

**NATIONAL ASS’N OF REGULATORY UTILITY
COMM’RS V. FERC:
FERC HOLDS THE GATES OPEN: FIGHTING TO
GRANT ELECTRIC STORAGE RESOURCES ACCESS
TO WHOLESALE MARKETS**

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I. INTRODUCTION

In *National Association of Regulatory Commissioners v. FERC*,¹ the Federal Energy Regulatory Commission’s (FERC) recently adopted regime designed to foster more energy storage resources on the interstate electric grid survived

¹ National Ass’n of Regulatory Comm’rs (NARUC) v. FERC, 964 F.3d 1177 (D.C. Cir. 2020) [hereinafter *NARUC v. FERC* or *NARUC*].

judicial review at the United States Circuit Court for the District of Columbia. In this decision, the court rejected a facial challenge raised by a group of appellants that sought to secure the right of state-level regulators to deny certain connections to portions of the grid—portions typically controlled by states authorities rather than by FERC.

Where FERC had designed its policy such that “electric storage resources” (ESRs)² would be presumptively subject to the policies in Order No. 841³—regardless of whether they were connected directly to the interstate grid or connected behind-the-meter to retail distribution systems—states had sought an ability to opt-out (i.e., broadly exempt) and deny ESRs like batteries or other storage devices from using state-controlled distribution lines to access federal markets run by regional transmission operators (RTOs) and independent system operators (ISOs). The key holding of the court is that FERC’s ability to deny the requested opt-out was within its “affecting” jurisdiction under section 824e(a) of the Federal Power Act (FPA), and thus lawful, relying upon a three-part analysis used in the 2016 decision in *Federal Energy Regulatory Comm’n v. Electric Power Supply Ass’n*.⁴

Although the decision by the D.C. Circuit was not challenged further, the issue of tight federal-state jurisdictional boundaries discussed in the opinion makes clear that the courts could easily see additional challenges as states react to the policies established in FERC Order No. 841 and as other emerging technologies evolve and enter electricity markets. The decision also represents precedent in which the D.C. Circuit approved FERC’s use of its broad jurisdictional authority under the FPA to incorporate emerging technologies into the wholesale markets within its authority.

As such, this note provides a brief discussion of the rapidly evolving landscape of electricity regulation in the United States, including the growing interest in emerging technologies. It then discusses FERC’s statutory jurisdiction under the FPA and the current approach used by courts to address a challenge under FERC’s “affecting” jurisdiction. With that background in place, this note discusses the D.C. Circuit’s analysis in *NARUC v. FERC*. This note then concludes with a brief final thought on potential implications of the decision.

2. The definition of “electronic storage resource” was a central issue in FERC’s rulemaking and the subsequent administrative challenge. See discussion *infra* Part II.D.1. The D.C. Circuit in *NARUC* did not directly define how it used the term ESR but explained that ESRs had the “unique characteristic” of being able to “both inject energy into the grid and receive energy from it.” *Id.* at 1182 (internal citation omitted). This note will adopt the D.C. Circuit’s description, and ESR will herein refer to any resource such as a battery or other technology with the ability to both receive energy from the grid and to later inject it back onto the grid.

3. Order No. 841, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 FERC ¶ 61,127 (2018) [hereinafter Order No. 841]; Order No. 841-A, *Electric Storage Participation Models in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 167 FERC ¶ 61,154 at PP 31, 38 (2019) [hereinafter Order No. 841-A]

4. *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 136 S. Ct. 760, 193 L. Ed. 2d 661 (2016), as revised (Jan. 28, 2016) [hereinafter *FERC v. EPSA* or *EPSA*].

II. BACKGROUND

A. *The Changing Landscape of Electric Energy Markets*

1. Backdrop to Regulation of Energy Storage

In the United States, concerns about aging infrastructure, climate change, and over-reliance on fossil fuels are driving the electricity industry to adopt more decentralized approaches to energy delivery, and distributed energy resources such as ESRs are projected to play an increasingly vital role in the energy landscape as consumer demand continues to outgrow current capacity.⁵ FERC's role in that changing landscape has included increasing interest in electric storage.

