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

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

AMERICAN PUBLIC POWER ASSOCIATION, *ET AL.*,

PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION

RESPONDENT.

TRANSMISSION ACCESS POLICY STUDY GROUP,

INTERVENOR.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

BRIEF OF INTERVENOR TRANSMISSION ACCESS POLICY STUDY GROUP IN SUPPORT OF PETITIONERS

Cynthia S. Bogorad
William S. Huang
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

Counsel for Transmission Access Policy Study Group

November 6, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

To counsel's knowledge, all parties, intervenors, and amici appearing before this Court are as stated in the Opening Briefs of Petitioners.

B. Rulings Under Review.

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

C. Related Cases.

References to the related cases appear in the Opening Briefs of Petitioners.

Respectfully submitted,

/s/ Cynthia S. Bogorad
Cynthia S. Bogorad
William S. Huang
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

Counsel for Transmission Access Policy Study Group

November 6, 2019

CORPORATE DISCLOSURE STATEMENT

The Transmission Access Policy Study Group ("TAPS") is a trade association of transmission-dependent utilities in thirty-five states, promoting open and non-discriminatory transmission access. TAPS members include municipal utilities, municipal joint action agencies, electric cooperatives, and an investor-owned utility. TAPS does not have any parent companies, and no publicly-held company has a 10% or greater ownership interest in TAPS.

Respectfully submitted,

/s/ Cynthia S. Bogorad

Cynthia S. Bogorad
William S. Huang
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

November 6, 2019

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AMP Rehearing	Request For Rehearing of American Municipal Power, Inc., the American Public Power Association, and the National Rural Electric Cooperative Association, *Electric Storage Participation in Markets Operated by Regional Transmission Operators and Independent System Operators*, Docket Nos. RM16-23-000, AD16-20-000 (Mar. 19, 2018), R.224
APPA Comments	Comments of the American Public Power Association and the National Rural Electric Cooperative Association on Notice of Proposed Rulemaking, *Electric Storage Participation in Markets Operated by Regional Transmission Operators and Independent System Operators*, Docket Nos. RM16-23-000, AD16-20-000 (Feb. 13, 2017), R.178
Commission or FERC	Federal Energy Regulatory Commission
EEI Comments	Comments of Edison Electric Institute, *Electric Storage Participation in Markets Operated by Regional Transmission Operators and Independent System Operators*, Docket No. RM16-23-000 (Feb. 13, 2017), R.121
FPA	Federal Power Act
ISO	Independent System Operator
JA	Joint Appendix
NARUC Rehearing	Request for Clarification and Rehearing of the National Association of Regulatory Utility Commissioners, *Electric Storage Participation in Markets Operated by Regional Transmission Operators and Independent System Operators*, Docket Nos. RM16-23-000, AD16-20-000 (Mar. 19, 2018), R.228

Opening Briefs of Petitioners	Opening Brief for Petitioners, American Public Power Association, National Rural Electric Cooperative Association, Edison Electric Institute, and American Municipal Power, Inc. and Opening Brief of Petitioner the National Association of Regulatory Utility Commissioners
Order No. 841	*Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), FERC Stats. & Regs. ¶ 31,398 (2018), R.214
Order No. 841-A	*Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841-A, 167 FERC ¶ 61,154 (2019), R.247
P	Denotes a paragraph number in a Commission order
R.	Indicates an item in the certified index to the record
RTO	Regional Transmission Organization
Storage Rule	*Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, *on reh'g and clarification*, Order No. 841-A
TAPS	Transmission Access Policy Study Group
TAPS Comments	Comments of the Transmission Access Policy Study Group, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket No. RM16-23-000 (Feb. 13, 2017), R.163
TAPS Rehearing	Request for Rehearing of the Transmission Access Policy Study Group, *Electric Storage Participation in Markets Operated by Regional Transmission Operators and Independent System Operators*, Docket Nos.

	RM16-23-000, AD16-20-000 (Mar. 19, 2018), R.219
Xcel Comments	Comments of Xcel Energy Services Inc., *Electric Storage Participation in Markets Operated by Regional Transmission Operators and Independent System Operators*, Docket Nos. RM16-23-000, AD16-20-000 (Feb. 13, 2017), R.172
Xcel Rehearing	Request for Rehearing of Xcel Energy Services Inc., *Electric Storage Participation in Markets Operated by Regional Transmission Operators and Independent System Operators*, Docket Nos. RM16-23-000, AD16-20-000 (Feb. 19, 2018), R.221

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Opening Briefs of Petitioners.

