisdiction, in which case state action is not

preempted. This approach follows the statutory bright line jurisdictional divide that maintains state regulatory power. The Court has repeatedly rejected potential impacts on federal policy as valid grounds for ignoring the FPA's clear jurisdictional divide.

The challenged Orders assert that FERC's jurisdiction extends to participation by distributed storage in wholesale markets because their participation directly affects wholesale market rates, and thus states may not bar such participation absent express authorization by FERC. This assertion contradicts the foundational principles of the FPA's jurisdictional divide: Congress was aware that state regulation might run counter to a federal plan, but still gave states complete regulatory authority over local distribution facilities and retail sales.

Courts have generally found no preemption where state law prohibits the entry of a resource into a federally regulated market because the prohibition leaves nothing for the federal statute to regulate. Here, the challenged Orders claim that a broad state prohibition against distributed storage entering wholesale markets would create, rather than remove, a barrier to participation, contrary to FERC's policy for enhancing competition. But, putting aside whether a state's broad prohibition would leave anything for FERC to regulate, the challenged Orders' premise—that any and all barriers to carrying out FERC's wholesale market policy should be eliminated—

contravenes the FPA's respect for states' rights even when the efficiency of the federal plan is diminished.

The challenged Orders recognized that states may impose restrictions and requirements at specific interconnections between distributed storage and wholesale markets, but only if they are reasonably related to reliability, operational, safety, or cost concerns at the interconnection, and disallowed a broad prohibition on participation as not reasonably related to such concerns. No legal authority supports this "reasonably related" constraint on states' power to regulate the use of distribution facilities. This constraint violates the FPA's bright line approach to deciding jurisdictional questions in favor of an ad hoc approach to "reasonably related" determinations. This is a recipe for controversy and litigation.

This approach also fails under the general preemption test of whether the matter on which states act is regulated by the federal statute. Here, a state could decide to keep a broad class of distributed storage out of wholesale markets based on reliability, safety, physical, operational, and cost issues that widely affect retail electric service and local distribution facilities used to interconnect those resources with wholesale markets. Such matters are regulated by state law, as the challenged Orders recognize, and thus are not preempted.

The challenged Orders broke with FERC policy by not allowing states to decide whether to allow retail customers to participate in wholesale markets. FERC

concluded that preserving this authority for states was not compelled by the FPA or precedent, relying on *EPSA* in particular. However, the FERC policy at issue in *EPSA* allowed states to make that decision. Nonetheless, the *EPSA* Court pointed out the value of giving states the last word as furthering the FPA's cooperative federalism goals.

The Commission's discretionary decision not to recognize states' rights to decide whether or not to allow distributed storage to participate in wholesale markets was arbitrary and capricious.

STANDING

Each Petitioner is an organization that represents electric utilities that own or operate local distribution systems throughout the United States: American Public Power Association represents the interest of not-for-profit, community owned electric utilities; National Rural Electric Cooperative Association represents local, not-for-profit electric cooperatives; Edison Electric Institute represent investor-owned utility companies; and, American Municipal Power Inc. represents the interests of municipal electric utilities in several states. All Petitioners regularly represent their members' interests by participating in matters before the Commission, including the instant proceeding. The issues raised by the challenged Orders and the relief sought by Petitioners concern issues related to the boundaries

of federal and state jurisdiction that can be addressed without participation by Petitioners' individual members.

Petitioners' members have obligations to maintain the reliability of their distribution systems and to provide safe, reliable, and reasonably priced service to their retail customers. Their ability to fulfill those public service obligations will be adversely affected by the challenged Orders as a result of the operational, reliability, and safety issues that they will have to address to implement the Orders. In addition, distributed storage on which they could otherwise rely to serve their loads will be diverted to wholesale markets, which will further impact their ability to maintain distribution system reliability. These injuries can be remedied by an order of this Court that restores the FPA's cooperative federalism principles that govern this matter.

ARGUMENT

I. Standard of Review

The challenged Orders must be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This Court affords "*Chevron* deference to the Commission's assertion of jurisdiction." *Conn. Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (citations omitted). Courts have recognized, however, that Congress, although "occupy[ing] a field" when defining FERC's jurisdictional reach, was

nevertheless "meticulous to take in only territory which this Court had held the states could not reach" because the federal scheme is "complementary in its operation to those of the states and in no manner usurp[s] their authority." *Panhandle E. Pipe Line Co. v. Pub.. Serv. Comm'n.*, 332 U.S. 507, 519-20 (1947).[6] The legislative design of federal authority supplementing, not supplanting, state jurisdiction, counsels against efforts that "by an extravagant, even if abstractly possible, mode of interpretation push powers granted" to the federal government to encroach those reserved for the states. *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 513-14 (1949); *see Nw. Cent. Pipeline Corp. v. State Corp. Comm'n.*, 489 U.S. 493, 512 (1989) (same).

II. The Commission Exceeded Its Authority By Adopting Policies That Limit States' Authority Over Distributed Storage

The Commission found it had authority to forbid states[7] from "decid[ing] whether electric storage resources in their state[s] that are located behind a retail

[6] *Panhandle E.* addressed the jurisdictional reach of Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), but interpreting the Commission's reach under that section applies equally to interpretations under Section 201(b) of the FPA, 16 U.S.C. § 824(b). *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 211-12 (1964).("The Natural Gas Act grew out of the same judicial history as did the part of the Federal Power Act with which we are here concerned; and § 201(b) of the Power Act has its counterpart in § 1(b) of the Gas Act, 15 U. S. C. § 717(b), which became law three years later in 1938.").