Today's electric power grid is a complex web of diverse resources and producers utilizing an advanced, inter-connected power grid capable of transmitting energy at low cost across great distances.⁶ Thousands of generation facilities—both centralized and distributed—produce electricity from a wide array of resources including traditional fossil fuels, natural gas, and nuclear energy as well as renewable resources like wind, hydro, solar, and geothermal.⁷

With increased diversity and variability in electricity generation in the decades following deregulation in the electric energy industry,⁸ the need for efficient energy storage has increased as operators work to balance generation with consumption in real time.⁹ However, in order for widespread adoption to occur, new technologies must be integrated not only into existing infrastructure, but also into FERC's existing regulatory framework under the FPA.¹⁰

B. *FPA Structure and Boundaries: Jurisdictional Bifurcation*

In the FPA, Congress outlined two primary matters to which FERC's authority extends: first, over all facilities used for the “transmission of electric energy in interstate commerce,” and second, over the “sale of electric energy at wholesale in interstate commerce.”¹¹ The United States Supreme Court has interpreted the FPA to grant FERC unlimited jurisdiction over all interstate trans-

5. AMERICAN SOCIETY OF CIVIL ENGINEERS, 2017 INFRASTRUCTURE REPORT CARD, 1-2 (2017).

6. James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 692-94 (2019) (stating that domestically-generated electric energy “is transported over 642,000 miles of high-voltage transmission lines and 6.3 million miles of lower voltage distribution lines”).

7. *Id.* (stating that “[t]he U.S. electric grid provides electric energy from over 9,000 large electricity generation sources”).

8. *New York v. FERC*, 535 U.S. 1, 7 (2002).

9. *EPSA*, 577 U.S. at 268 (stating the long-standing limitation in electricity industry that “electricity cannot be stored effectively” for future use); Richard L. Revesz & Burcin Unel, *Managing the Future of the Electricity Grid: Energy Storage and Greenhouse Gas Emissions*, 42 HARV. ENVTL. L. REV. 139, 142 (2018) (stating that renewable power resources that are only capable of “intermittent and variable” power generation “based on daylight and weather patterns”).

10. Revesz & Unel, *supra* note 9, at 144 (explaining that ESRs can be installed on either wholesale or retail grids, presenting challenges to regulators at both federal and state levels).

11. 16 U.S.C. § 824(b)(1) (2015) (further stating that FERC's jurisdiction includes “all facilities for such transmission or sale”); *see also* § 824(d) (defining a “wholesale” transaction to be “a sale of electric energy to any person for resale”).

mission, but to limit FERC's jurisdiction over interstate sales to only wholesale transactions.¹²

More pertinent here, the FPA also provides FERC broad authority to ensure that any transmission or sale subject to its jurisdiction shall occur at "just and reasonable" rates and to ensure that any regulation or practice "affecting or pertaining to such rates" is not "unjust, unreasonable, unduly discriminatory or preferential."¹³ Toward that goal of "just and reasonable" rates and practices, FERC has the "power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate."¹⁴

Where FERC's exercise of federal jurisdiction conflicts with State law, the Supremacy Clause of the United States Constitution provides that the federal law is "the supreme Law of the Land," and preempts State law.¹⁵ The Supreme Court has held that FERC "may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority."¹⁶ Thus, where a FERC action conflicts with State regulatory law, any jurisdictional dispute involving a pre-emption question will be resolved in favor of FERC so long as Congress has granted FERC the power to take such an action.¹⁷

C. How the Supreme Court Resolved a Challenge to FERC's "Affecting" Jurisdiction: FERC v. EPSA

The United States Supreme Court recently addressed the limits to FERC's "affecting" jurisdiction in the context of wholesale demand response programs in *FERC v. EPSA*.¹⁸ The *EPSA* case arose when energy industry associations challenged a FERC rule that required wholesale market operators to compensate electricity users that provided "demand response" at a rate equal to that offered to power generators, so long as such a rate was a "net benefit" to consumers and demand response participation was permitted by State regulators.¹⁹