STATEMENT OF THE ISSUES

The issues presented for review are set forth in the Opening Briefs of Petitioners.

SUPPLEMENTAL STATEMENT OF THE CASE

TAPS adopts the statements of the case set forth in the Opening Briefs of Petitioners and supplements them with the following additional information.

In response to FERC's Notice of Proposed Rulemaking that led up to the Storage Rule, TAPS, Petitioners, and others submitted comments that generally supported FERC's effort to better integrate storage resources connected at the transmission level. However, they identified the substantial real-world burden that would be placed on distribution utilities if they were required to allow storage resources connected to their local distribution facilities or behind the retail meter ("distributed storage") to participate in wholesale markets administered by Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") (collectively, "transmission organizations").[1] *See, e.g.*, EEI

[1] Some of the comments describing the burden on distribution utilities do so in discussions of distributed energy resources, generally. Because the Notice of

Comments at 22, R.121, JA__ ("While [distribution utilities'] retail activity is not regulated by the Commission, the costs and burden on [distribution utilities] associated with the Commission proposals that seek to regulate resources connected to the distribution grid need to be addressed in determining whether the proposal is just and reasonable."); Xcel Comments at 8, R.172, JA__ ("[A]ctions to enable [distributed energy resource] participation in wholesale markets will not be exclusive to the wholesale markets but rather will impose significant burdens on the distribution systems subject to state retail jurisdiction."). TAPS' comments addressed how the proposed rule would impose an even greater and disproportionate burden on small utilities. *See, e.g.*, TAPS Comments at 2, R.163, JA__ ("The significant complexity—and associated cost—of acquiring and deploying modelling and forecasting tools that address these issues will be a burden on many utilities, particularly smaller distribution utilities."). *See also id.* at 21, R.163, JA__ ("[T]hese challenges disproportionately affect small utilities, because the large costs associated with addressing these challenges will be paid by a relatively small amount of retail load, if not borne directly by the [resource].").

Proposed Rulemaking defined "distributed energy resources" to encompass "electric storage resources" (*see* Notice of Proposed Rulemaking, *Electric Storage Participation in Regions with Organized Wholesale Electric Markets*, 157 FERC ¶ 61,121, at 61,121 n.2 (2016), R.65, JA__), those comments are relevant to the Storage Rule's requirements regarding distributed storage. Additionally, some expressly noted that their comments regarding distributed energy resources applied equally to distributed storage. *See, e.g.*, TAPS Comments at 29, R.163, JA__.

To address these burdens, TAPS and others—in addition to challenging FERC's broad assertion of jurisdiction over distributed storage—urged FERC to adopt a mechanism, patterned on FERC's existing treatment of wholesale market participation by demand response (i.e., reduced consumption of electricity by retail customers), that would allow state and local regulators to decide whether storage resources in the footprint of the distribution utilities they regulate are permitted to participate in wholesale markets. TAPS Comments at 10, R.163, JA ____; APPA Comments at 22, R.178, JA__ ("the Commission should adopt … the same sort of 'gatekeeper' role for state or regulatory authority as it did in Order Nos. 719 and 719-A.[2]"). *See also* EEI Comments at 27, R.121, JA__. TAPS and others explained that such a mechanism was even more appropriate for distributed storage resources "because their operation can have significant impacts on distribution facilities that were not originally designed to handle [the bidirectional flows such resources cause], and because the distribution utility's costs of the metering, settlements, and rate-unbundling required to accommodate [distributed energy resource] sales to RTOs are higher than the administrative costs associated with accommodating aggregators of demand response." TAPS Comments at 10, R.163,

[2] *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071 (2008), FERC Stats. & Regs. ¶ 31,281, *corrected*, 126 FERC ¶ 61,261 (2009), *on reh'g*, Order No. 719-A, 128 FERC ¶ 61,059, FERC Stats. & Regs. ¶ 31,292, *on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

JA__. *See also* Xcel Comments at 8, R.172, JA__ ("Customer load reduction is entirely different from the situation where customers engage in bidirectional trafficking of energy across the distribution grid to sell in to wholesale markets and purchase power to charge storage devices from those wholesale markets.").