[7] The challenged Orders use the term "relevant electric retail regulatory authorities (RERRA)," *e.g.*, Order No. 841-A at P 11, JA . *See supra* note 1. For simplicity and to avoid an uncommon acronym, this brief uses "state" as a substitute for that term.

meter or on the distribution system are permitted to participate in the RTO/ISO markets through the electric storage resource participation model." Order No. 841-A at P 9, JA . The Commission denied states the ability to make this policy decision based on FERC's view that "it has exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets, including the wholesale market rules for participation of resources connected at or below distribution-level voltages." *Id.* The Commission found that "the FPA and relevant precedent does not legally compel" it to allow states to play a role in deciding whether distributed storage should operate only in distribution and retail uses. *Id.* P 33, JA . Neither rationale justifies FERC's usurpation of power that the FPA grants to the states.

A. The FPA's Language Does Not Support FERC's Ban On State Policy Decisions Over Whether Distributed Storage May Participate In Wholesale Markets

The Commission's view that its exclusive jurisdiction over wholesale markets allows it to bar states from broadly prohibiting distributed storage participation in wholesale markets cannot be squared with the language and intent of the FPA or with preemption principles addressing the boundaries of federal and state jurisdiction under the Act. As characterized by the dissenting Commissioner, FERC's reasoning confuses the Commission's undoubted authority to "determin[e] 'how' resources will participate in the wholesale market" with its lack of authority

to determine "'whether'" distributed storage can or should be permitted to participate in the market. Order No. 841-A, McNamee Dissent at P 11, JA .

The distinction between federal jurisdiction over "how" resources participate in wholesale markets and state jurisdiction over "whether" distributed storage can or should participate in those markets follows the jurisdictional divide found in FPA § 201(b)(1), 16 U.S.C. § 824(b)(1). Under that divide, federal jurisdiction "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . . but shall not apply to any other sale of electric energy . . . [and] [t]he Commission shall have jurisdiction over all facilities for such transmission or sales of electric energy, but shall not have jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." *Id.*[8] The terms under which electric storage resources sell into the wholesale markets (*viz.*, the "how" of participation) fall within FERC's statutory authority as matters directly related to the rates, terms, and conditions for transmission and wholesale sales in interstate commerce. In contrast, deciding if

[8] FPA Section 201(f) exempts public power and cooperative utilities from FERC's FPA rate regulation, and thus precludes FERC from requiring that they allow distributed storage located on their systems to participate in wholesale markets. *See* Order No. 841-A at P 13, JA . *See also* McNamee Dissent at P 8 n.21, JA (noting FPA limitation on FERC's authority "applies with equal force to public power and electric cooperatives that are exempt from Part II of the FPA. *See* 16 U.S.C. § 824(f).").

distributed storage can or should enter those markets (*viz.*, the "whether" of participation) is central to states' regulation of "facilities used in local distribution" and of the terms of retail electric service, and thus falls outside FERC's jurisdiction.

The statutory language shows that "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary [] case-by-case analysis." *S. Cal. Edison*, 376 U.S. at 215. Instead of following this bright line, however, the challenged Orders assert that states have limited, not complete, regulatory control over distributed storage. Specifically, the Commission "acknowledge[d] that states have the authority to include conditions in their own retail distributed energy or retail electric storage resource programs that prohibit any participating resources from also selling into the RTO/ISO markets. In that scenario, the owner of a resource has a choice between participating in the retail market or wholesale market. However, states may not take away that choice by broadly prohibiting all retail customers from participating in RTO/ISO markets." Order No. 841-A at P 41, JA . The Commission also acknowledged that state jurisdiction over distribution facility interconnections could "include technical requirements to safeguard against reliability or safety concerns," but asserted that such restrictions must be "reasonably related to the interconnection of a particular resource to the distribution system." *Id.* P 42, JA .

Nothing in FPA Section 201(b)(1) supports the Commission's dictating what actions a state may or may not take when regulating distributed storage (or any other facilities used for generation or local distribution) within the state. This Court's explanation of the breadth of state authority over facilities used for generation granted by FPA Section 201(b)(1) applies as well to the breadth of states' FPA Section 201(b)(1) authority over facilities used in local distribution: "State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission." *Conn. Dept. of Pub. Util. Control*, 569 F.3d at 481.

B. FERC's Ban On State Actions That Protect Retail and Distribution Services Exceeds Its Statutory Authority

1. Judicial Precedent Does Not Support FERC's Decision

The Commission asserts that because it "has exclusive jurisdiction over the terms of eligibility for participation in the RTO/ISO markets," a state's broad prohibition against distributed storage participation in wholesale markets would be "aimed *directly* at the RTO/ISO markets, even if contained in the terms of retail service, [and thus] would intrude on the Commission's jurisdiction over the RTO/ISO markets." Order No. 841-A at P 41, JA (emphasis in original). As support, the Commission asserts: "Just as the Commission cannot issue 'a regulation

compelling every consumer to buy a certain amount of electricity on the retail market' because such a regulation would specify terms of sale at retail, states cannot intrude on the Commission's jurisdiction by prohibiting all consumers from selling into the wholesale market." *Id.* & n.113 (quoting *EPSA*, 136 S. Ct. at 776).