In answering the question of FERC's regulatory jurisdiction, the Court followed a three-part analysis and addressed (1) whether FERC's rule directly affected wholesale rates; (2) whether FERC had regulated retail sales; and (3)

12. *New York v. FERC*, 535 U.S. at 19-20. Although not an issue in the *NARUC* case as interpretation of FPA was not presented, it is interesting to note that the Court in *New York v. FERC* stated that, at least in the context of wholesale unbundling in the early 2000s, evolution of the electric industry favored textual analysis rather than resorting to legislative history. *Id.* at 23 ("Whatever persuasive effect legislative history may have in other contexts, here it is not particularly helpful because of the interim developments in the electric industry" and that "we are left with the statutory text as the clearest guidance") (in unanimously adopted section III).

13. 16 U.S.C. §§ 824d(a), 824e(a).

14. 16 U.S.C. § 825h (1935).

15. *Hughes v. Talen Energy Mktg., LLC.*, 136 S. Ct. 1288, 1297 (2016) (quoting U.S. CONST. art. VI, § 1, cl. 2).

16. *New York v. FERC*, 535 U.S. at 18.

17. *Id.*

18. 577 U.S. at 272-23, 275-76 (addressing a challenge to FERC Order No. 745). *See also id.* at 264-65 (explaining that "demand response" is a practice by which wholesale market operators pay electricity consumers *not* to consume power in order to free up supply at certain times when to do so is cheaper than paying generators for increased power production).

19. *Id.* at 273-74.

whether the challenged rule was consistent with the core purposes of the FPA.²⁰ On each issue, the Court found that FERC had not violated its jurisdiction under the FPA.²¹

Addressing these issues, the Court made several clarifying points that shaped its analysis. First, in order to avoid construing the FPA's "affecting or pertaining" language as a near-infinite grant of authority, the Court applied what it called a "common-sense construction" that limited FERC's "affecting" jurisdiction to only those "rules or practices that *directly* affect the [wholesale] rate."²² Second, the Court held that regardless of indirect effects on retail rates, the FPA "imposes no bar" where FERC acts to regulate "what takes place on the wholesale market[] as part of carrying out its charge to improve how that market runs."²³ Third, the Court held that FERC's rule was consistent with the core purpose of the FPA because it would not "read the FPA, against its clear terms, to halt a practice that so evidently enables [FERC] to fulfill its statutory duties."²⁴

D. Orders No. 841, 841-A, and FERC's Action to Encourage Inclusion of Electric Storage Resources in Wholesale Markets

In light of the advancing technology and increasing viability of Electric Storage Resources (ESRs), in 2016 FERC requested information from the Regional Transmission Organizations and Independent System Operators (RTO/ISOs) to determine whether barriers existed to ESR participation in wholesale markets, and whether such barriers "may potentially lead to unjust and unreasonable rates."²⁵ The following year, FERC issued a Notice of Proposed Rulemaking (NOPR) in which it observed that "market rules designed for traditional resources can create barriers to entry for emerging technologies."²⁶ Specifically, FERC sought to promulgate a rule ensuring that the grid relied upon by wholesale market operators adopted participation models that accommodate the unique ability of ESRs to both receive and inject energy on the grid.²⁷

20. *Id.* at 776-77. *Cf. id.* at 296-97 (Scalia, J., dissenting) (arguing that the majority had incorrectly interpreted the FPA's jurisdictional provisions and as a result had improperly framed the legal issue in the case, Scalia states, "[The majority's] formulation inverts the proper inquiry. The pertinent question under the Act is whether the rule regulates sales 'at wholesale.' If so, it falls within FERC's regulatory authority. If not, the rule is unauthorized whether or not it happens to regulate 'retail electricity sales'; for, . . . the FPA prohibits FERC from regulating 'any other sale of electric energy' that is not at wholesale." (quoting 16 U.S.C. § 824(b)(1)) (emphasis in original).

