

ORAL ARGUMENT HAS NOT BEEN SCHEDULED
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19-1142
Consolidated with No. 19-1147

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS, *ET. AL.*,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

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

JOINT BRIEF OF INDUSTRY INTERVENORS
IN SUPPORT OF RESPONDENT

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February 7, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

Except for the following, to counsel's knowledge, all parties, intervenors, and amici appearing before this Court are as stated in the Opening Briefs of Petitioners: amici Sunrun Inc., Tesla, Inc., Vivint Solar Developer, LLC, and Engie Storage Services NA LLC filed a joint notice of intent to participate in this proceeding as amici curiae with this Court on January 23, 2020.

Rulings Under Review

References to the rulings at issue appear in the Opening Briefs of Petitioners and Respondent.

Related Cases

References to the related cases appear in the Opening Brief of Petitioners and Respondent.

Respectfully submitted,

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February 7, 2020

CERTIFICATE REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

No party has opposed the filing of this brief.¹ Counsel certifies, pursuant to Circuit Rule 29(d), that a separate brief is necessary to address the legal questions at issue in this case from the particular viewpoint of trade associations that represent commercial entities that may be impacted, as well as regulated entities directly impacted, by the Federal Energy Regulatory Commission (“FERC”) determinations being challenged here (“Industry Intervenors”).

Industry Intervenors represent the perspective of businesses engaged in the electric storage industry and public utilities that support or are charged with implementing FERC’s actions to eliminate long standing barriers to electric storage participation in wholesale markets and, in particular, FERC’s ruling that extending storage resources’ participation in wholesale markets to those resources interconnected to distribution facilities or located behind a retail meter is consistent with FERC’s existing jurisdictional reach and judicial precedent. As such, Industry Intervenors are uniquely positioned to provide an important and relevant perspective

¹ While no party opposed the filing of this brief, Petitioner NARUC opposed Industry Intervenors’ proposed 7,500-word limit. Intervenors and Petitioner NARUC were not able to reach agreement on this matter. In Order on Briefing Format and Schedule issued October 3, 2019, this Court resolved the matter and approved a 4,550 word limit.

to the Court and participated in the underlying administrative docket as separate parties.

Respectfully submitted,

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GLOSSARY

Commission	FERC
Electric Storage Resource	A resource capable of receiving electric energy from the grid and storing it for later injection of electric energy back to the grid, regardless of the storage medium (<i>e.g.</i> , batteries or pumped-hydro) and includes Electric Storage Resources located on the interstate transmission system, on a distribution system, or behind-the-meter.
FERC	The Federal Energy Regulatory Commission, successor agency of the Federal Power Commission, that administers the FPA.
FPA	Federal Power Act, 16 U.S.C. § 824 <i>et seq.</i>
NARUC	The National Association of Regulatory Utility Commissioners.
NOPR	Notice of Proposed Rulemaking
Order	<i>Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators</i> , Order No. 841, 162 FERC ¶ 61,127 (2018).
P	Denotes a paragraph number in a FERC order.
Rehearing Order	<i>Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators</i> , Order No. 841A, 167 FERC ¶ 61,154 (2019).
RTO or RTOs	An electric power transmission system operator that coordinates, controls, and monitors a multi-state electric grid and administers interstate wholesale electric and related product markets, inclusive of both “Regional Transmission Operators” and “Independent System Operators” or “ISOs”.
Rule	The Order, together with the Rehearing Order.
States	Those government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, <i>inter alia</i> , the regulated electric utilities within their respective borders
State Br.	Brief of Petitioner National Association of Regulatory Utility Commissioners
State Petitioners	Petitioner National Association of Regulatory Utility Commissioners

Utility Br.	Brief of Petitioners American Public Power Association, National Rural Electric Cooperative Association, Edison Electric Institute, and American Municipal Power, Inc.
Utility Petitioners	Petitioners American Public Power Association, National Rural Electric Cooperative Association, Edison Electric Institute, and American Municipal Power, Inc.

STATUTES AND REGULATIONS

All applicable statutes and regulations are attached to Respondents' Brief.

