

**UNITED STATES OF AMERICA**  
**FEDERAL ENERGY REGULATORY COMMISSION**

Electric Storage Participation in Markets Operated     )           Docket Nos.   RM16-23-000  
by Regional Transmission Organizations and           )                                   AD16-20-000  
Independent System Operators                            )

**REQUEST FOR CLARIFICATION AND REHEARING OF THE NATIONAL  
ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

Pursuant to section 313 of the Federal Power Act (“FPA”)<sup>1</sup> and Rules 212 and 713 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure,<sup>2</sup> the National Association of Regulatory Utility Commissioners (“NARUC”) respectfully requests clarification and rehearing of the Commission’s February 15, 2018 order in the above-captioned proceeding.<sup>3</sup>

**I. INTRODUCTION**

Pursuant to 16 U.S.C. § 824e,<sup>4</sup> the November 17, 2016 Notice of Proposed Rulemaking (“NOPR”)<sup>5</sup> posited amending FERC’s regulations to remove barriers to the participation of electric storage resources and distributed energy resource (“DER”) aggregations in the capacity, energy, and ancillary service markets operated by regional transmission organizations (“RTOs”)

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<sup>1</sup> 16 U.S.C. § 8251.

<sup>2</sup> 18 C.F.R. §§ 385.713 (2017).

<sup>3</sup> *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018) (“Final Rule” or “Order No. 841”). On February 28, 2018, FERC issued an errata notice for Order No. 841.

<sup>4</sup> 16 U.S.C. § 824e (2012).

<sup>5</sup> *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 81 Fed. Reg. 86,522 (Nov. 30, 2016) (Docket Nos. RM16-23 and AD16-20) (“NOPR”).

and independent system operators (“ISOs”) (“RTO/ISO markets”). The February 15, 2018 Final Rule amends the regulations to require that each RTO and ISO revise its tariff to establish a participation model that would facilitate electric storage resources taking part in the markets.<sup>6</sup> Because the record was deficient, FERC also announced a new docket, Docket No. RM18-9-000, to explore DER aggregation reforms proposed in the 2016 NOPR.<sup>7</sup>

FERC should continue to address barriers to the use of energy storage devices in wholesale markets. However, FERC must be careful that its actions do not inhibit or conflict with authority Congress specifically reserved to NARUC’s State Commission members. The Final Rule fails to recognize explicitly this aspect of State jurisdiction over storage resources located on the distribution system. State Commissions are actively pursuing deployment and use of State-jurisdictional storage resources. To avoid inhibiting ongoing State storage deployment initiatives, FERC should immediately grant rehearing to clarify that the States retain authority to determine whether resources located behind a meter or on the distribution system are allowed to participate in the wholesale markets. Alternatively, FERC should clarify that the determination of this jurisdictional issue is reserved for Docket No. RM18-9-000 as part of the broader discussion of States’ authority to determine whether to allow aggregated market participation by all distribution-level resources.<sup>8</sup>

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<sup>6</sup> Order No. 841 at P 3.

<sup>7</sup> Order No. 841 at P 5.

<sup>8</sup> NOPR at P 157 & n.238; Order No. 719, 125 FERC ¶ 61,071 at P 154.

## II. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2),<sup>9</sup> NARUC provides the following enumerated statement of issues, including citations to representative Commission and court precedent on which we rely:

The Final Rule’s statement that States cannot “decide whether electric storage resources in their state 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 resource participation model,”<sup>10</sup>

- ignores the reservation of State authority and the limitations on the Commission’s authority in FPA section 201;<sup>11</sup>
- is inconsistent with the reasoning in Order No. 719 and Order No. 2006-A;<sup>12</sup>
- is inconsistent with the clear acknowledgement of the crucial State role with respect to energy storage;<sup>13</sup>
- could inhibit State energy storage initiatives; and
- undermines and prejudices the broader open inquiry regarding all DER in Docket No. RM18-9-000.<sup>14</sup>

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<sup>9</sup> 18 C.F.R. § 385.713(c)(2) (2017).