The Commission's reasoning overlooks that regulation in both situations applies to "consumers . . . on the retail market" over which states, not FERC, have jurisdiction. *See Panhandle E.*, 332 U.S. at 515 n.10 ("emphasis may rather be placed on the fact that both situations involve sales to ultimate consumers"). The *EPSA* analysis also recognizes that the Commission cannot encroach the jurisdictional boundary set by FPA Section 201(b): "FERC cannot take an action transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates. . . . [T]he regulation [compelling consumers to purchase electricity] would exceed FERC's authority as defined in § 824(b), because it specifies terms of sale at retail—which is a job for the States alone." 136 S. Ct. at 775.

It does not follow, contrary to FERC's logic, that states impermissibly cross the statutory divide simply because a broad prohibition on distributed storage participation in wholesale markets would affect wholesale markets. *See Nw. Cent.*, 489 U.S. at 514 ("To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production, for there can be

little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations. Congress has drawn a brighter line, and one considerably more favorable to the States' retention of their traditional powers to regulate.").

The *EPSA* focus on the subject of the regulation follows a consistent judicial approach in determining whether state action affecting wholesale markets cross FPA jurisdictional boundaries.[9] For example, in *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1599 (2015) (cited by Order No. 841-A at P 41 n.112, JA), the Court stated, "Those precedents emphasize the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted." (Emphasis in original). *See EPSA*, 136 S.Ct. at 786 (Scalia, J., dissenting) ("FERC's regulatory authority over electric-energy sales depends not on which 'market' the 'transactions occu[r] on' (whatever that means), but rather on the *identity of the putative purchaser*.") (emphasis in original).

[9] To be sure, a wholly separate line of preemption cases addresses state action that interferes with specific numeric rates or rate allocations set by FERC. *E.g.*, *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016). No specific numeric rates or rate allocations are presented in the instant matter, only a policy objective of improving the markets. *See, e.g.*, Order No. 841 at P 2, JA .

Under this approach, state action that actively imposes on participants in interstate wholesale markets is preempted, but state action that imposes on entities and facilities subject to state jurisdiction—such as those used to interconnect to the distribution system and all retail consumers—is not preempted. *Compare, e.g., N. Natural Gas Co. v. State Corp. Comm'n.*, 372 U.S. 84, 92 (1963) ("The danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at *purchasers* who take gas in Kansas for resale after transportation in interstate commerce.") (emphasis in original) *with Nw. Cent.*, 489 U.S. at 514 (finding no preemption because "Kansas has regulated production rates in order to protect producers' correlative rights—a matter firmly on the States' side of that dividing line.").

This focus on the subject of regulation comports with the FPA's bright-line delineation between federal and state jurisdiction. *See Panhandle E.*, 332 U.S. at 514-15 & n.10 ("as the decisions stood in 1938, the states could regulate sales direct to consumers … sales for resale, usually to local distributing companies, were beyond the reach of state power"). Maintaining that clear delineation, not preempting state action in favor of federal policies to support transmission organization markets, follows the statutory language and intent. *See id.*, 517-18 ("The [Natural Gas] Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way."); *Nw. Cent.*, 489

U.S. at 517 ("*any* regulation of production rates by the States has potential impact on pipeline purchasing decisions and costs, and it is clear that Congress in the NGA intended federal regulation to take account of state laws defining production rights—not automatically to supersede them") (emphasis in original); *see also Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (opinion of Gorsuch, J.) ("Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law.") (citations omitted).

Notwithstanding that a state's broad prohibition of distributed storage participation in wholesale markets would target retail electric customers, retail electric sales, and local distribution facilities and services, FERC's ban on such a prohibition is allegedly warranted because "the authority to determine which resources are eligible to participate in the RTO/ISO markets is a fundamental component of the regulation of the RTO/ISO markets." Order No. 841-A at P 38, JA . The Commission sees its preemptive ban as "merely exercising its authority under the FPA to 'regulate what takes place in the wholesale market' by ensuring that technically capable resources are eligible and able to participate in those markets." *Id.* (footnote omitted). FERC finds authorization in the "jurisdictional findings in *EPSA* regarding wholesale demand response," arguing they "apply with at least as

much force to participation in RTO/ISO markets by electric storage resources engaged in wholesale sales in interstate commerce, even where those resources are interconnected on a distribution system or located behind a retail meter." *Id.* P 39, JA .

FERC's reliance on *EPSA* is misplaced. *EPSA* dealt not with whether states must allow distributed resources to participate in wholesale markets, but with "whether the Commission has statutory authority to regulate *wholesale market operators'* compensation of demand response bids." 136 S. Ct. at 773 (emphasis added); *see also id.* at 776 ("whatever the effects at the retail level, *every aspect* of the regulatory plan happens exclusively on the wholesale market and governs exclusively that market's rules") (emphasis added). The issue was how they participate, not whether they must be allowed to participate.

Nor did *EPSA* address FERC's asserted preemption of states' authority to prohibit retail customers from selling directly into wholesale markets or to prohibit the use of facilities used in local distribution to access those wholesale markets. Just the opposite, there, FERC continued its "policy of allowing any state regulatory body to prohibit consumers in its retail market from taking part in wholesale demand response programs." *Id.* at 772. Here, the Commission seeks to avoid the latter point's significance by noting that the "jurisdictional conclusion in *EPSA* did not

rest upon the fact that states were granted an opt-out." Order No. 841-A at P 40,[10] JA . While that is accurate, it is immaterial: unlike here, a state prohibition was not an issue in *EPSA*, and thus the Court had no reason to address its impact on jurisdiction.

