



D.C. Circuit Backs FERC on Electric Storage Rule

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Most controversially, FERC declined to allow states to decide whether storage resources interconnected at the local distribution level—the part of the power grid under state jurisdiction—may participate in the federally regulated RTO/ISO markets. That decision drew legal challenges, as locally interconnected storage projects must use the state-jurisdictional distribution facilities to reach the federally regulated wholesale power markets. The National Association of Regulatory Utility Commissioners, the American Public Power Association and others argued on appeal that FERC exceeded its jurisdiction by unlawfully regulating matters left to the states.

The D.C. Circuit was not convinced. Conceding that FERC’s rule will “lure” locally interconnected storage to the federal markets, which will require use of state-regulated distribution systems, the panel concluded that there is no jurisdictional problem: any impact on state regulation due to FERC’s rule is the type of “permissible effect” of federal regulation allowed under the Federal Power Act, as articulated in the U.S. Supreme Court’s *EPSCA* decision.¹ Nothing in Order No. 841 directly regulates the state-jurisdictional distribution system; states “remain equipped with every tool they possessed prior to Order No. 841 to manage their facilities and systems.”

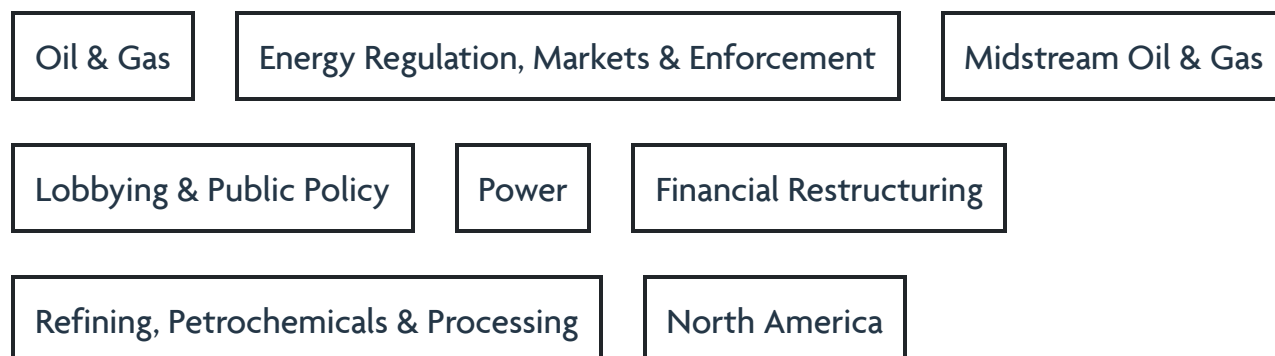
The court explained that states retain the authority to ban local storage resources from participating in both the (state) retail and (federal) wholesale markets simultaneously. They may, therefore, force some storage resources to choose one market or the other. States also retain their authority to impose safety and reliability requirements on the distribution system, even if those requirements may “hinder FERC’s goal of making the federal markets more friendly” to storage. Under federal preemption jurisprudence, though, there is a distinction

between states taking direct aim at matters within FERC's jurisdiction and states taking measures aimed at fulfilling their own jurisdictional obligations. The former must fall when such action threatens the scheme of federal regulation. Ultimately, the Supremacy Clause in the U.S. Constitution, *not* Order No. 841, prohibits states from interfering with FERC's regulation of electric storage in the wholesale power markets, the court held.

In addressing this facial challenge to FERC's rule, the court noted that its decision need not address every hypothetical state regulation. States and other parties will be free to challenge FERC's rule on an "as applied" basis going forward.

¹ *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016).

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