<sup>10</sup> Order No. 841 at P 35.

<sup>11</sup> 16 U.S.C. §§ 824(b), 824o(i). *See California Independent System Operator Corporation v. FERC*, 372 F.3d 395, 398-99 (D.C. Cir. 2004).

<sup>12</sup> *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071 (2008) (Docket Nos. RM07-19-000 and AD07-7-000) at P 155; *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006-A, 113 FERC ¶ 61,195 at P 105 (Nov. 22, 2005) (Docket No. RM02-12-001). *See FERC v. Electric Power Supply Association*, 136 S.Ct. 760 (2016) (“*FERC v. EPSA*”).

<sup>13</sup> Order No. 841 at P 36 (“[W]e emphasize the ongoing, vital role of the states with respect to the development and operation of electric storage resources. Such state responsibilities include, among other things, retail services and matters related to the distribution system, including design, operations, power quality, reliability, and system costs.”).

<sup>14</sup> Order No. 841 at P 5.

### III. ARGUMENT

NARUC comments below specify its general support for “FERC’s efforts to address barriers to the use of energy storage devices and aggregated DERs that seek to participate in wholesale markets.”<sup>15</sup> However, that support was conditioned on FERC’s acknowledgement that “States retain the authority to determine whether to allow aggregated resources located on the distribution grid to participate and that system reliability is not adversely impacted.”<sup>16</sup> The Final Rule improperly extended federal jurisdiction to a matter within the jurisdiction of the States: authority to determine whether resources on the State-jurisdictional distribution system can participate in the RTO/ISO markets.<sup>17</sup> FERC has exclusive jurisdiction over the wholesale markets and the rules that apply to resources participating in those markets, including *how* such resources participate. Nonetheless, Congress assigned States the task of determining *whether* resources located behind a retail meter or on the distribution system can, in the first instance, participate in wholesale markets.

We commend FERC for acknowledging the States’ “ongoing, vital role . . . with respect to the development and operation of electric storage resources.”<sup>18</sup> FERC specified that State “responsibilities include . . . retail services and matters related to the distribution system,

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<sup>15</sup> *Motion to Intervene and Comments of the National Association of Regulatory Utility Commissioners* on NOPR (filed on February 13, 2017) at 3 (“NOPR Comments”).

<sup>16</sup> NOPR Comments at 3. NARUC had requested that FERC clarify that it will require prohibition from aggregator participation in the markets for all DERs, not just demand response where state laws or regulations prohibit such participation. NOPR at P 157 & n.238. This is the same prohibition FERC required in its Order 719 where it permitted limitation of aggregator participation where “the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate.” Order No. 719, 125 FERC ¶ 61,071 at P 154.

<sup>17</sup> While NARUC’s comments specifically mentioned aggregated resources because of the context of the NOPR, NARUC’s concerns with jurisdictional overreach extend to all DER participants, which includes electric storage resources, aggregated or not.

<sup>18</sup> Order No. 841 at P 36.

including design, operations, power quality, reliability, and system costs.”<sup>19</sup> Those acknowledged crucial State responsibilities are pursuant to Congress’s preservation of exclusive State jurisdiction over, among other things, electric retail sales and distribution facilities.<sup>20</sup> The Final Rule states that FERC “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.” That assertion is, perhaps unintentionally, overbroad to the extent it can be construed to constrain State authority with respect to distribution facilities.<sup>21</sup>

The Final Rule cites *FERC v. EPSA* as support for this contention of exclusive jurisdiction over the wholesale markets and the criteria for participation.<sup>22</sup> In *FERC v. EPSA*, the “practices at issue” in the case were “market operators’ payments for demand response commitments” as set forth by Order No. 745.<sup>23</sup> The Supreme Court noted that Order No. 719, upon which Order No. 745 had built, requires, among other things, “wholesale market operators to receive demand response bids from aggregators of electricity consumers, *except when the state regulatory authority overseeing those users’ retail purchases bars such demand response participation.*”<sup>24</sup> In fact, as part of its reasoning upholding Order No. 745, the Court found that:

Wholesale demand response as implemented in [Order No. 745] is a program of cooperative federalism, in which the States retain the last word. That feature of

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<sup>19</sup> Order No. 841 at P 36.