The Commission claimed that its "jurisdiction over the participation of energy efficiency resources in RTO/ISO markets as a practice directly affecting wholesale markets, rates, and prices" necessarily implies that [states] "may not bar, restrict, or otherwise condition the participation of energy efficiency resources in RTO/ISO markets unless the Commission expressly gives [states] such authority." Order No. 841-A at P 37, JA (footnotes omitted); *see id.* P 38, JA (applying those findings to the instant matter). Contrary to FERC's view, states' barring, restricting, or conditioning participation in wholesale markets is not preempted merely because the resulting non-participation might directly affect those markets. *See Nw. Cent.*, 489 U.S. at 516 ("regulating producers in such a way as to have some impact on the purchasing decisions and hence costs of interstate pipelines does not without more result in conflict pre-emption."); *see also Va. Uranium*, 139 S. Ct. at 1914-15

[10] The suggestion that Justice Scalia "shared" FERC's understanding that the opt-out provision "was not a determinative part of [*EPSA's*] analysis." *Id.* & n.107, JA , hardly seems a fair reading, given that he goes on to state: "the fact that FERC . . . is willing to let States opt out of its demand-response scheme serves to highlight just how far the rule intrudes into the retail electricity market." 136 U.S. at 789 (Scalia, J., dissenting).

(Ginsburg, J., concurring) ("A state law regulating an upstream activity within the State's authority is not preempted simply because a downstream activity falls with a federally occupied field.")

The inappropriateness of preemption on these grounds has been evident since the FPA was enacted:

> It has never been questioned that technologically generation, transmission, distribution and consumption are so fused and interdependent that the whole enterprise is within the reach of the commerce power of Congress, either on the basis that it is, or that it affects, interstate commerce, if at any point it crosses a state line. Such a broad and undivided base for jurisdiction of the Power Commission would be quite unobjectionable and perhaps highly salutary if the United States were a unitary government and the only conflicting interests to be considered were those of the regulated company. But state lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise. Congress is acutely aware of the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed.. . . But whatever reason or combination of reasons led Congress to put the provision [*i.e.*, Section 201(b)(1)] in the Act, we think it meant what it said by the words "but shall not have jurisdiction, except as specifically provided in this Part or the Part next following . . . over facilities used in local distribution."

Conn. Power & Light Co. v. FPC, 324 U.S. 515, 529-30 (1945).

In another case, a pipeline supported "the proposition that the federal regulatory scheme pre-empts state regulations that may have either a direct or indirect effect on matters within federal control" by claiming a state law requiring proration of production, "though directed to producers, … impermissibly affects interstate pipelines' purchasing mix and hence price structures, and requires the

abandonment of gas dedicated to interstate commerce, both matters within FERC's jurisdiction under the NGA." *Nw. Cent.*, 489 U.S. at 507. The Court rejected the first point, stating "these jurisdictional tensions will frequently appear in the form of state regulation of producers and their production rates that has some effect on the practices or costs of interstate pipelines subject to federal regulation. Were each such effect treated as triggering conflict pre-emption, this would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish in § 1(b), and would render Congress' specific grant of power to the States to regulate production virtually meaningless." *Id.* at 515.

Rejecting the claim that state law intruded on FERC's abandonment authority, the Court said: "FERC's abandonment authority necessarily encompasses only gas that operators have a right under state law to produce. Appellant's premise—that the reserves of dedicated leases may not be abandoned without FERC approval—thus fails to support the conclusion it draws, for exactly what the producible reserves underlying a lease at any given moment consist in is a question of state law." *Id.* at 521. Similarly, FERC's authority over wholesale markets encompasses only electricity that distributed storage have a right under state law to offer into those markets, and thus a broad state prohibition against distributed storage entering interstate markets would remove them from FERC's jurisdiction. *See Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 56 (2d Cir. 2018) (collecting cases

where "FERC itself has sanctioned state programs that increase capacity or affect wholesale market prices, so long as the states regulate matters within their jurisdiction").[11]

The cases addressing the boundaries of FERC and state jurisdiction fit within a much wider context of cases supporting the proposition that broad state prohibition of entry into a federally-regulated market is not preempted. Those cases recognize "that where 'coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.' That is not to say that pre-emption has no role in such programs, but courts must be careful not to confuse the 'congressionally designed interplay between state and federal regulation,' for impermissible tension that requires pre-emption under the Supremacy Clause." *Hughes*, 136 S.Ct. at 1300 (Sotomayor, J., concurring) (internal citations omitted).

In particular, "federal regulation of certain activities does not mean that States must authorize activities antecedent to those federally regulated. For example, federal regulation of nuclear power plants does not demand that States allow the construction of such power plants in the first place." *Va. Uranium*, 139 S. Ct. 1916

[11] *Zibelman* addresses whether state regulation of generation facilities is preempted, but it is applicable here because FPA Section 201(b)(1) gives states exclusive jurisdiction over both "facilities used for the generation of electric energy [and] over facilities used in local distribution."

(Ginsburg, J., concurring) (citation omitted); *see id.* at 1907 (Opinion of Gorsuch, J.) (stating a "sound preemption analysis cannot be as simplistic" as arguing federal "authority to regulate later stages of the nuclear fuel life cycle would be effectively undermined if mining laws like Virginia's [prohibiting uranium mining] were allowed.").