21. *EPSA*, 577 U.S. at 295-96.

22. *Id.* at 278 (alteration in original) (emphasis in original) (citation omitted).

23. *Id.* at 281-82. *See also id.* at 287-88 (highlighting what the Court described as a "finishing blow" to arguments of jurisdictional encroachment: FERC had permitted States to ban retail consumers from bidding into demand response programs, thereby allowing States to ultimately block any potential negative effect upon retail sales).

24. *Id.* at 291. The Court also sought to avoid a regulatory gap in which neither federal nor state officials had jurisdiction because such a conclusion would effectively extinguish the program. *Id.* at 289 (stating that "under the [FPA], no electricity transaction can proceed unless it is regulable by someone").

25. Order No. 841, *supra* note 3, at P 8.

26. *Id.* at P 10.

27. *Id.* at PP 7, 10.

1. Initial Rulemaking – FERC Defined “ESR” Broadly and Prevented States from Barring Retail-Connected ESRs from Accessing Wholesale Systems

In 2018, FERC issued Order No. 841 which stated the Commission’s purpose to “remove barriers to the participation” of ESRs in the energy markets operated by the RTOs and ISOs.²⁸ Citing its “affecting” jurisdiction under the FPA, the Commission took the action to “ensure that RTO/ISO markets produce just and reasonable rates.”²⁹ The order required RTO/ISO operators to adopt models that “recognize[] the physical and operational characteristics” of ESRs and “facilitate their participation in the RTO/ISO markets.”³⁰

To clarify which resources the RTO and ISO operators should accommodate in the revised participation models, the Commission defined an ESR as “a resource capable of receiving electric energy from the grid and storing it later for injection of electric energy back to the grid.”³¹ Additionally, the Commission stated that by “capable of . . . later injection of electric energy back to the grid,” it meant that a resource eligible under the new participation models must be “both physically designed and configured” to do so, as well as “contractually permitted to do so” under its arrangement with utility operators.³²

Furthermore, in disagreement with comments to its NOPR, the Commission expressed its intention that the adopted definition was not limited only to those ESRs already “interconnected to the transmission system” because such resources are already participating in RTO/ISO markets.³³ Rather, the Commission included all ESRs whether they are on “the transmission system, on a [local] distribution system, or behind the meter” in order to ensure that the new participation rules would not be limited to any particular ESR technology.³⁴ Importantly, ESRs located behind the meter on local distribution systems depend on state-controlled retail lines to reach the RTO/ISO wholesale markets.³⁵

In Order No. 841, the Commission also addressed comments that proposed states be allowed to decide whether ESRs located on retail systems are permitted to participate in wholesale markets.³⁶ The Commission rejected the proposal and stated that it “has exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets,” including the rules for participation of resources connected to state-controlled systems.³⁷

28. *Id.* at P 1.

29. *Id.* (citing 16 U.S.C. § 824e).

30. Order No. 841, *supra* note 3, at P 1.

31. *Id.* at P 29.

32. *Id.* at P 33. In other words, if a resource was not contractually permitted to inject electricity back into the grid, it would not meet the definition of ESR established by FERC.

33. *Id.* at P 31.

34. *Id.* at P 29.

35. *NARUC*, 964 F.3d at 1183.