STATEMENT OF THE ISSUES

1. Did FERC's determination that RTOs must enable the participation of distribution-connected Electric Storage Resources in wholesale markets exceed its FPA jurisdiction?
2. Did FERC act arbitrarily, capriciously, or otherwise abuse its discretion by directing RTOs to ensure wholesale market access for distribution-connected Electric Storage Resources and preventing States from broadly prohibiting Electric Storage Resources from participating in the wholesale market?

STATEMENT OF THE CASE

Industry Intervenors adopt the statement of facts set forth in the Opening Brief of Respondent.

SUMMARY OF ARGUMENT

The FPA grants the Federal Energy Regulatory Commission or "FERC" plenary jurisdiction to regulate matters related to the wholesale sale of electricity in interstate commerce. In the Rule, FERC sought to remedy unjust and unreasonable wholesale energy rates caused by RTO rules preventing Electric Storage Resources from participating in the wholesale markets. The Rule aims exclusively at

improving competition in the wholesale markets and is thus well within FERC's jurisdiction.

The fact that wholesale transactions by Electric Storage Resources could impact distribution facilities does not render FERC's decision an unlawful departure from its jurisdiction. FERC regulation of wholesale transactions occurring on distribution facilities is nothing new, and this Court has long held that regulation of those *transactions* does not amount to unlawful regulation of the *distribution facilities* themselves. Moreover, FERC carefully cabined the reach of the Rule to ensure that it would not intrude on the authority reserved to States to regulate retail service and distribution facilities. Granting States a "veto" power over wholesale transactions sought by Petitioners would upset decades of precedent and practice and severely limit FERC's authority to ensure just and reasonable wholesale rates.

FERC did not act arbitrarily and capriciously in directing RTOs to create participation models that will facilitate the wholesale market participation of all Energy Storage Resources, including those located on the distribution grid or behind-the-meter. FERC reasonably concluded, based on substantial evidence, that excluding this significant subset of technically-capable resources from entering the wholesale markets would diminish competition and fail to meet its statutory obligations to ensure just and reasonable rates.

ARGUMENT

I. THE RULE EXERCISES JURISDICTION OVER ONLY WHOLESALE MARKET TRANSACTIONS BY ELECTRIC STORAGE RESOURCES, CONSISTENT WITH THE STATUTE AND LONGSTANDING PRECEDENT

In the FPA, Congress determined that “Federal regulation of matters related to . . . the sale of [electric] energy at wholesale in interstate commerce is necessary in the public interest”, 16 U.S.C. § 824d(a), and charged FERC with ensuring that the rates, terms, and conditions of wholesale energy sales are “just and reasonable.” 16 U.S.C. § 824d(a). Electric Storage Resources are a rapidly emerging technology capable of selling electric energy, ancillary services and capacity at wholesale. *See, e.g., Elec. Storage Participation in Mkts. Operated by Reg’l Transmission Orgs. & Indep. Sys. Operators*, Notice of Proposed Rulemaking, 157 FERC ¶ 61,121 at PP 6-12 (2016); Order 841 at P 19. The Rule on review directed FERC-jurisdictional wholesale market operators – RTOs – to ensure that their rules do not present barriers to Electric Storage Resources providing services in their markets. Based on an extensive record, FERC determined that existing barriers to the market participation of these resources diminished market competition, rendering the wholesale rates set by the RTO markets unjust and unreasonable. As a remedy, FERC required RTOs to revise their rules “to ensure that . . . electric storage resources can be dispatched

as supply and demand and can set the wholesale market clearing price as both a wholesale seller and wholesale buyer.” Order 841 at P 76 (quoting revised regulation § 35.28(g)(9)(i)(B)); *see also* FERC Br. 11 (explaining the compliance filings directed and made).

