ORAL ARGUMENT SCHEDULED FOR MAY 5, 2020

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 Petitions for Review of Orders of the
Federal Energy Regulatory Commission

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

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March 12, 2020

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GLOSSARY

Br.	Brief
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
Environmental Intervenors	Environmental Defense Fund, Natural Resources Defense Council, and Vote Solar
ISO	Independent System Operator
JA	Joint Appendix
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 or Rehearing Order	*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
Solar Amici	Sunrun Inc., Tesla, Inc., Vivint Solar Developer, LLC, and Engie Storage Services NA LLC
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

SUMMARY OF REPLY ARGUMENT

TAPS adopts and supports the jurisdictional arguments made in the Briefs of Petitioners. TAPS, however, files a separate Reply Brief to respond to the assertions of FERC, Intervenors for Respondent, and Amici regarding the argument in the Opening Briefs that the Storage Rule is arbitrary and capricious.

Contrary to the assertions of FERC and supporting Intervenors and Amici, FERC in the Storage Rule failed to adequately address the new, real-world burden the Storage Rule will impose on distribution utilities. The Storage Rule's generic statements about the *benefits* of wholesale market participation by electric storage resources in general do not constitute an adequate evaluation of the *burden* on distribution utilities from the Storage Rule's requirements related to a subset of those resources—i.e., those connected to distribution facilities or behind the retail meter ("distributed storage"). In addition, the efforts of FERC and its supporters to mask or minimize that basic deficiency by claiming that the Storage Rule's burdens are somehow the fault of retail regulators doing their jobs, or that wholesale market participation by distributed storage is already commonplace, should be rejected.

FERC also failed to explain its departure from Order No. 719-A, in which it granted state and local regulators the ability to opt-out of that rule's requirements related to wholesale market participation by demand response. FERC's proffered

justifications are inadequately explained, inconsistent with precedent, and unsupported by the record. And FERC never addressed why the opt-out it adopted for demand response (i.e., reduced consumption of electricity by retail customers) should not apply to distributed storage resources, given the *greater* burden imposed on distribution utilities by such resources injecting energy into distribution facilities to sell their output into wholesale markets.

Because of these failures, the Storage Rule is arbitrary and capricious and should be vacated by this Court.

ARGUMENT

I. FERC's Failure to Adequately Address the Burden the Storage Rule Will Place on Distribution Utilities Renders It Arbitrary and Capricious.

A. Neither FERC, Nor Any Party Supporting FERC, Has Identified Where the Challenged Orders Adequately Considered the Burden the Storage Rule Places on Distribution Utilities.

TAPS, Petitioners, and others submitted comments in the Storage Rule proceeding highlighting the real-world burdens that would be placed on distribution utilities if they were forced to allow distributed storage resources to participate in wholesale markets. TAPS Br. at 1-2 (quoting EEI Comments at 22, R.121, JA120; Xcel Comments at 8, R.172, JA175). TAPS highlighted the even greater and disproportionate burden the Storage Rule would place on small distribution utilities. *See, e.g.*, TAPS Comments at 2, R.163, JA139.

FERC, for its part, recognized that state and local regulators would have responsibilities for "the development and operation of electric storage resources," that included, "among other things, retail services and matters related to the distribution system, including design, operations, power quality, reliability, and system costs." Order No. 841-A, P 10, R.247, JA508. But contrary to the suggestions of FERC and supporting Intervenors and Amici, the Storage Rule failed to evaluate the burden it would impose on distribution utilities.

FERC attempts to defend its decision by citing to the paragraph of its Rehearing Order where it found that the burdens imposed on distribution utilities "could be outweighed by the overall benefits from increased competition due to greater participation of electric storage resources in RTO/ISO markets." FERC Br. at 69 (citing Order No. 841-A, P 45, R.247, JA540). But a finding that something "could" occur—which inherently means that it "could not" occur—is not much of a finding at all and cannot justify placing a significant burden on distribution utilities. *Interstate Nat. Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 53 (D.C. Cir. 2002) (finding FERC's decision arbitrary and capricious where "[t]he record simply lacks indicators of the Commission's seriously tackling" a policy decision).