36. Order No. 841, *supra* note 3, at P 35.

37. *Id.*

2. Rehearing Denied/Petition for Review – FERC Reaffirms that its Action and Broad Definition of “ESR” were Necessary to Fulfill its Statutory Purpose

After FERC issued Order No. 841, several petitioners sought rehearing and clarification on the Commission’s decision not to allow states to decide whether ESRs on retail grids are permitted to participate in RTO/ISO wholesale markets.³⁸ Specifically, some petitioners argued that the decision exceeded FERC’s jurisdiction because the FPA “expressly excludes from Commission jurisdiction retail electric service and facilities for the local distribution of electric energy.”³⁹ They also argued that FERC should have allowed states an “opt-out” as it had done for the demand response rule at issue in *FERC v. EPSA*.⁴⁰

The Commission denied rehearing on both arguments.⁴¹ It emphasized that the Commission was not exercising any jurisdiction over “terms of sale at retail,” but was instead “merely exercising its authority under the FPA” to regulate the wholesale market “by ensuring that technically capable resources are eligible and able to participate in those markets.”⁴² Invoking the Supreme Court decision in *EPSA*, the Commission also reaffirmed that “establishing the criteria for participation in the RTO/ISO markets,” including for ESRs located on retail distribution systems, was “essential to the Commission’s ability to fulfill its statutory responsibility to ensure that wholesale rates are just and reasonable.”⁴³

In response to FERC denying rehearing, two petitions for review were filed in the D.C. Circuit Court of Appeals and consolidated to one case.⁴⁴ Petitioners included a group of companies who owned or operated local utilities (Local Utility Petitioners) and the National Association of Regulatory Commissioners (NARUC). The petitioners brought the following arguments before the D.C. Circuit Court of Appeals: (1) “that FERC ha[d] exceeded its jurisdiction by barring states from ‘broadly prohibiting’ local ESRs from participating in RTO/ISO markets,” (2) that FERC’s refusal to allow states to “opt-out” restricted state authority and encroached upon state administrative processes, and (3) that even if FERC was within its jurisdiction under the FPA, the decision not to provide an opt-out was “arbitrary and capricious” under the Administrative Procedure Act.⁴⁵

In its reply brief, petitioner NARUC acknowledged that FERC’s direction to wholesale operators to “reduce barriers to participation” was a valid exercise of its authority.⁴⁶ However, it argued that a ban designed to restrict states’ range

38. Order No. 841-A, *supra* note 3, at P 12.

39. *Id.*

40. *Id.* (referring to FERC Order Nos. 719 and 745. *See supra* Part II.C.).

41. *Id.* at P 30.

42. *Id.* at P 38.

43. Order No. 841-A, *supra* note 3, at PP 31, 37-39.

44. *NARUC*, 964 F.3d at 1184.

45. *Id.* at 1184 (referring the “arbitrary and capricious” standard of 5 U.S.C. § 706(2)(A) (1966)).

46. Reply Brief of Petitioner at 2, *National Ass’n of Regulatory Util. Comm’rs v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020) (Nos. 19-1142 and 19-1147 (consolidated)).

of possible regulatory action amounted to “direct regulation of States and the distribution facilities” in contravention of the FPA’s plain terms.⁴⁷

III. ANALYSIS

The central issue⁴⁸ in *NARUC* was the policy decision FERC made to bar states and state agencies from adopting statewide opt-outs for ESRs located on retail grids that would in turn prevent those ESRs from accessing the interstate grid.⁴⁹

The D.C. Circuit held that FERC’s order on its face did not overstep its jurisdictional authority when it barred states from prohibiting ESRs from accessing federal wholesale markets.⁵⁰ However, the court was careful to note that this decision was not an “as-applied” determination of one state’s actions measured against FERC interpretation of its jurisdictional expanse.⁵¹ Nonetheless, interpreting FERC’s “affecting” jurisdiction under section 824e(a) of the FPA, the D.C. Circuit grounded its decision on FERC’s authority under the FPA to ensure that wholesale rates and the rules and practices affecting those rates are “just and reasonable,”⁵² and it applied the three-part federal-state jurisdictional review utilized in the 2016 Supreme Court decision in *FERC v. Electric Power Supply Ass’n, et al.*⁵³