Preemption questions do not arise when a state broadly prohibits entry into a federally-regulated market because the prohibition means nothing enters the market to affect it, either directly or indirectly. This distinction was highlighted in a case where a state law defining how slaughterhouses may treat certain types of animals "reaches into the slaughterhouse's facilities and affects its daily activities," and thus is preempted by federal regulations overseeing slaughterhouse operations. *Nat'l Meat Ass'n. v. Harris*, 565 U.S. 452, 467 (2012). In contrast, the Court, while "express[ing] no view" on circuit decisions finding state bans on entry into a federally-regulated market are not preempted,[12] did note a state ban on slaughtering

[12] *Cavel Int'l, Inc. v. Madigan*, 500 F3d 551, 554 (7th Cir. 2007) ("*Given* that horse meat is produced for human consumption, its production must comply with the Meat Inspection Act. But if it is not produced, there is nothing, so far as horse meat is concerned, for the Act to work upon.")(emphasis in original): *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 333 (5th Cir.), *cert. denied*, 550 U.S. 957 (2007) ("This preemption clause expressly limits states in their ability to govern meat inspection and labeling requirements. It in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place. We cannot read this as expressly preempting Texas's prohibition on horsemeat for human consumption."); *Ass'n. des Eleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140, 1150 (9th Cir. 2017) ("If foie gras is made,

horses "differ[s] from [the state law at issue] in a significant respect[:] A ban on butchering horses for human consumption works at a remove from the sites and activities that the [Federal Meat Inspection Act] most directly governs. When such a ban is in effect, no horses will be delivered to, inspected at, or handled by a slaughterhouse, because no horses will be ordered for purchase in the first instance." *Id*.

Likewise, here, a state's broad prohibition of distributed storage entry into wholesale markets would mean that these resources would not be offered into the transmission organization's market, and therefore FERC would have nothing to regulate. *See* McNamee Dissent at P 5, JA (("There is no doubt that the participation of [distributed storage] can "affect wholesale rates," but in order to "affect" wholesale rates such [resources] must first have access to the wholesale market, and they can only do so by using distribution facilities. In my view, the FPA does not provide the Commission with the authority to require that distribution facilities permit [electric storage resources] to use those facilities to access wholesale markets."); *see also id.* P 7, JA (FERC's assertion of such authority as affecting wholesale rates "borders on teleology as legal analysis").

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producers must, of course, comply with the [Poultry Products Inspection Act]. But if a state bans a poultry product like foie gras, there is nothing for the [Act] to regulate.").

Not so, according to the Commission, because broad state prohibitions constitute a barrier contrary to the rule's intent to "remove[] barriers to their participation, enhancing competition among all resources that are technically capable of providing wholesale services." Order No. 841 at P 52, JA ; *see id.* P 35, JA (claiming that FERC's "exclusive jurisdiction over … the wholesale market rules for participation of resources connected at or below distribution-level voltages" plus many such resources "connected to the distribution system participate in the RTO/ISO markets today" justify not allowing states to broadly prohibit entry). This imposition of federal policy goals to the detriment of the statutory authority granted states contravenes the FPA's language and intent. *See Conn. Light & Power*, 324 U.S. at 530 ("Congress is acutely aware of the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed.").

2. The Commission Standard for What the States May or May Not Regulate Is Unsupported By the FPA

The Commission tempered its assertion of exclusive jurisdiction by indicating that before entering the wholesale markets a distributed storage must "have the requisite permits, agreements, or other necessary documentation in place." Order No. 841-A at P 42, JA . Those necessary documents are all state-issued because states have statutory authority to regulate all aspects—including reliability, safety, operations, costs, and in most cases, interconnections—of the distribution system:

> We acknowledge that states have jurisdiction over the interconnections of certain resources to the distribution system and the requirements *reasonably related* to those interconnections, such as a requirement to upgrade the distribution system to facilitate the injection of electric energy back to the grid, a requirement to install certain technologies to mitigate a reliability or safety concern, or a charge for wholesale distribution service. We further understand that interconnection agreements may include technical requirements to safeguard against reliability or safety concerns, such as utility curtailment and anti-islanding provisions, or requirements to install equipment that forces resources to trip offline during extreme frequency, voltage, or fault current incidents.

Id. (emphasis added).

Yet, the Commission rejected that these technical, operational, and cost concerns could justify "a broad prohibition on participating in the RTO/ISO markets [a]s *not reasonably related* to the interconnection of a particular resource to the distribution system." *Id.* (emphasis added). The challenged Orders thus appear to establish an ad hoc "reasonably related" test for determining what limitation a state may or may not place on participation in wholesale markets. On one side, a state may impose technical restrictions and various requirements (e.g. upgrades, installation of technologies, and rate setting) to individual interconnections and transactions where necessary to facilitate sales from distributed storage in the wholesale market *if* those requirements are reasonably related to reliability, operational, safety, or cost concerns at the specific interconnection.

On the other side, a broad prohibition could never be "reasonably related to the interconnection of a particular resource to the distribution system." Order No.

841-A at P 42, JA . No support is offered for this assertion, which appears to rest on FERC's judgment as to what reasons would or would not justify a prohibition. This is not an acceptable approach to preemption questions. *See Va. Uranium*, 139 S. Ct. at 1905 (opinion of Gorsuch, J.) ("this Court has generally treated field preemption inquiries like this one as depending on *what* the State did, not *why* it did it.") (emphasis in original).