FERC tries to gloss over the inadequacy of the Storage Rule's burden analysis by: (1) stating that it found "allowing *all* eligible electric storage to participate in wholesale markets promotes just and reasonable wholesale rates"

(FERC Br. at 64); and (2) asserting that "the converse is also true," so "allowing States to bar such participation would undercut FERC's statutory charge." *Id.* at 65. But the generic, conclusory statements from the Storage Rule that FERC cites to support that argument do not distinguish between the incremental benefits of wholesale market participation by distributed storage versus transmission-level storage (i.e., storage connected to the RTO grid). Order No. 841-A, PP 45, 56, R.247, JA539-540, JA548. They thus provide no insight into—let alone an evaluation of—the benefits of the Storage Rule's requirements related to distributed storage.

In any event, generic statements about the potential *benefits* of participation by storage resources in wholesale markets plainly do not constitute an adequate evaluation of the *burden* on distribution utilities resulting from the Storage Rule's application to distributed storage.

FERC's reliance on paragraph 56 of its Rehearing Order to argue that it adequately recognized the increased costs the Storage Rule would place on distribution utilities (FERC Br. at 69) is likewise misplaced. The Rehearing Order's conclusory statement that the "benefits of allowing electric storage resources broader access to the wholesale market" outweigh unexplained "policy considerations" does not evaluate or even mention the Storage Rule's burden on distribution utilities. Order No. 841-A, P 56, R.247, JA548. This does not meet

FERC's statutory obligation to take a "'hard look'" at an issue and "'genuinely engage[] in reasoned decisionmaking.'" *Consolidated Edison Co. v. FERC*, 823 F.2d 630, 637 (D.C. Cir. 1987) (quoting *Greater Bos. Tel. Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).

Despite the many comments that specifically raised the issue of the burden the Storage Rule places on distribution utilities,[1] FERC never adequately addressed it. FERC has not engaged in reasoned decision-making with respect to that issue, and its Storage Rule is therefore arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. The Court Should Reject Suggestions that There Was No Need for FERC to Consider the Specific Burdens the Storage Rule Imposes on Distribution Utilities.

Having failed to adequately address the burden the Storage Rule places on distribution utilities, FERC attempts to rationalize that omission by shifting blame for the Storage Rule's burden to the state and local regulators. FERC asserts for the first time on brief that the administrative burdens the Storage Rule places on distribution utilities to track prohibited resales of electricity purchased at retail, "would come from a state regulation—e.g., a prohibition on resales of energy purchased under a retail tariff—not from the Rule itself." FERC Br. at 69. But even

[1] *See* TAPS Br. at 1-2.

if the Court were inclined to consider this new argument,[2] it is not the "'satisfactory explanation'" that a reasoned decision-making process requires. *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43). A prohibition on the resale of energy purchased at retail is not a random regulatory choice; it is implicit in the definition of the retail sales left by Federal Power Act section 201 to state and local jurisdiction—if that energy is re-sold, then the original transaction is actually a sale for resale. And a decision by state and local regulators to track prohibited resales of energy purchased under retail tariffs—which will likely be necessary to prevent retail-wholesale price arbitrage and market manipulation, and to assure that owners of distributed storage do not violate the terms of retail service—is not something that would have been necessary absent the Storage Rule's preemption of their ability to bar distributed storage from making sales into wholesale markets.

FERC similarly misses the point when it asserts that the Storage Rule "does 'not impos[e] any new requirements on distribution utilities to enable the participation of electric storage resources in [wholesale] markets,'" and that "States

[2] "It is well established that 'courts may not accept appellate counsel's post hoc rationalizations for agency action.'" *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1316 (D.C. Cir. 1991) (quoting *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 50). *See also Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

retain full 'authority to regulate the distribution system,' including their "'design, operations, power quality, reliability, and system costs.'" FERC Br. at 68 (cleaned up). As the dissenting Commissioner correctly recognized, preserving state and local regulators' authority to safely and reliably manage their distribution systems in the face of the new challenges presented by distributed storage selling into wholesale markets does not eliminate the burden of the Storage Rule on distribution utilities. Order No. 841-A, Partial Concurrence and Partial Dissent of Commissioner McNamee ("McNamee Dissent") P 20, R.247, JA627 ("the majority misses the point, as those safety and reliability regulations can be challenging and expensive tasks.").