In Order No. 841, FERC stated that "it may be appropriate, on a case-by-case basis, for distribution utilities to assess a charge on electric storage resources" for deliveries of electricity across the distribution system (P 296, R.214, JA__), but did not address the scope and magnitude of the physical infrastructure, operational, and administrative burdens on distribution utilities raised by commenters. FERC rejected requests for a mechanism allowing state and local regulators to determine whether storage resources in the footprints of the distribution utilities they regulate can reach the transmission grid and participate in wholesale markets (*id.* P 35, R.214, JA__ (footnotes omitted)), stating only:

> We also understand that numerous resources connected to the distribution system participate in the RTO/ISO markets today. Under these circumstances, we are not persuaded to grant the MISO Transmission Owners' and DTE Electric/Consumers Energy's request that the Commission allow states 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.

FERC did not mention other commenters that had made similar requests, or address comments from TAPS that the burdens on small distribution utilities would be disproportionate to any potential benefits.

In requesting rehearing, TAPS, Petitioners, and others reiterated their concerns regarding FERC's assertion of jurisdiction over distributed storage and the burden it would place on distribution utilities. TAPS Rehearing at 10, R.219, JA__ ("The costs and logistical challenges of making these changes will be enormous; and [retail regulatory authorities] will be faced with the responsibility for allocating available distribution capacity, as well as the costs of distribution facility upgrades—all while assuring that the distribution utilities they regulate retain the ability to promptly interconnect new retail customers within a matter of days, not the months or years typical for wholesale interconnections."); Xcel Rehearing at 23-24, R.221, JA__ (footnote omitted) ("[The Final Rule] will burden distribution utilities and their ratepayers through the implementation of its provisions . . . . These costly improvements will be of comparatively little benefit to distribution ratepayers and their utility service providers."). TAPS and others again called on FERC to address the burden Order No. 841 would impose by adopting a retail regulator opt-out mechanism, patterned on Order No. 719-A's treatment of demand response, that would allow state and local regulators to

restrict wholesale market participation by distributed storage.[3] TAPS Rehearing at 11, R.219, JA__; AMP Rehearing at 3, R.224, JA__ ("[T]he Commission should grant rehearing and specifically adopt a Relevant Electric Retail Regulatory Authority … 'opt-out/opt-in' mechanism, like the existing regulation for demand response bids in RTO and ISO markets …").

On rehearing, FERC "recognize[d] … that sales for resale of electricity necessarily have effects on the distribution system" (Order No. 841-A, P 56, R.247, JA__) and that "the states have authority to regulate the distribution system, 'including [its] design, operations, power quality, reliability, and system costs.'" *Id.* P 47, R.247, JA__. But again FERC did not assess the physical infrastructure, operational, and administrative burdens that wholesale market participation by distributed storage imposes on distribution utilities, including small utilities. Rather, stating that distribution utilities might be able to pass such costs on to their customers, and that any costs imposed by the Storage Rule "*could* be outweighed" by the overall benefits from increased competition due to greater participation of storage resources in organized wholesale markets (*id.* P 45, R.247, JA__ (emphasis added)), FERC barred all distribution utilities and their regulators from "directly

[3] *See* TAPS Rehearing at 11 n.14, R.219, JA__ (explaining that "Order No. 719-A required RTOs to accept bids from Demand Response located in large utilities unless the [retail regulatory authority] expressly opts out, and (in recognition of the burden on small utilities) to reject bids from Demand Response located in small utilities unless the [retail regulatory authority] expressly opts in.").

prohibit[ing] electric storage resources from participating in the wholesale market." *Id.* P 47, R.247, JA__.

FERC also declined TAPS' and Petitioners' request to provide state and local retail regulators with the same opt-out mechanism it adopted and still applies to demand response. *Id.* PP 32, 50, R.247, JA__. FERC explained that unlike demand response, sales from distributed storage are sales of electricity for resale subject to FERC's jurisdiction, and state and local regulators did not have a "longstanding history of managing and regulating" distributed storage programs. *Id.* PP 51-56, R.247, JA__. The Commission did not explain how the burden imposed on distribution utilities by wholesale market participation by distributed storage was any less than for demand response.