As a factual matter, and contrary to FERC's premise, it seems likely that given the interconnected nature of the distribution system, potential reliability, safety, operational, and cost impacts on the distribution system from electric storage resource participation in wholesale markets could be pervasive enough at a fair number of interconnections or in the aggregate that a broad-based prohibition would be the better regulatory choice than case-by-case assessments. Not the least of the difficulties with FERC's proposed regime is who—as between FERC and a state—would have the final say on whether a broad-based prohibition is reasonably related to such broad concerns. The potential for controversy, litigation, and delay with an ad hoc approach is evident.[13]

In any event, an ad hoc approach is antithetical to the FPA's structure and intent. "In short, our decisions have squarely rejected the view of the Court of

[13] This contrasts with the demand response regulations that "leave it to the relevant regulatory authority to decide the eligibility of retail customers, their decision or policy should be clear and explicit." Order No. 719-A at P 50.

Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis." *S. Cal. Edison*, 376 U.S. at 215-16; *see also EPSA*, 136 S.Ct. at 780 (noting that FERC allowing states a "veto" over wholesale demand response "is a program of cooperative federalism, in which the States retain the last word.").

The test for judging if state action is preempted "is whether the matter on which the State asserts the right to act is any way regulated by the Federal Act." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947). A state or local policy broadly prohibiting participation by distributed storage in wholesale markets based on potential reliability, safety, operational, and cost impacts on local distribution systems concerns matters not regulated by FERC under the FPA, but left to state regulation. In contrast, Order No. 841's purpose resides in FERC's authority over the rates, terms, and conditions of wholesale markets. *See, e.g.,* Order No. 841 at P 2, JA (("By removing barriers to the participation of electric storage resources in the RTO/ISO markets, our actions in this Final Rule will enhance competition and, in turn, help to ensure that the RTO/ISO markets produce just and reasonable rates.").

Reliability, safety, operational, and cost issues on distribution systems are matters within states' jurisdiction under the FPA. *See* Order No. 841-A at P 46, JA ("nothing in Order No. 841 preempts the states' right to regulate the safety and reliability of the distribution system and … electric storage resources located on the distribution system are subject to various technical requirements that should help alleviate any concerns related to the safety and reliability of the distribution system due to RTO/ISO dispatch"). Despite this acknowledgement, FERC removes some tools that states can use to maintain safe, reliable, and economical operation of a distribution system by barring them from adopting broad-based prophylactic measures.

As safety, reliability, and costs on local distribution systems are not matters regulated by FERC under the FPA, a state's broad prohibition of distributed storage participation in wholesale markets would not be preempted. *See Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation and Dev. Comm'n.*, 461 U.S. 190, 216 (1983) (accepting "California's avowed economic purpose as the rationale for enacting [a state-wide prohibition on nuclear plant construction]. Accordingly, the statute lies outside the occupied field of nuclear safety regulation."). It follows that FERC's decision to ban state and local policies that broadly prohibit distributed storage participation in wholesale markets cannot stand where such prohibitions are warranted as regulation of matters that fall outside FERC's jurisdictional reach.

For these reasons, the Commission's ban on a broad prohibition by states against distribution-level electric storage resources entering wholesale markets should be vacated.

III. FERC's Decision Not To Permit State Policies That Limit Distributed Storage to Retail and Distribution Uses Is Arbitrary and Capricious

The Commission declined to follow its prior policy "allowing any state regulatory body to prohibit consumers in its retail market from taking part in wholesale demand response programs." *EPSA*, 136 S. Ct. at 772. While indicating it had discretion to follow the same policy here, FERC declined to exercise its discretion to adopt that approach. Order No. 841-A at PP 50-56. JA .

This refusal appears to shunt aside a program of cooperative federalism in favor of FERC's jurisdiction over all aspects of eligibility to participate. *See id.* P 37, JA ("the Commission may set the terms of transactions occurring in the RTO/ISO markets, including which resources are eligible to participate, to ensure the reasonableness of wholesale prices and the reliability of the interstate grid."); *see* McNamee Dissent at P 3, JA (the majority "should have furthered the path of 'cooperative federalism' by permitting the states to choose whether or not [distributed storage] may participate in the wholesale markets through an opt-out provision").

In large part, pushing aside cooperative federalism rests on FERC's view that "*EPSA* does not require the Commission to adopt an electric storage resource opt-

out." *Id.* at P 40, JA . To state the obvious: a resource "opt-out" was not at issue in *EPSA*, and *EPSA* did not mandate one, because FERC's demand response regulations already included one. *EPSA*, 136 S. Ct. at 772. The Court, nonetheless, pointed to the efficacy of such a policy toward promoting the goals of FPA Section 201(b)(1):

> Although claiming the ability to negate such state decisions, the Commission chose not to do so in recognition of the linkage between wholesale and retail markets and the States' role in overseeing retail sales. . . . And that veto gives States the means to block whatever 'effective' increases in retail rates demand response programs might be thought to produce. Wholesale demand response as implemented in the Rule is a program of cooperative federalism, in which the States retain the last word. That feature of the Rule removes any conceivable doubt as to its compliance with §824(b)'s allocation of federal and state authority.

136 S. Ct. at 779-80 (citations omitted). Even if not legally compelling it, the Court appears to endorse adopting a state "veto" where, as here, the linkage between wholesale and retail markets is recognized.