Moreover, contrary to FERC's assertion, state and local regulators do not "retain full 'authority …'" under the Storage Rule, because the Rule expressly preempts the simplest and least expensive way for state and local regulators to avoid the adverse distribution system impacts of wholesale market transactions by distributed storage. The remaining regulatory tools available to impose limits on such wholesale market participation will be costly and resource-intensive—requiring detailed analyses of individual storage resources and the development and implementation of new operational and reliability practices, new interconnection study methodologies, expanded modeling capability, and new tariffs. *See, e.g.*, TAPS Comments at 17-20, R.163, JA154-157; Xcel Rehearing at

23-24, R.221, JA464-465. They will also be much harder for RTOs to implement accurately. TAPS Rehearing at 10, R.219, JA451 ("Rather than leaving [relevant electric retail regulatory authorities] policies to be implemented through *ad hoc* decisions or inaction on a case-by-case basis for individual storage resources at each interconnection point, the Storage Rule should have provided a straightforward mechanism to enable RTOs to implement [relevant electric retail regulatory authorities] decisions about distribution-connected and behind-the-retail-meter storage resources in a systematic and orderly way.").

Finally, the Court should reject Environmental Intervenors' and Solar Amici's attempts to minimize FERC's failure to appropriately consider the burden the Storage Rule will impose on distribution utilities by suggesting that wholesale market participation by distributed storage is a trivial change from the *status quo*. *See, e.g.*, Solar Amici Br. at 7-8; Environmental Intervenors Br. at 2, 4. To the contrary, *Southern California Edison Co.*, 164 FERC ¶ 61,130, P 1 (2018)—which was decided while the Storage Rule was pending on rehearing before FERC—illustrates the new challenges imposed on distribution systems by the participation of distributed storage in wholesale markets. In that case, Southern California Edison Company filed proposed revisions to its wholesale distribution tariff[3] to

[3] Southern California Edison Company and other California public utilities filed wholesale distribution tariffs with FERC as a result of California's restructuring of the state's electric industry during the late 1990s. *Pac. Gas & Elec. Co.*, Op. No.

facilitate the interconnection of distributed storage to its distribution system. FERC rejected those revisions on the grounds that they called for the curtailment of distributed storage's charging demand prior to retail and other wholesale loads, without providing distributed storage an opportunity to pay for a study and necessary system upgrades. *S. Cal. Edison Co.*, 164 FERC ¶ 61,130, P 39 (2018). FERC, however, acknowledged the difficulty Southern California Edison Company faced because study methodologies to allow distributed storage to be treated similarly to retail and other wholesale loads had not yet been developed. *Id.* P 39 & n.63. This order shows FERC's recognition that even large distribution utilities with significant resources are still figuring out how to accommodate wholesale market participation by distributed storage while preserving safety and reliability for their retail and other wholesale customers.

Additionally, many of the storage resources to which Environmental Intervenors and Solar Amici point to suggest distributed storage is old hat are outside the scope of the Storage Rule. For instance, Solar Amici, apparently based on extra-record evidence,[4] tout the percentage of solar-panel/battery-storage

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458, 100 FERC ¶ 61,156, P 1 (2002), *clarified*, Op. No. 458-A, 101 FERC ¶ 61,151 (2002), *aff'd on voluntary remand*, 107 FERC ¶ 61,115 (2004), *vacated and remanded sub nom. S. Cal Edison Co. v. FERC*, 415 F.3d 17 (D.C. Cir. 2005), *on remand sub nom. Pac. Gas & Elec. Co.*, 113 FERC ¶ 61,296 (2005), *reh'g granted*, 115 FERC ¶ 61,226 (2006).

[4] Solar Amici provide no citation to the record.

combinations sold by Sunrun Inc. Solar Amici Br. at 8. But in dismissing concerns regarding certain distributed storage provisions included in an RTO's filing to comply with the Storage Rule, FERC expressly found that "Electric Storage Resources co-located with generation are beyond the scope of compliance with Order No. 841."[5] Solar Amici also concede (Solar Amici Br. at 7 n.10) that storage resources less than 100 kW are excluded from the Storage Rule's scope (Order No. 841, P 265, R.214, JA374; Order No. 841-A, P 94, R.247, JA571). And they point to nothing in the record to quantify the number of existing distributed storage resources that are large enough to fall within the scope of the Storage Rule, let alone identify the subset of such resources that are participating in wholesale markets other than as demand response (and therefore subject to the Order No. 719-A opt-out).