<sup>20</sup> 16 U.S.C. §§ 824(b).

<sup>21</sup> Order No. 841 at P 35.

<sup>22</sup> Order No. 841 at P 35, n.55.

<sup>23</sup> *FERC v. EPSA* at 773.

<sup>24</sup> *FERC v. EPSA* at 771, *citing* Order No. 719, 73 Fed. Reg. 64119, P 154 (codified 18 CFR § 35.28(g)(1) (2015)) (emphasis added). The Court also noted that no party had sought judicial review of Order No. 719. *Id.*

[Order No. 745] removes any conceivable doubt as to its compliance with § 824(b)'s allocation of federal and state authority.<sup>25</sup>

*FERC v. EPSA* certainly supports the assertion that the Commission can determine *how* resources participate in the RTO/ISO markets because the Court held that the Commission had the authority to determine how the prices were set. However, it cannot be used to support the declaration that States cannot determine whether resources participate in the RTO/ISO markets.<sup>26</sup>

At a minimum, the Final Rule's statement about exclusive federal jurisdiction should be clarified to specify that FERC determines *how* resources connected at or below distribution-level voltages can participate in the wholesale markets. Such a clarification is consistent with the citation in the very next sentence. There, the Final Rule, citing to PJM's Manual 14C, points out that "that numerous resources connected to the distribution system participate in the RTO/ISO markets today."<sup>27</sup> PJM's Manual 14C concedes FERC does not determine *whether* distribution-level resources can participate in wholesale markets.<sup>28</sup> Indeed, that manual specifies the only reason for a Wholesale Market Participation Agreement ("WMPA") is to facilitate participation

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<sup>25</sup> *FERC v. EPSA* at 780.

<sup>26</sup> The Final Rule also cited in that same footnote, Order No. 841 at P 35, n.55, the recently decided order in *Advanced Energy Economy*, 161 FERC ¶ 61,245, at PP 59-60 (2017) ("*AEE* Order"), as support. In the AEE Order, the Commission found that a relevant electric retail regulatory authority ("RERRA") "may not bar, restrict, or otherwise condition the participation of [energy efficiency resources] in wholesale markets unless the Commission expressly gives RERRAs such authority." *Id.* at P 61. The Commission found that even though it gave RERRAs an opt-out from allowing resources to participate as wholesale demand response, it was not obligated to do so. *Id.* at P 62. The Commission did find that the RTO/ISO stakeholder process "may be an appropriate forum to develop proposed market rules necessary to implement such an opt-out that would impact PJM's markets, operations and planning." *Id.* at P 71. Parties have moved for rehearing on this order challenging the Commission's authority to not grant an opt-out option for RERRAs. The Commission has not taken final action in this docket.

<sup>27</sup> Order No. 841 at P 35.

<sup>28</sup> Order No. 841 at P 35, n.56.

by distribution-level generators over which FERC *lacks* jurisdiction.<sup>29</sup> FERC and PJM generally are not involved in the physical interconnection of distribution-level facilities using the WMPA.<sup>30</sup> Rather, PJM’s WMPA – and the market entry of generation resources thereunder – is a product of federal-state comity that should not be mistaken for an exercise of exclusive federal jurisdiction.

NARUC seeks clarification because the Final Rule specifies that States will not be allowed “to decide whether electric storage resources in their state 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 resource participation model.”<sup>31</sup> This statement should be deleted from the Final Rule. It is disconnected from the rule’s focus on *how* electric storage resources can participate in the wholesale markets and fails to recognize the States’ jurisdiction in this area.

