

Power Industry Challenges FERC Order Promoting Battery Products

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On Monday, July 15, several groups representing the power industry sued the Federal Energy Regulatory Commission (FERC) seeking to overturn a Commission order that promotes the use of electric storage resources (ESRs) regardless of their storage medium (e.g., batteries, flywheels, compressed-air, and pumped-hydro). A successful legal challenge would resurrect barriers to implementation of this technology.

The groups petitioned the U.S. Court of Appeals for the D.C. Circuit to review FERC's "Storage Rule," originally issued in February 2018 as Order 841 and, upon reconsideration, recently affirmed with clarifications as Order 841-A (collectively "Order 841").¹

Order 841 requires the regional grid operators that FERC regulates to allow private ESRs to connect to the grid as energy producers regardless of whether they operate directly on a local distribution system or behind a retail meter. The effect of the order is to allow those who have installed even small ESRs to sell power back to the grid. Order 841 does this by precluding regional operators from setting the minimum capacity required for an ESR to have access to the grid at more than 100kW. The ability to sell power back to the grid, in turn, makes smaller ESRs more affordable.

Proponents of Order 841 argue that it will add efficiency and resilience to the grid. Opponents contend that the ESRs are unpredictable and connecting them will represent a significant cost to grid operators. To this end, grid operators will also likely argue that Order 841 should have included opt-out provisions, by citing past instances in which FERC, after considering an issue argued to be at

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the fringes of its jurisdictional reach, limited the scope of its action on the basis of “cooperative federalism.”

In Order 841-A, FERC also denied the grid operators’ request to alter the compliance deadlines established in the original Order 841. Under the schedule now set, grid operators will have until December 2, 2019, to implement the changes. The petition for review by the D.C. Circuit will not affect this deadline unless the court issues an order to that effect. The petitioners have not (yet) sought such a delay.

Whether FERC exceeded its jurisdiction under the FPA when it issued Orders 841 and 841-A will likely be the critical issue on which the petitioners focus. If FERC clears this hurdle at the D.C. Circuit, the court may give FERC deference on its decision not to allow states to opt out.

The case will be closely watched as it will have a significant impact on if, when, and how ESRs will be further integrated into the grid. Companies with an interest in these products should consider whether it is important enough to them to merit seeking intervention in the case to support FERC or the filing of an amicus (friend of the court) brief.

[1] *Electric Storage Participation in Markets Operated By Regional Transmission Organizations and Independent System Operators*, Order No. 841-A, Docket Nos. RM16-23-001 and AD16-20-001, 167 FERC ¶ 61,154 (May 16, 2019).