In refusing to exercise discretion to allow states to decide whether distributed storage may access the wholesale markets similar to the rule adopted for demand response resources in Order No. 719, the Commission noted that "fewer states have policies that involve electric storage facilities, and those policies that exist were implemented fairly recently." Order No. 841-A at P 52, JA (footnote omitted). Even if true, FERC never addresses whether states have broader distributed energy resource policies that encompass distributed storage, much less hundreds of

municipal and cooperative utilities that states allow to set their own storage policies. FERC's rationale ignores that electric storage resources' unlike demand response, can inject energy into the grid, which creates a greater need for states to exercise their authority over those resources' participation in wholesale markets to "maintain the safety and the reliability of the distribution system or their use of electric storage resources on their systems." Order No. 841 at P 36, JA ; *see also* McNamee Dissent at P 17, JA (observing that "[t]he Storage Orders will likely result in day-to-day operational impacts on the distribution system greater than those presented by [energy efficiency resources] or [demand response], but without providing states an opportunity to avoid these impacts by allowing them to opt-out."). And while the Commission pointed to the other ways that states allegedly can manage distribution system impacts, Order No. 841-A at P 56, JA , such an approach still forces these management responsibilities upon the states, while the Commission apparently reserves the right to second guess these efforts under its ad hoc "reasonably related" standard. Accordingly, FERC's refusal to adopt a framework allowing states to decide whether distributed storage resources may access the wholesale markets similar to the rule adopted for demand response resources in Order No. 719 should be vacated as arbitrary and capricious.

CONCLUSION

For the reasons stated, the Court should grant the petition, vacate Order Nos. 841 and 841-A insofar as they preclude states from broadly prohibiting distributed electric storage resources from participating in wholesale markets, and remand with instructions that a provision by which a relevant state or local regulator may broadly prohibit distributed electric storage resources from participating in wholesale markets may properly be adopted as provided by states' exclusive jurisdiction under FPA Section 201(b)(1).

Respectfully submitted,

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October 30, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(7) and 32(g) of the Federal Rules of Appellate Procedure,

1. This document complies with the type-volume limitations of the October 3, 2019 Order because it contains 8,872 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This document complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

/s/ Dennis Lane
Dennis Lane
M. Denyse Zosa

October 30, 2019

ADDENDUM

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15 U.S.C.A. § 717(b)

§ 717 (b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

CREDIT(S)

(June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36; Pub.L. 102-486, Title IV, § 404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub.L. 109-58, Title III, § 311(a), Aug. 8, 2005, 119 Stat. 685.)

16 U.S.C.A. § 824(b)

§ 824(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824*o*, 824*o*-1, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824*o*, 824*o*-1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

CREDIT(S)

(June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847; amended Pub.L. 95-617, Title II, § 204(b), Nov. 9, 1978, 92 Stat. 3140; Pub.L. 102-486, Title VII, § 714, Oct. 24, 1992, 106 Stat. 2911; Pub.L. 109-58, Title XII, §§ 1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985; Pub.L. 114-94, Div. F, § 61003(b), Dec. 4, 2015, 129 Stat. 1778.)

16 U.S.C.A. § 824(f)

§ 824(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

CREDIT(S)

(June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847; amended Pub.L. 95-617, Title II, § 204(b), Nov. 9, 1978, 92 Stat. 3140; Pub.L. 102-486, Title VII, § 714, Oct. 24, 1992, 106 Stat. 2911; Pub.L. 109-58, Title XII, §§ 1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985; Pub.L. 114-94, Div. F, § 61003(b), Dec. 4, 2015, 129 Stat. 1778.)

16 U.S.C.A. § 824e

§ 824e Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

CREDIT(S)

(June 10, 1920, c. 285, pt. II, § 206, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 852; amended Pub.L. 100-473, § 2, Oct. 6, 1988, 102 Stat. 2299; Pub.L. 109-58, Title XII, §§ 1285, 1286, 1295(b), Aug. 8, 2005, 119 Stat. 980, 981, 985.)

16 U.S.C.A. § 825*l*

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction

of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

CREDIT(S)

(June 10, 1920, c. 285, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860; amended June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 16, 72 Stat. 947; Aug. 8, 2005, Pub.L. 109-58, Title XII, § 1284(c), 119 Stat. 980.)

16 U.S.C.A. § 825l (West)

18 C.F.R. § 35.28
(EXCERPT)

§ 35.28 Non-discriminatory open access transmission tariff.

(a) Applicability. This section applies to any public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce and to any non-public utility that seeks voluntary compliance with jurisdictional transmission tariff reciprocity conditions.

(b) Definitions—

(1) Requirements service agreement means a contract or rate schedule under which a public utility provides any portion of a customer's bundled wholesale power requirements.

(2) Economy energy coordination agreement means a contract, or service schedule thereunder, that provides for trading of electric energy on an "if, as and when available" basis, but does not require either the seller or the buyer to engage in a particular transaction.

(3) Non-economy energy coordination agreement means any non-requirements service agreement, except an economy energy coordination agreement as defined in paragraph (b)(2) of this section.

(4) Demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.

(5) Demand response resource means a resource capable of providing demand response.

(6) An operating reserve shortage means a period when the amount of available supply falls short of demand plus the operating reserve requirement.

(7) Market Monitoring Unit means the person or entity responsible for carrying out the market monitoring functions that the Commission has ordered Commission-approved independent system operators and regional transmission organizations to perform.

(8) Market Violation means a tariff violation, violation of a Commission-approved order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.

(9) Electric storage resource as used in this section means a resource capable of receiving electric energy from the grid and storing it for later injection of electric energy back to the grid.

(g) Tariffs and operations of Commission-approved independent system operators and regional transmission organizations—

(1) Demand response and pricing—

(i) Ancillary services provided by demand response resources.