In contrast, the dissenting Commissioner recognized that the "Storage Orders potentially will create complications for, and impact the day-to-day operations and management of, the distribution system – as well as its safety and reliability – in a manner that is in fact *greater* than the impact of demand response resources …" and concluded that the "Commission should have included an opt-out provision." Order No. 841-A, Partial Concurrence and Partial Dissent of Commissioner McNamee ("McNamee Dissent") PP 18, 22, R.247, JA__.

Petitioners appealed the Storage Rule, and TAPS intervened.

SUMMARY OF ARGUMENT

TAPS agrees with and adopts the Opening Briefs of Petitioners regarding the issue of whether FERC exceeded its Federal Power Act authority by ruling that it can preempt state and local regulators from imposing conditions on retail service and state-jurisdictional interconnections that directly restrict associated distributed storage from participating in wholesale markets. TAPS also supports the positions in the Opening Briefs of Petitioners that FERC acted arbitrarily and capriciously and otherwise not in accordance with law, by failing to provide state and local regulators an opt-out mechanism to restrict wholesale market participation by storage resources connected to distribution facilities or behind the retail meters of the distribution utilities they regulate. TAPS files this brief to emphasize FERC's failure to adequately consider the burden the Storage Rule will place on distribution utilities, and the arbitrariness of its refusal to provide state and local regulators an opt-out patterned on the mechanism adopted by FERC and still in use with respect to demand response that seeks to participate as a resource in organized wholesale markets.

As FERC recognized, the requirement that state and local regulators allow distributed storage to sell electricity into organized wholesale markets will "necessarily have effects on the distribution system." Order No. 841-A, P 56, R.247, JA__. These effects—which include the burden of monitoring and ensuring

the safe and reliable delivery of wholesale market energy to and from the resource over local distribution facilities that were not designed for bidirectional flows, separately tracking the retail and wholesale purchases and sales of distributed storage charging and discharging, and communicating and coordinating with transmission organizations—are significant. As TAPS pointed out, the Storage Rule disproportionately affects small utilities, where the additional burdens of accommodating wholesale market participation by distributed storage are large and borne by a small customer base, and the number of such resources—and any potential wholesale market benefit—is likely to be small. TAPS Comments at 16, R.163, JA__.

Yet FERC's Storage Rule glosses over the burdens it will impose on distribution utilities with the statement that the costs "could be outweighed" by the rule's benefits to wholesale markets. Order No. 841-A, P 45, R.247, JA__. FERC also does not adequately explain why it refused to adopt an opt-out mechanism as it did in Order No. 719-A for demand response, even though the burden imposed on distribution utilities by the Storage Rule will be even greater. FERC's failure to adequately address these issues renders the Storage Rule arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).

ARGUMENT

I. FERC Exceeded its Statutory Authority by Depriving States of Their Authority to Decide Whether Distributed Storage May Participate in Wholesale Markets

As addressed in the Opening Briefs of Petitioners, which TAPS adopts, FERC has jurisdiction under the Federal Power Act to determine *how* energy resources—including distributed storage—participate in wholesale markets. FPA § 201(b)(1), 16 U.S.C. § 824(b)(1). FERC's jurisdiction, however, does not extend to broadly determining *whether* storage resources connected to local distribution facilities or behind the retail meter can reach the FERC-jurisdictional transmission grid and thereby participate in organized wholesale markets. *Id.*; *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1904 (2019). Rather, as Petitioners argue, "Section 201(b)(1) … allows states to take any action over local distribution facilities or retail sales without FERC interference," and nothing in that provision "supports the Commission's dictating what actions a state may or may not take when regulating [any facilities] used for generation or local distribution … within the state." Opening Brief for Petitioners American Public Power Association, *et al.* at 9, 18; *see also* Opening Brief of Petitioner National Association of Regulatory Utility Commissioners at 15. This interpretation is consistent with judicial and FERC precedent and should be adopted by this Court. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 780 (2016) ("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."); Order No. 2003-C,[4] P 51 (holding that it would "cross[] the jurisdictional line established by Congress in the FPA" for FERC to assert jurisdiction over interconnections to local distribution facilities solely on the basis of the generator's intent to make wholesale sales).