Thus, FERC and its supporters' attempts to mask or minimize FERC's failure to consider the burden the Storage Rule will place on distribution utilities are no substitute for the reasoned decision-making process in which FERC is required to engage. *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 516 (D.C. Cir. 1985).

[5] *Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,137, PP 54, 256 (2019) (cited in FERC's Brief at 11).

II. FERC's Arguments for Departing from Order No. 719-A's Opt-Out Are Insufficient to Justify Its Change in Policy.

In Order No. 719-A, FERC granted state and local regulators the ability to opt-out of its demand response rule and deny retail customers subject to their jurisdiction the opportunity to sell their non-consumption of electricity into organized wholesale markets.[6] In their comments in the Storage Rule proceeding, TAPS, Petitioners, and others argued that an opt-out is even *more* appropriate for distributed storage than in Order No. 719-A's demand response context, because distributed storage, unlike demand response, "inject[s] power into the distribution system" and pushes energy from local distribution facilities to the transmission grid for resale. TAPS Rehearing at 4, R.219, JA445. In the Storage Rule, nevertheless, FERC departed from its Order No. 719-A precedent and refused to grant state and local regulators an opt-out with regard to wholesale market participation by distributed storage.

[6] In the case of small distribution utilities, FERC granted an opt-in that required transmission organizations to reject demand response bids from retail customers within the footprints of small distribution utilities unless the utility's retail regulator expressly elected to opt-in to the transmission organization's demand response program. *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, PP 49, 60, FERC Stats. & Regs. ¶ 31,292, *on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

FERC defends this departure mainly on the grounds that electric storage transactions involve actual sales of electricity and therefore "hew closer to the Commission's core mandate of regulating wholesale sales." FERC Br. at 67. But FERC provides no explanation for why the distinction between its "wholesale sales" jurisdiction and "affecting" jurisdiction justifies the difference in treatment with respect to the appropriateness of granting an opt-out for state and local regulators. FERC points to nothing in the Federal Power Act or precedent indicating that its "affecting" jurisdiction is less robust than its jurisdiction over "wholesale sales."

Nor does FERC explain how an exercise of its "wholesale sales" jurisdiction justifies its departure from Order No. 719-A's opt-out with respect to distributed storage. In fact, even where asserting its "wholesale sales" jurisdiction with respect to resources connected to distribution facilities, FERC has found that it would "cross[] the jurisdictional line established by Congress in the [Federal Power Act]" for FERC to assert jurisdiction over "all interconnections that *could* be used for wholesale sales," or to "allow a potential wholesale seller to cause the involuntary conversion of a facility previously used exclusively for state-jurisdictional interconnections and delivery, and subject to the exclusive jurisdiction of the state, into a facility also subject to the Commission's interconnection jurisdiction."[7]

[7] *Standardization of Generator Interconnection Agreements and Procedures*, Order

Thus, the distinction between "wholesale sales" and "affecting" jurisdiction does not justify FERC's failure to provide an opt-out where a storage resource connected (or seeking connection) to local distribution facilities or behind the retail meter simply intends to make a wholesale sale.

FERC's other asserted basis for departing from Order No. 719-A is that unlike demand response, "States and distribution utilities lack a longstanding history of managing and regulating electric storage resource programs." FERC Br. at 67. FERC's assertion, however, is based solely upon its finding that only four states "'mentioned any specific state electric storage initiatives'" in the comments they submitted in the Storage Rule proceeding. *Id.* (quoting Order No. 841-A, P 52 n.145, R. 247, JA546). Of course, identifying which states and distribution utilities have electric storage initiatives based upon the states that happened to volunteer such information in a rulemaking is a highly unreliable survey methodology, particularly when only ten states[8] submitted any substantive comments. This

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No. 2003-C, 111 FERC ¶ 61,401, P 51, FERC Stats. & Regs. ¶ 31,190 (2005) (emphasis added), *aff'd sub nom. NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1468 (2008). FERC's assertion (FERC Br. at 44) that the Storage Rule reflects a "lighter touch" than Order No. 2003-C is flatly wrong. As discussed above, the jurisdiction FERC asserts under the Storage Rule is far broader—encompassing potential transactions over facilities previously used exclusively for state-jurisdictional service, based solely on the intent of the owner of a distributed storage resource to make a wholesale sale.