Petitioners take issue with FERC’s determination that, to resolve the market barrier problems it identified, RTO rules must be revised so they do not bar participation by *all* Electric Storage Resources, including those connected to the distribution system or behind a customer’s meter. State Br. 14-26; Util. Br. 14-35. At bottom, Petitioners’ arguments must be rejected because the Rule is unquestionably focused solely on improving competition in FERC-jurisdictional wholesale markets and ensuring that rates in those markets are just and reasonable. Order 841A at PP 42, 47. This unequivocal “aim” of the Rule puts it squarely within FERC’s authority, and indeed its obligation, to regulate wholesale electricity markets, regardless of the fact that it may have impacts on state-regulated distributed facilities. *See FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 774–79 (2016) (“*EPSA*”); *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015) (considering “the target at which [a] law aims” in determining whether a State is properly regulating retail or, instead, improperly regulating wholesale sales). The Rule’s careful application of its jurisdiction to only wholesale market activities, and its express

preservation of State authority to regulate distribution facilities and retail service, is a reasonable interpretation of its statutory authority and consistent with long-standing precedent and practices. *See Automated Power Exch. Inc., v. FERC*, 204 F.3d 1144, 1151 (2000) (citations omitted) (This court “reviews FERC’s statutory interpretation under the now-familiar framework announced in *Chevron*.”); *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (“No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.”).

A. The Rule is Consistent with Long-Standing Precedent Regarding the Division of Federal and State Regulatory Authority

Petitioners argue variously that, because Electric Storage Resources providing wholesale services may be located on the distribution grid or behind-the-meter, FERC’s regulation of them in the Rule “expand[s] its authority beyond the [FPA’s] clear limits.” Utility Br. 23. They claim that FERC was thus required, as a matter of law or discretion, to give States “the final word” on whether or not these resources can participate in wholesale markets. State Br. 24.

As a threshold matter, these claims ignore that Congress intended for FERC to have *plenary* jurisdiction over all wholesale market transactions. *See, e.g., FPC*

v. Southern California Edison Co., 376 U.S. 205, 216 (1964) (FERC’s jurisdiction is “plenary and extend[s] . . . to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.”) (“*FPC v. SCE*”); *New York v. FERC*, 535 U.S. 1, 21-22 (2002) (explaining that “[t]he FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been previously subject to state regulation.”); *FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 460-61 (1972) (affirming FERC’s exclusive jurisdiction over wholesale transactions by public utilities). FERC’s authority under the FPA to “regulate sales for resale of electric energy and transmission in interstate commerce by public utilities is not dependent on the location of generation or transmission facilities, but rather on the definition of, as particularly relevant here, wholesale sales contained in the FPA.” *See, e.g., Cal. Pub. Utils. Comm’n*, 132 FERC ¶ 61,047 at P 72 (2010) (relying upon precedent set forth in *FPC v. SCE* and *FPC v. Florida Power & Light Co.*).

Petitioners’ do not assert that the transactions that are the subject of the rule are not wholesale in nature. Instead, their assertion is that States must have authority to “opt-out” or “veto” wholesale market transactions because such transactions may have an incidental effect on distribution facilities. This argument is on faulty ground.

As FERC explained, the Court in *EPSA* did not find FERC’s authority lessened by the location of the resource participating in the wholesale markets. Order 841A at PP 33-36. The Rule does nothing more than “regulate what takes place in the wholesale market’ by ensuring that technically capable resources are eligible and able to participate in those markets.” *Id.* at P 38 (quoting *EPSA*, 136 S.Ct. at 776). FERC considered the States’ jurisdiction over wholesale market participation by distribution-connected resources and reasonably concluded that “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 841A at P 38.

The FPA left “no power in the states” to regulate wholesale sales in interstate commerce. *FPC v. SCE*, 376 U.S at 215. Yet “Petitioners ask this Court to overturn the Rule so States may (in the future) categorically prohibit all wholesale transactions by distributed storage resources.” FERC Br. 20. To view the limiting clause of § 201(b) as “an affirmation of state authority over any interstate sales for resale, would be to speculate about a congressional purpose for which there is no support.” *United States v. Pub. Utils. Comm’n*, 345 U.S. 295, 311 (1953). Taking State Petitioners’ conclusion that their authority applies to wholesale transactions whenever a distribution facility is involved to its logical end would result in

thousands of distribution-connected utilities that purchase wholesale power under FERC regulation today transitioning to purchase power under regulation by individual states. This is the very result Congress sought to avoid when it enacted the FPA. *Id.* at 311 (explaining that “Section 201 of the FPA is “a direct result of *Attleboro*. They are to be read together”); *accord FPC v. SCE*, 376 U.S. at 215; *Public Utils. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927) (“*Attleboro*”).