(A) Every Commission-approved independent system operator or regional transmission organization that operates organized markets based on competitive bidding for energy imbalance, spinning reserves, supplemental reserves, reactive power and voltage control, or regulation and frequency response ancillary services (or its functional equivalent in the Commission-approved independent system operator's or regional transmission organization's tariff) must accept bids from demand response resources in these markets for that product on a basis comparable to any other resources, if the demand response resource meets the necessary technical requirements under the tariff, and submits a bid under the Commission-approved independent system operator's or regional transmission organization's bidding rules at or below the market-clearing price, unless not permitted by the laws or regulations of the relevant electric retail regulatory authority.

(B) Each Commission-approved independent system operator or regional transmission organization must allow providers of a demand response resource to specify the following in their bids:

(1) A maximum duration in hours that the demand response resource may be dispatched;

(2) A maximum number of times that the demand response resource may be dispatched during a day; and

(3) A maximum amount of electric energy reduction that the demand response resource may be required to provide either daily or weekly.

(ii) Removal of deviation charges. A Commission-approved independent system operator or regional transmission organization with a tariff that contains a day-ahead and a real-time market may not assess charge to a purchaser of electric energy in its day-ahead market for purchasing less power in the real-time market during a real-time market period for which the Commission-approved independent system operator or regional transmission organization declares an operating reserve shortage or makes a generic request to reduce load to avoid an operating reserve shortage.

(iii) Aggregation of retail customers. Each Commission-approved independent system operator and regional transmission organization must accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, and the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers. An independent system operator or regional transmission organization must not accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, where the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into organized markets by

an aggregator of retail customers, or the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers.

(iv) Price formation during periods of operating reserve shortage.

(A) Each Commission-approved independent system operator and regional transmission organization must modify its market rules to allow the market-clearing price during periods of operating reserve shortage to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power. Each Commission-approved independent system operator and regional transmission organization must trigger shortage pricing for any interval in which a shortage of energy or operating reserves is indicated during the pricing of resources for that interval.

(B) A Commission-approved independent system operator or regional transmission organization may phase in this modification of its market rules.

(v) Demand response compensation in energy markets. Each Commission-approved independent system operator or regional transmission organization that has a tariff provision permitting demand response resources to participate as a resource in the energy market by reducing consumption of electric energy from their expected levels in response to price signals must:

(A) Pay to those demand response resources the market price for energy for these reductions when these demand response resources have the capability to balance supply and demand and when payment of the market price for energy to these resources is cost-effective as determined by a net benefits test accepted by the Commission;

(B) Allocate the costs associated with demand response compensation proportionally to all entities that purchase from the relevant energy market in the area(s) where the demand response reduces the market price for energy

at the time when the demand response resource is committed or dispatched.

(vi) Settlement intervals. Each Commission-approved independent system operator and regional transmission organization must settle energy transactions in its real-time markets at the same time interval it dispatches energy, must settle operating reserves transactions in its real-time markets at the same time interval it prices operating reserves, and must settle intertie transactions at the same time interval it schedules intertie transactions.

(2) Long-term power contracting in organized markets. Each Commission-approved independent system operator or regional transmission organization must provide a portion of its Web site for market participants to post offers to buy or sell power on a long-term basis.

(9) Electric storage resources.

(i) Each Commission-approved independent system operator and regional transmission organization must have tariff provisions providing a participation model for electric storage resources that:

(A) Ensures that a resource using the participation model for electric storage resources in an independent system operator or regional transmission organization market is eligible to provide all capacity, energy, and ancillary services that it is technically capable of providing;

(B) Enables a resource using the participation model for electric storage resources to be dispatched and ensures that such a dispatchable resource can set the wholesale market clearing price as both a wholesale seller and wholesale buyer consistent with rules that govern the conditions under which a resource can set the wholesale price;

(C) Accounts for the physical and operational characteristics of electric storage resources through bidding parameters or other means; and

(D) Establishes a minimum size requirement for resources using the participation model for electric storage resources that does not exceed 100 kW.

(ii) The sale of electric energy from an independent system operator or regional transmission organization market to an electric storage resource that the resource then resells back to that market must be at the wholesale locational marginal price.

Credits

[Order 888, 61 FR 21692, May 10, 1996; Order 2003, 68 FR 49929, Aug. 19, 2003; Order 2006, 70 FR 34240, June 13, 2005; Order 661, 70 FR 35009, June 16, 2005; 70 FR 47093, Aug. 12, 2005; Order 661–A, 70 FR 75014, Dec. 19, 2005; Order 676, 71 FR 26212, May 4, 2006; Order 890, 72 FR 12492, March 15, 2007; 73 FR 64167, Oct. 28, 2008; Order 719–A, 74 FR 37801, July 29, 2009; Order 745, 76 FR 16678, March 24, 2011; 76 FR 49963, Aug. 11, 2011; Order 755, 76 FR 67285, Oct. 31, 2011; Order 760, 77 FR 26686, May 7, 2012; Order 764, 77 FR 41541, July 13, 2012; Order 807, 80 FR 17681, April 1, 2015; 80 FR 76855, Dec. 11, 2015; 81 FR 42909, June 30, 2016; Order 831, 81 FR 87799, Dec. 5, 2016; Order 831–A, 82 FR 53410, Nov. 16, 2017; Order 841, 83 FR 9631, March 6, 2018; Order 844, 83 FR 18156, April 25, 2018; 83 FR 60347, Nov. 26, 2018; Order 841–A, 84 FR 23927, May 23, 2019]

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), I hereby certify that on the 30th day of October, 2019, the foregoing will be served on all parties who have consented to electronic service via e-mail through the Court's CM/ECF system as listed on the attached service list or via U.S. Mail as indicated below.

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