[8] Based on a review of the comments submitted in FERC Docket No. RM16-23-000, Arkansas, California, Connecticut, Delaware, Maryland, Massachusetts,

incomplete sample—which actually showed that nearly half the states submitting comments included information on their own energy storage initiatives—does not justify FERC's departure from Order No. 719-A. In addition, FERC did not acknowledge at least two other distribution utility storage initiatives that were described in comments. TAPS Comments at 4-5 nn.4-6, R.163, JA141-142. *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43 ("the agency must examine the relevant data and articulate a satisfactory explanation for its action…").

Not only are FERC's two attempted justifications for its departure from Order No. 719-A unsupported, but FERC never addresses why the opt-out it adopted for demand response in Order No. 719-A should not apply to distributed storage, given the *greater* burden wholesale market participation by distributed storage imposes on distribution systems since they inject energy onto distribution facilities. McNamee Dissent P 17 ("An [electric storage resource's] activity quite literally pushes or pulls energy across the distribution facilities and thereby has a very real physical impact on the distribution system. The physical nature of an [electric storage resource's] activities may impact the operations of distribution-level facilities as well as their safety and reliability in a manner that [demand response's] and [energy efficiency resources'] voluntary decision not to consume

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Missouri, New Jersey, New York, and Ohio were the only states with agencies or representatives that submitted comments.

electricity does not."); TAPS Comments at 10, R.163, JA147 ("Indeed, such a restriction is even more important for [distributed energy resources] because their operation can have significant impacts on distribution facilities that were not originally designed to handle bidirectional flows, and because the distribution utility's costs of the metering, settlements, and rate-unbundling required to accommodate [distributed energy resources] sales to RTOs are higher than the administrative costs associated with accommodating aggregators of demand response."). Even the lesser operational impacts imposed by the wholesale market participation of demand response resources have been recognized by the Commission as relevant to the appropriateness of applying the Order No. 719-A opt-out.[9]

In addition, providing an opt-out in the Storage Rule would interfere less with FERC's stated interest in promoting wholesale competition (Order No. 841-A, P 56, R.247, JA548) than the opt-out granted for demand response in Order No. 719-A. Even if a state or local regulator were to opt-out with respect to distributed storage, transmission-level storage resources connected to utilities in the regulator's footprint would still be able to participate in wholesale markets. On

[9] *Advanced Energy Econ.*, 161 FERC ¶ 61,245, P 63 (2017) (refusing to extend the Order No. 719-A opt-out to energy efficiency resources on the grounds that "[u]nlike demand response resources, [energy efficiency resources] are not likely to present the same operational and day-to-day planning complexity that might otherwise interfere with an [distribution utility's] day-to-day operations.").

the other hand, if a state or local regulator opts-out of demand response, there will be no wholesale market participation by *any* demand response from retail customers of utilities subject to that regulator's jurisdiction.

Finally, Environmental Intervenors assert that FERC's hands are tied with respect to an opt-out and that even if it wanted to provide one it could not. This is simply incorrect. Assuming for the sake of argument that FERC has authority to impose the Storage Rule's burdens on distribution utilities, then it has ample authority under the Federal Power Act to include an opt-out for distributed storage. To begin with, FERC did not rely on Environmental Intervenors argument in the Storage Rule nor has it done so in its brief before this Court. But even if it had, Supreme Court precedent makes clear that FERC can decline to assert jurisdiction under the circumstances here. *See New York v. FERC*, 535 U.S. 1, 28 (2002) (finding that that it was legally permissible for FERC to assert jurisdiction over unbundled retail transmission services but decline to do so for bundled retail transmission services "even if … the [Federal Power Act] gives FERC the authority to regulate the transmission component of a bundled retail sale … because of the complicated nature of the jurisdictional issues."). Moreover, the Supreme Court looked favorably on "FERC's notable solicitude toward the States," in deciding to provide an opt-out for demand response. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 779 (2016).

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 Storage Rule on the grounds that FERC has failed to: (1) adequately address, both in the Storage Rule and now on appeal, the real-world burden that the Storage Rule places on distribution utilities; and (2) provide a reasonable explanation for its departure from Order No. 719-A. These failures render FERC's Storage Rule arbitrary and capricious.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Cynthia S. Bogorad, in reliance on the word count of the word processing system used to prepare this reply 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. This Reply Brief contains 3,875 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.

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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 12th day of March, 2020, 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:

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