Petitioners’ framing of the issue as a question of “cooperative federalism”, arising from a practice that merely “affects” wholesale rates, also mischaracterizes the wholesale transactions that are the aim of the Rule. State Petitioners posit that “the *EPSA* opinion supports a plain reading of the [FPA], which gives States the final word regarding the use of their local distribution facilities.” State Br. 24. This is inaccurate. Even if Petitioners were correct in their reading of *EPSA*, the regulation of prices for demand response is separate and distinct from regulating Electric Storage Resources transacting through the wholesale energy and associated product markets administered by RTOs. *See* Order 841 at P 32 (explaining that “Participation by demand response resources in an RTO/ISO market does not involve a sale of electric energy at wholesale in interstate commerce.”); *EPSA*, 136 S.Ct. at 784 (holding that the demand response rule “governs a practice directly

affecting wholesale electricity rates”); *see also EnergyConnect, Inc.*, 130 FERC ¶ 61,031 at P 30 (2010) (“where an entity is only engaged in the provision of demand response services, and makes no sales of electric energy for resale, that entity would not own or operate facilities that are subject to the Commission’s jurisdiction and would not be a public utility that is required to have a rate on file with the Commission.”). Electric Storage Resources that are providing wholesale services and participating through the RTO markets are properly within FERC’s exclusive jurisdiction. *FPC v. Fla. Power & Light Co.*, 404 U.S. at 460-61. The Court’s determinations in *EPSA* regarding FERC’s authority to regulate practices affecting wholesale rates do not conflict with this long-standing precedent, and do not support the idea that States can intrude on FERC’s plenary authority.

B. The Rule is Fully Consistent with Longstanding Precedent and Practices Regarding FERC Regulation of Wholesale Services Provided Over Distribution Facilities

Petitioners all inaccurately contend that states have plenary jurisdiction over the usage of distribution facilities. *See* State Br. 3, 16 (asserting that the FPA “unequivocally establishes the States’ right to decide how the local distribution system is used,” and claiming that the Rule “invade[d] Congress’ express reservation to the States over how state-jurisdictional distribution systems are constructed, used, and paid for.”); Util. Br. 15-18; TAPS Br. 10. These arguments ignore two decades

of precedent and practice affirming that FERC’s plenary jurisdiction over wholesale transactions must extend to *all* transactions, even those that occur over distribution facilities. In the Rule, FERC did not alter or change its existing jurisdiction over wholesale usage of distribution facilities. The Rule’s assertion of jurisdiction over the rates, terms, and conditions of wholesale transactions occurring on distribution facilities is, in short, nothing new, despite the feverish claims of Petitioners.

Rather, FERC correctly acknowledged that FERC-jurisdictional utilities could set rates for wholesale uses of their distribution facilities and FERC would review such rates, Order 841 , a position this Court affirmed almost twenty years ago. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 695 (D.C. Cir. 2000) (holding that FERC’s jurisdiction extends to “*all wholesale transmissions, regardless of the nature of the facility*” (emphasis added)).

Moreover, this Court has unequivocally held that FERC’s exercise of jurisdiction over wholesale *transactions* involving the use of a distribution facility does not run afoul of Congress’ reservation of authority to the states to regulate distribution *facilities*. *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*. 475 F.3d 1277 (D.C. Cir. 2007) (“*NARUC v. FERC*”) (affirming FERC’s exercise of jurisdiction over interconnections to the distribution system where, “at the time the interconnection is requested, may be used either to transmit electric energy in interstate commerce

or to sell electric energy at wholesale in interstate commerce.”). This Court explained that this “[a]ssertion of jurisdiction over specified [wholesale] transactions, even though affecting the conduct of the owners with respect to its [distribution] facilities, is not *per se* an exercise of jurisdiction over the facility.” *Id.* 1282.