II. FERC Acted Arbitrarily and Capriciously by Failing to Provide State and Local Retail Regulators with an Opt-Out Patterned on Order No. 719-A, Given the Rule's Burden on Distribution Utilities

A. FERC failed to adequately consider the burden the Storage Rule places on distribution utilities

The Storage Rule will have significant effects on distribution utilities. Unlike the networked transmission systems FERC is statutorily mandated to regulate, distribution systems under state and local regulation are largely composed of radial facilities designed to move energy in a single direction from their connections with the transmission grid to the ultimate consumers of electricity on the distribution system, i.e., retail customers. The wholesale transactions envisioned by the Storage Rule—driven by transmission organization dispatch

[4] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003-C, 111 FERC ¶ 61,401, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1468 (2008).

instructions that do not consider distribution system conditions and impacts (Xcel Rehearing at 25, R.221, JA__)—turn this arrangement on its head; they will require distribution utilities to allow energy to be injected onto their facilities and pushed upstream in the opposite direction (i.e., toward the transmission grid), creating "'bidirectional trafficking of energy across the distribution grid.'" McNamee Dissent P 17, R.247, JA__ (quoting Xcel Comments at 8, R.172, JA__); *see also* TAPS Rehearing at 10, R.219, JA__. To accommodate this operational change, distribution utilities "'will need to harden the underlying distribution system to support bidirectional power flows and pay for substantial metering upgrades.'" McNamee Dissent P 21, R.247, JA__ (quoting Xcel Rehearing at 23, R.221, JA __); *see also* TAPS Comments at 14, R.163, JA__. As TAPS explained, for small distribution utilities like TAPS' members, such bidirectional flows can also trigger costly notice, study, and upgrade requirements under their interconnection agreements with the surrounding larger transmission-owning utility. TAPS Comments at 19, R.163, JA__.

In addition to these substantial infrastructure investments, the Storage Rule will require distribution utilities to adopt complicated administrative systems. At a minimum, this will include tracking and differentiating between retail and wholesale purchases and sales made by each distributed storage resource to ensure that electricity purchased from the wholesale market *is* re-sold at wholesale rather

than consumed, and that, where required by state/local regulation, electricity purchased at retail *is not* re-sold at wholesale. Systems will also be needed to timely communicate that information to, and coordinate with, transmission organizations. *Id*. at 16, R.163, JA__; Xcel Rehearing at 9, R.221, JA__.

The burdens imposed by the Storage Rule will be especially onerous for small distribution utilities. To the extent that the costs of the facility and administrative/staffing upgrades needed to support wholesale market participation by distributed storage cannot be directly assigned to those resources, the costs will be borne by a small retail customer base. TAPS Comments at 16, R.163, JA__. Additionally, many small utilities currently have no direct interaction with their transmission organization; they therefore lack in-house settlements expertise, or even the systems needed to communicate directly with that organization should problems arise. *Id.* at 21, R.163, JA__. Even basic functions like load forecasting will become more complex and require small utilities to expend additional resources to safely manage their systems. *Id.* at 20, R.163, JA__.

FERC states that it is not preempting "the states' right to regulate the safety and reliability of the distribution system" and that state and local regulators may impose interconnection requirements "to install certain technologies to mitigate a reliability or safety concern." Order No. 841-A, PP 46, 42, R.247, JA__. But as the dissenting Commissioner correctly observed, the Commission "misses the point, as

those safety and reliability regulations can be challenging and expensive tasks." McNamee Dissent P 20, R.247, JA__. FERC's attempted justification is like telling homeowners they must allow a stranger to move into their house, but assuring the homeowners that they can still ensure the safety of the other inhabitants and maintain the home's cleanliness. That distribution utilities have a right and responsibility to operate their systems safely and reliably does nothing to reduce the additional burden imposed by the Storage Rule.