Read in isolation, this text can be construed to deny States the ability to determine whether electric storage resources participate in the RTO/ISO markets. However, the Final Rule also clarifies that an electric storage resource is not eligible, by definition, for participation in the RTO/ISO markets if it is “contractually barred from injecting electric energy back onto the grid.”<sup>32</sup> In contrast, that statement is consistent with the States’ threshold authority over the

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<sup>29</sup> See PJM Manual 14C: Generation and Transmission Interconnection Facility Construction, Revision 12, § 1.3 (“Generators planning to connect to the local distribution systems at locations that *are not under FERC jurisdiction* and wish to participate in PJM’s market need to execute a PJM Wholesale Market Participation Agreement”) (emphasis added).

<sup>30</sup> See PJM Manual 14A: New Service Request Process, Revision 20, § 4.3 (“Developers interconnecting to *non-FERC jurisdictional facilities* who intend on participating in the PJM wholesale market will receive a three party agreement known as a WMPA. The WMPA is a non-Tariff agreement which must be filed with the FERC. *The WMPA is essentially an ISA without interconnection provisions.*”) (emphasis added). FERC is involved with interconnection requests for qualifying facilities under the Public Utilities Regulatory Policies Act.

<sup>31</sup> Order No. 841 at P 35.

<sup>32</sup> Order No. 841 at P 33

participation of such resources in the RTO/ISO markets. As an example, the Final Rule acknowledges that an electric storage resource could be barred from participating through “the interconnection agreement between an electric storage resource that is interconnected on a distribution system or behind-the-meter with the distribution utility to which it is interconnected.”<sup>33</sup> What is missing from that acknowledgement is that is the States that have jurisdiction over the referenced distribution interconnection agreements that potentially establish such prohibitions.

Utility-scale energy storage is now shifting from a few experimental programs to prominent State-prompted deployments such as those in California, with more and more States looking expand the use of energy storage resources.<sup>34</sup> The FERC should avoid inhibiting State efforts to build on these successful installations and encourage system operators to include storage in their integrated planning. By granting rehearing to clarify that the Final Rule does not eliminate the States’ authority to determine whether a resource is able to participate in the RTO/ISO markets, the Commission can do just that. Granting rehearing of the Final Rule to recognize the States’ authority in this area should provide clarity that also would advance the federal and state policymakers shared interest in a resilient electric system with a diverse resource mix.<sup>35</sup>

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<sup>33</sup> Order No. 841 P 33.

<sup>34</sup> California Public Utilities Commission, *Order Instituting Rulemaking to consider policy and implementation refinements to the Energy Storage Procurement Framework and Design Program* (D.13-10-040, D.14-10-045) (Jan. 11, 2018); see e.g., J. Rackley, *State Strategies for Advancing the Use of Energy Storage*, National Governors Association Center for Best Practices (2016); National Renewable Energy Laboratory, U.S. Dept. of Energy, *Issue Brief: A Survey of State Policies to Support Utility-Scale and Distributed-Energy Storage* (2014).

<sup>35</sup> Grid Reliability and Resilience Pricing; Grid Resilience in Regional Transmission Organizations and Independent System Operators, *Order Terminating Rulemaking Proceeding*,



Moreover, to the extent any concerns about the scope of State authority remains outstanding, it is more properly decided in the broader context of DER aggregation, which includes energy storage resources. This remains an outstanding issue in Docket No. RM18-9-000. If FERC chooses not to affirmatively clarify States' authority in the instant proceeding, it should defer a final determination to the broader Docket No. RM18-9-000 proceedings.

#### IV. CONCLUSION

NARUC respectfully requests that FERC grant the clarification and rehearing request to clarify that the Final Rule does not eliminate the States' authority to determine whether a resource is able to participate in the RTO/ISO markets, or, alternatively, defer final determination on this issue until it can be addressed in the context of all DERs in Docket No. RM18-9-000.

Respectfully submitted,

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*Initiating New Proceeding, and Establishing Additional Procedures* (Docket Nos. RM18-1-00, AD18-7-000) (Jan. 8, 2018) at 11, n.31.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC: March 19, 2018

Respectfully submitted:

/s/ Jennifer M. Murphy