Such is the case here. The Rule requires RTOs to revise their rules and practices to ensure that Electric Storage Resources are not barred from providing wholesale services that such resources are otherwise technically capable of providing. Order 841A at P 38 (“the Commission is 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” (citations omitted)). The Rule squarely regulates wholesale transactions by public utilities and does not regulate any distribution facilities that may be involved. FERC Br. 20 (“States retain their existing, plenary authority over the operations, design, reliability, and costs of distribution systems”).

To be sure, FERC may not regulate retail distribution services that occur over distribution facilities. *See Detroit Edison v. FERC*, 334 F.3d 48, 51 (D.C. Cir. 2003) (explaining that Section 201(b) conveys exclusively to states jurisdiction over “local distribution ‘service’ – *i.e.*, the service of delivering electricity to end

users.”). But the Rule does not regulate distribution service to end-use consumers; its reach is limited to the rates, terms, and conditions of wholesale service provided by utilities that FERC *already* is allowed to regulate. Petitioners point to no provision of the Rule that regulates either retail distribution services or specific distribution facilities.

Entertaining Petitioners’ claims that the FPA guarantees States can opt-out or veto FERC’s exercise of jurisdiction over wholesale transactions whenever a distribution facility is involved could have far-reaching consequences. First, it would upset the two decades of precedent described above that FERC, the states, and regulated entities have developed and implemented to ensure the comprehensive regulation of all electricity transactions that Congress intended in an era of open access. *See, e.g., New York v. FERC*, 535 U.S. at 13-28 (analyzing the FPA’s jurisdictional divide between wholesale and retail transmission); *EPSA*, 136 S.Ct at 767-769. Moreover, given the highly interconnected nature of the electric grid, entertaining these claims could give States wide power to limit FERC’s authority in other areas where federal regulation inevitably involves distribution facilities or impacts them, given that wholesale and retail markets and the facilities used in each sphere are not “hermetically sealed.” *EPSA*, 136 S.Ct at 776. Petitioners have offered no persuasive arguments that these long-standing

precedents and practices should be upset. Federal regulation of wholesale transactions occurring over distribution facilities is well-established, and the “parade of horrors” that Petitioners claim will result from that regulation have not occurred. *Cf.* Order 841A at P 123 (explaining that the Commission will allow distribution owners to seek cost recovery for transmission service provided to Electric Storage Resources over distribution facilities).

C. The Rule Carefully Preserves State Authority and Does Not “Commandeer” State-Regulated Distribution Facilities

FERC carefully considered the impact of the Rule on matters of state jurisdiction and state concern. The Rule squarely focuses on ensuring that limits on the participation of Electric Storage Resources in wholesale markets will no longer diminish competition and cause unjust and unreasonable rates. *Cf. Pub. Utils. Com.*, 345 U.S. at 311 (holding that the limiting clause of § 201(b) protects only “state regulation of local affairs, including rates of intrastate and ‘interstate for consumption’ sales”). In the Rehearing Order, FERC dedicated twenty-two pages to providing a careful analysis of the jurisdictional boundary of the FPA. Order 841A PP 32-56. Further, FERC went to great lengths to respect the authority of states to regulate distribution facilities and the Commission put in place safeguards

to ensure that the Rule would not intrude on that authority. Order 841 at PP 29-36; Order 841A at PP 30-56.

Nonetheless, State Petitioners assert that the Rule requires “States to allow local storage resources to use distribution facilities,” and that by “eliminat[ing] the States’ options on local storage resources’ participation in the interstate wholesale markets,” FERC has “commandeered” the state administrative process. State Br. 32-36. The Court should reject such mischaracterization and hyperbole, which wholly ignores FERC’s thorough and careful consideration of the impacts of the Rule on State’s lawful authority over retail matters and distribution facilities. As FERC explained, while the Rule “provides that states may not prohibit electric storage resources from participating in wholesale markets, that requirement does not amount to an effective right of access to the distribution system itself.” Order 841A at P 48. The Rule explicitly respects and preserves States’ authority over matters of local concern, including “retail services and matters related to the distribution system, including design, operations, power quality, reliability, and system costs.” *See* Order 841 at P 36. In particular, FERC explicitly stated that the Rule preserves and does not seek to overturn the States’ rights to (1) develop programs that incentivize distribution-connected resources to provide retail, rather than wholesale, services, Order 841A at P 41; (2) oversee the design, operations, power quality,

reliability, and system cost of local distribution facilities, including imposing “technical requirements to safeguard against reliability or safety concerns,” *id.* at P 42; and (3) regulate retail sales, *id.* at P 44. In short, the Rule properly reserves to the States “the regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce,” exercising authority over only those matters that are “essentially national in character.” *Attleboro*, 273 U.S. at 89. As FERC explains, “to the extent States had authority before the Rule to set the terms and conditions of access to the distribution system, they retain that authority after the Rule.” FERC Br. 16.