Although it is not the Court's responsibility to review whether FERC has precisely calculated the relative costs and benefits of the Storage Rule, it is well within the Court's purview to "ensure that an agency has at least understood the relevant factors to be considered and has provided an adequate explanation of its reasoning process." *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C. Cir. 1983). Here, FERC's "explanation"—the statements that costs imposed by the Storage Rule on distribution utilities "*could* be outweighed" by the competitive benefits from the Rule (Order No. 841-A, P 45, R.247, JA ___ (emphasis added)), and that "any policy considerations in favor of an opt-out" are outweighed by "the benefits of allowing electric storage resources broader access to the wholesale market…" (*id.* P 56, R.247, JA__)—does not satisfy this standard.[5]

[5] The Storage Rule's suggestion that existing cost allocation mechanisms may

FERC never explains whether the benefits that it concludes "could" outweigh increased distribution utility costs are solely from wholesale market participation by distributed storage (as opposed to transmission-connected storage). And even assuming FERC had adequately explained the benefits of the Storage Rule's requirements regarding distributed storage, FERC never clearly articulates what it views as the effects the Storage Rule will "necessarily have" on distribution utilities, the costs it will impose on distribution utilities, or what other "policy considerations" favoring a retail regulator opt-out FERC may have considered before determining that they "could be" or are outweighed. FERC must do more than offer a "passing reference to relevant factors." *Mo. Pub. Serv. Comm'n v. FERC*, 234 F.3d 36, 41(D.C. Cir. 2000).

Nor do these statements adequately consider the relative benefits and burdens of the Storage Rule's requirements with respect to small utilities. As TAPS noted:

> Particularly for a small utility—where any increased costs not directly assigned to the [distributed energy resource] would be borne by a small customer base, and only a few [distributed energy resources] would be likely to participate in RTO markets—those costs may far

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allow distribution utilities to pass some increased costs on to their customers (Order No. 841-A, P 45, R.247, JA ___) does not fill this gap. The potential ability to recover such costs by increasing customer charges at most shifts the rule's burdens—it neither eliminates them, nor obviates FERC's obligation to consider them.

> exceed the potential efficiency benefits from [distributed energy resource] participation in organized wholesale markets.

TAPS Comments at 16, R.163, JA__. An agency's "failure to address … comments, or at best its attempt to address them in a conclusory manner, is fatal to its defense" and renders it arbitrary and capricious. *Int'l Union v. MSHA*, 626 F.3d 84, 94 (D.C. Cir. 2010).

B. FERC failed to adequately justify its departure from its treatment of state and local regulators with regard to demand response

FERC's failure to adequately consider the burdens on distribution utilities imposed by the Storage Rule could have been mitigated by granting state and local regulators an opt-out opportunity just as it did in Order Nos. 719 and 719-A, where it addressed wholesale market participation by demand response. In Order No. 719, the Commission granted states and local regulators the ability to opt-out—to deny retail customers subject to their jurisdiction the opportunity to sell their non-consumption of electricity into organized wholesale markets. Order No. 719, P 155. In response to concerns about the burdens on small utilities and in recognition of the statutory distinctions Congress has made for them (Order No. 719-A, PP 51, 59), FERC on rehearing added a more protective provision for small utilities: it required transmission organizations to reject demand response bids from retail customers within the footprints of small utilities *unless* the utility's retail

regulator expressly elected to opt into the transmission organization's demand response program. Order No. 719-A, PP 49, 60; *see also* TAPS Rehearing at 11 n.14, R.219, JA__. Order No. 719-A gave state and local retail regulators much needed flexibility to determine, based on local conditions, whether and when distribution utility customers would be permitted to participate in wholesale markets.

In the Storage Rule, FERC concludes that this flexibility is unnecessary for distributed storage resources because they were not expressly addressed by Order No. 719 (Order No. 841-A, P 50, R.247, JA __), and they "differ significantly from the demand response resources at issue in Order No. 719." *Id.* P 51, R.247, JA__. "[U]nlike demand response," FERC explains, distributed storage resources "are capable of engaging in sales for resale of electricity and … are public utilities subject to the Commission's jurisdiction." *Id.* R.247, JA__.