State Petitioners’ claims of commandeering are particularly belied by the fact that nothing in the Rule prevents distribution-system owners and operators from continuing to develop technical standards for the physical interconnection and operation of Electric Storage Resources connected to distribution facilities in order to maintain safe and reliable retail service. FERC’s findings in the Rule are “limited to sales in RTO/ISO markets and do not address what retail customers may do with energy purchased at retail.” Order 841A at P 46. Rather, the changes directed in the Rule “are all about, and only about, improving the wholesale market.” Order 841A at P 44 (quoting *EPSCA*, 136 S.Ct at 776). In the Rule, FERC explicitly provides that

States will retain authority to regulate retail rates, as well as the safe and reliable operation of distribution facilities.² Order 841 at P 36; Order 841A at PP 38-42.

State Petitioners' commandeering claims also fall flat when one considers that while the Rule instructs RTOs to "enable" and "facilitate" the participation of Electric Storage Resources nothing in the Rule mandates the participation of any Electric Storage Resource in the wholesale market, nor does the Rule mandate that the States enable or facilitate the participation of such resources in wholesale markets. As noted above, the Rule did not alter the States' jurisdiction and States retain the ability to design retail programs to incentivize local market opportunities, rather than wholesale. Under the Rule, States can, if they chose, condition participation in those retail programs on a resource committing to not participate in the wholesale market. Order 841A at P 41. What they cannot do, however, is enact a broad ban on wholesale market participation that is wholly untethered from their lawful authority over retail service or distribution facilities.

² To be sure, some state-imposed requirements regarding physical interconnection could cross the line into regulation of wholesale market participation or regulation of facilities used in the provision of FERC-jurisdiction transmission service, and thus be preempted by existing FERC authority. *Cf. NARUC v. FERC*, 475 F.3d 1277 (explaining jurisdiction was limited to facilities used in providing interstate wholesale service). But neither FERC, nor this Court, are presented with that question in this case.

II. GIVING STATES A “VETO” OVER A PUBLIC UTILITY’S ACCESS TO WHOLESALE ELECTRIC MARKETS WOULD BE INCONSISTENT WITH THE STATUTE’S DIRECTION TO ENSURE RATES, TERMS, AND CONDITIONS ARE JUST, REASONABLE, AND NOT UNDULY DISCRIMINATORY OR PREFERENTIAL

Accepting Petitioners’ assertions that FERC, as a matter of either jurisdiction or as a matter of discretion, must give States an opt-out or veto of an Electric Storage Resource’s participation in wholesale markets would hamstring FERC’s ability to fulfill its statutory mandate. FERC’s conclusion in the Rule to direct RTOs to ensure the rates, terms, and conditions of RTO tariffs do not present a barrier to participation for Electric Storage Resources is consistent with FERC’s long-term policies. *See EPSA*, 136 S.Ct. at 768 (explaining that 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.” (citations omitted)). FERC decision to not adopt an opt-out was a reasonable decision that is not otherwise arbitrary and capricious.

FPA Section 205 obligates FERC to ensure that rates and charges received by any public utility “for or in connection with” the transmission or wholesale sale of energy, as well as the “rules and regulations affecting or pertaining to such rates or charges,” are just and reasonable. 16 U.S.C. § 824d(a). Electric Storage Resources are public utilities and FERC will regulate the rates, terms, and practices for any

wholesale transactions. Similarly, RTOs are public utilities and FERC regulates the rules and regulations of RTOs that administer interstate wholesale markets. Disregarding, or ignoring, the barriers faced by otherwise-capable Electric Storage Resources in accessing the wholesale markets administered by the RTOs is inconsistent with FERC's statutory mandate to ensure just and reasonable rates.