But even assuming FERC were correct that the potential to make wholesale sales gives FERC jurisdiction over distributed storage, neither of these statements justify FERC's failure to provide an opt-out for retail regulators given the burdens imposed by the Storage Rule.[6] FERC is correct that Order No. 719 related to

[6] For example, in adopting the *pro forma* open access transmission tariff, FERC asserted jurisdiction over retail transmission where a state chose to unbundle retail service, but declined to extend its jurisdiction to retail transmission service that remained bundled. The Supreme Court upheld FERC's decision to decline jurisdiction, concluding that "the agency had discretion to decline to assert such

demand response, not specifically distributed storage; but both rules address distribution utility customers that seek to participate in wholesale markets. Moreover, the physical differences identified by FERC justify providing states and local regulators with *more* flexibility when dealing with distributed storage—not less. AMP Rehearing at 15, R.224, JA__; TAPS Rehearing at 4, R.219, JA__. Demand response curtails the baseline consumption of energy drawn from the distribution system and reduces flows from the transmission grid to local distribution facilities. In contrast, distributed storage "inject[s] power into the distribution system" and pushes energy from local distribution facilities to the transmission grid for re-sale, "'dramatically re-shap[ing] load curves, thereby creating more significant operational, safety, and reliability concerns for retail customer interconnections and distribution systems.'" McNamee Dissent P 18, R.247, JA__ (quoting TAPS Rehearing at 4, R.219, JA__). These operational, safety, and reliability concerns would justify granting a retail regulator opt-out for distributed storage even if FERC had not already done so for demand response.

FERC also attempts to explain its departure from Order No. 719 by arguing that "unlike in the case of demand response resources," states, local regulatory authorities, and distribution utilities "do not have a longstanding history of

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jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues." *New York v. FERC*, 535 U.S. 1, 28 (2002).

managing and regulating programs for electric storage resources within their boundaries." Order No. 841-A, P 52, R.247, JA__. FERC's assertion, however, does not explain how the lack of a "longstanding history of managing and regulating programs for electric storage" lessens the burden placed on distribution utilities by the Storage Rule. Nor can FERC dismiss Petitioner National Association of Regulatory Utility Commissioners' statement that "more and more States [are] looking [to] expand the use of energy storage resources," (NARUC Rehearing at 8, R.228, JA__), by noting that "only California, Connecticut, Massachusetts and New York mentioned any specific state electric storage initiatives" in their comments. Order No. 841-A, P 52 n.145, R.247, JA__. The comments filed by those four states are not an exhaustive—or even representative—survey of state and local energy storage initiatives. Moreover, FERC ignored comments highlighting local-level storage projects occurring outside of those four states, like those of TAPS members in Illinois and South Dakota. TAPS Comments at 5-6 nn.4-6, R.163, JA__. While distributed storage is a relatively new development, distribution utilities and their state and local regulators are actively engaged in evaluating and experimenting with the technology. As the dissenting Commissioner correctly points out, "states play a vital role as policy laboratories when it comes to broad initiatives that have

significant state-by-state details to be ironed out." McNamee Dissent P 23, R.247, JA__.

"It is axiomatic that '[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.'" *Kreis v. Sec'y of the Air Force*, 406 F.3d 684, 687 (D.C. Cir. 2005) (quoting *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996)). Even assuming FERC has jurisdiction to require distribution utilities and retail regulators to allow wholesale market participation by distributed storage, it should have provided state and local regulators the same opt-out authority that FERC adopted in Order No. 719-A and still applies to demand response. And before doing otherwise, it must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs.*, 463 U.S. at 30. FERC's explanations in the Storage Rule fail to differentiate between distributed storage and demand response in any manner that would justify departing from the retail regulator opt-out provided for demand response. *Cf. ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018) ("[T]he decision must give a 'reasoned analysis' to justify the disparate treatment of regulated parties that seem similarly situated…").

CONCLUSION

The Court should vacate the Storage Rule on the grounds that FERC exceeded its statutory authority and improperly intruded on state and local regulatory processes. If the Court concludes that the Storage Rule's requirements regarding distributed storage are within FERC's statutory authority, it should vacate the rule on the grounds that FERC acted arbitrarily and capriciously by failing to assess the substantial burdens that the rule will place on distribution utilities, while also denying retail regulators the authority to directly restrict wholesale market participation by distributed storage based on such an assessment under local conditions.

Respectfully submitted,

/s/ Cynthia S. Bogorad
Cynthia S. Bogorad
William S. Huang
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

Counsel for Transmission Access Policy Study Group

November 6, 2019

CERTIFICATE OF COMPLIANCE

I, Cynthia S. Bogorad, in reliance on the word count of the word processing system used to prepare this brief, certify that the foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), Circuit Rule 32(e)(2)(B), and this Court's order dated October 3, 2019. The brief contains 4,631 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in Times New Roman 14-point font, a proportionately spaced typeface, using Microsoft Word 2010.

/s/ Cynthia S. Bogorad

Cynthia S. Bogorad
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

Counsel for Transmission Access Policy Study Group

November 6, 2019

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I, Cynthia S. Bogorad, hereby certify that I have, this 6th day of November, 2019, served the foregoing upon the counsel listed in the Service Preference Report via the Court's CM/ECF system or via U.S. Mail, as indicated below:

Jeffrey Michael Bayne — Email
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
Email: jeffrey.bayne@spiegelmcd.com

Cynthia Schneider Bogorad — Email
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
Email: cynthia.bogorad@spiegelmcd.com

Jeffery Scott Dennis — Email
Advanced Energy Economy
1000 Vermont Avenue, NW
Suite 300
Washington, DC 20005
Email: jdennis@aee.net

Gary Greenstein Email
Wilson Sonsini Goodrich & Rosati, PC
1700 K Street, NW
Fifth Floor
Washington, DC 20006-3817
Email: ggreenstein@wsgr.com

Charles Carter Hall Email
Earthjustice
1625 Massachusetts Avenue, NW
Suite 702
Washington, DC 20036-2212
Email: chall@earthjustice.org

James Carl Holsclaw Email
The Holsclaw Group, LLC
303 E. Main Street
Plainfield, IN 46168
Email: jim@thglaw.com

William S. Huang Email
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
Email: william.huang@spiegelmcd.com

Jennifer L. Key Email
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Email: jkey@steptoe.com

Dennis Lane Email
Stinson LLP
1775 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
Email: dlane@stinson.com

Daniel M. Malabonga — Email
Midcontinent Independent System Operator, Inc.
720 City Center Drive
Carmel, IN 46032
Email: dmalabonga@misoenergy.org

John Nelson Moore — Email
Natural Resources Defense Council
20 N. Wacker Drive
Suite 1600
Chicago, IL 60606
Email: jmoore@nrdc.org

Alexa Mullarky — Email
Southern California Edison Company
2244 Walnut Grove Avenue
Rosemead, CA 91770
Email: alexa.j.mullarky@sce.com

Jennifer M. Murphy — Email
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, NW
Suite 200
Washington, DC 20005
Email: jmurphy@naruc.org

Thomas Christian Orvald — Email
NextEra Energy, Inc.
801 Pennsylvania Avenue, NW
Suite 220
Washington, DC 20004
Email: thomas.orvald@nee.com

Vickie Lynn Patton — Email
Environmental Defense Fund
2060 Broadway
Suite 300
Boulder, CO 80302
Email: vpatton@edf.org

James Bradford Ramsay — Email
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, NW
Suite 200
Washington, DC 20005
Email: jramsay@naruc.org

Randall S. Rich — Email
Pierce Atwood, LLP
1875 K Street, NW
Suite 700
Washington, DC 20006
Email: rrich@pierceatwood.com

Kim Noelle Smaczniak — Email
Earthjustice
1625 Massachusetts Avenue, NW
Suite 702
Washington, DC 20036-2212
Email: ksmaczniak@earthjustice.org

Robert Harris Solomon — Email
Federal Energy Regulatory Commission
(FERC) Office of the Solicitor
Room 9A-01
888 First Street, NE
Washington, DC 20426
Email: robert.solomon@ferc.gov

Anand Viswanathan — Email
Federal Energy Regulatory Commission
(FERC) Office of the Solicitor
888 First Street, NE
Washington, DC 20426
Email: Anand.Viswanathan@ferc.gov

Marie Denyse Zosa
Stinson LLP
1775 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
Email: denyse.zosa@stinson.com

Email

/s/ Cynthia S. Bogorad

Cynthia S. Bogorad
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006