For the same reason, FERC's decision to decline to adopt an "opt-out" as a matter of its discretion was not arbitrary and capricious. FERC reasonably explained that allowing for the broad exclusion of distribution-connected and behind-the-meter resources would not serve the goal of enhancing competition, and that if this large category of resources was excluded from the markets, the likely result would be unjust and unreasonable rates due to reduced competition and the dispatch of more expensive resources to meet system needs. Order 841 at P 2. In the Rule, FERC reasonably concluded that existing wholesale market rules had failed to "efficiently dispatch ... electric storage resources, thereby reducing competition in [those] markets." Order 841 at P12. It was reasonable for FERC to conclude that accommodating and integrating additional Electric Storage Resources into wholesale markets "would enhance competition and, in turn, help to ensure that these markets produce just and reasonable rates." *Id.* See also *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("the breadth of agency discretion

is at zenith when the action assailed relates primarily to the fashioning of policies, remedies and sanctions”) (cleaned up). No record evidence calls the Commission’s conclusions into question. It was reasonable for FERC to conclude that an opt-out was not necessary given that an Electric Storage Resource’s participation in the wholesale market “will be under circumstances that are consistent with states’ authority to regulate the distribution system.” Order 841A at P 48.

The current state of Electric Storage Resource technology and deployment fully supports FERC’s determinations. Electric Storage Resources located on the distribution network can provide all of the same wholesale services that transmission-connected storage can provide, including supplying energy during periods of peak demand and providing many more services beneficial to consumers.³ Electric Storage Resources are often paired with renewable generators, helping to balance the intermittent nature of renewable resources and allowing a more efficient allocation of transmission capacity. Since FERC issued the NOPR leading to the

³ See, e.g., Advanced Energy Economy, Putting Distributed Energy Resources to Work in Wholesale Electricity Markets: Case Studies of Emerging Applications and their Benefits for Customers and the Grid (Sept 2019), *available at*: <https://info.aee.net/der-in-wholesale-electricity-markets>; . Rocky Mountain Institute, The Economics of Battery Energy Storage (2015), *available at*: <https://rmi.org/insight/economics-battery-energy-storage/>.

Rule, distributed Electric Storage Resource installations have grown substantially and this growth is not projected to diminish. *See, e.g.*, U.S. Energy Info. Admin., *U.S. Utility-Scale Battery Storage Power Capacity to Grow Substantially by 2023* (July 2019) (charting growth from approximately 200 MW of installed capacity in 2013 to approximately 2,500 MW by 2023)(“EIA Report”).

Electric Storage Resources located on the distribution grid or behind-the-meter and participating in wholesale markets are expected to enhance real-time load management, reduce localized congestion, and defer expensive infrastructure investment, providing additional market efficiencies that reduce cost of electric service. FERC’s decision to decline to adopt the “opt-out” was a reasonable exercise of its judgment. FERC’s determination that market participation by these resources will lead to just and reasonable rates for consumers is supported by the record. FERC also has clearly “stayed within the bounds of its statutory authority,” *City of Arlington v. FCC*, 569 U.S. 290 (2013) (emphasis omitted), and even were this Court to find the statute unclear, FERC has acted reasonably. *See Constellation Energy Commodities Grp., Inc. v. FERC*, 457 F.3d 14, 24 (D.C. Cir. 2006) (finding that it is “within the scope of the agency’s expertise to make . . . a prediction about the market it regulates,” and a reasonable prediction deserves “deference notwithstanding that there might also be another reasonable view.” (citations omitted)).

III. CONCLUSION

The transmission and wholesale sale of electricity is a matter of national concern and FERC is vested with the exclusive authority over the rates, terms, and conditions of the provision of such services when provided by FERC-jurisdictional utilities. FERC did not infringe on States' jurisdiction by directing FERC-jurisdictional RTOs to provide a participation model that facilitates the participation of Electric Storage Resources. The Court should uphold the Rule as a lawful exercise of its jurisdiction under the FPA and defer to FERC's reasonable conclusions set forth therein.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)*B) because this brief contains 4,359 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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