Because Petitioners challenged the validity of FERC’s orders as an “off-sides” overstep into matters of state jurisdiction rather than a conflict with an actual state action, the court addressed the claims as a facial challenge, not as an “as-applied” challenge.⁵⁴ In framing the issues as a facial challenge, the court made clear that the petitioners’ burden was high: they would need to show that “no set of circumstances exist under which the regulations would be valid.”⁵⁵ However, it is also important to note that because there was no specific set of facts at issue upon which to determine an as-applied challenge, the court regarded any dismissal of the claims to be without prejudice with respect to potential future as-applied challenges.⁵⁶

A. The D.C. Circuit’s Analysis of FERC’s Jurisdictional Authority under the EPSA Analysis

Addressing the petitioners’ primary claim that FERC had exceeded its jurisdiction under the FPA by barring states from prohibiting ESRs from accessing

47. *Id.* at 15.

48. Before addressing the primary FPA issues, the court first determined justiciability issues, finding that both *NARUC* and the Local Utility Petitioners had standing to challenge FERC’s orders, and the issue was ripe for judicial review. *NARUC*, 964 F.3d at 1184-85.

49. *Id.* at 1181.

50. *Id.* at 1185-86, 1189.

51. *Id.* at 1185, 1189.

52. *Id.* at 1181 (quoting 16 U.S.C. § 824e(a)).

53. *EPSA*, 577 U.S. at 276-77.

54. *NARUC*, 964 F.3d at 1185, 1189.

55. *Id.* at 1185 (citation omitted).

56. *Id.* at 1185, 1189.

RTO/ISO markets,⁵⁷ the court followed the three-part analysis utilized by the U.S. Supreme Court in the *EPSA* case.⁵⁸ As discussed more fully below, the court first asked whether FERC's action "directly affect[ed] wholesale rates."⁵⁹ Second, the court asked "whether the Commission [had] regulated state-regulated facilities."⁶⁰ Third, the court examined whether its conclusions were consistent with the FPA's "core purposes of curbing prices and enhancing reliability in the wholesale electricity market."⁶¹

1. FERC's Prohibition of State-imposed Participation Bans "Directly Affected" Wholesale Rates

The court concluded that "FERC's prohibition of state-imposed participation bans directly affect[ed] wholesale rates."⁶² It stated that FERC's responsibility under the FPA to regulate the wholesale market "encompasses both wholesale rates and the panoply of rules and practices affecting them."⁶³ The court reasoned that "Order No. 841 solely target[ed] the manner in which an ESR may participate in wholesale markets" and that the action was "intentionally designed to increase wholesale competition, thereby reducing wholesale rates."⁶⁴

The court further reasoned that keeping the wholesale "gates" open to all ESRs regardless of where they connect to the electrical grid ensures that the benefits of technological advancement, increased competition, and the resulting reduction in wholesale rates would be realized in wholesale markets.⁶⁵ Therefore, the court stated that "if 'directly affecting' wholesale rates were a target, [Order No. 841] hit the bullseye."⁶⁶

2. FERC Had Not Regulated "Access" But "Markets."

Secondly, the court addressed the issue of whether FERC had "unlawfully regulate[d] matters left to the states."⁶⁷ The court's key determination was that FERC's orders did not regulate "access" to local markets—as petitioners had framed it—but rather regulated wholesale markets, which are well within FERC's authority. The petitioners argued that the FPA left regulation of access to federally controlled wholesale markets to the states and that FERC's action prohibiting the states from "blocking the gates" amounted to direct regulation of such access.⁶⁸

57. *Id.* at 1184.

58. *Id.* at 1185-86 (referring to *EPSA*, 577 U.S. 260 (2016)).

59. *NARUC*, 964 F.3d at 1186 (quoting *EPSA*, 577 U.S. at 276).

60. *Id.*

61. *Id.* at 1186 (internal quotation marks omitted).

62. *Id.*

63. *Id.* (internal quotation marks omitted).

64. *NARUC*, 964 F.3d at 1186.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1186-87.

The court dispelled this notion. First, it stated that although the new RTO/ISO participation models might “lure local ESRs to the federal marketplace,” an ESR’s use of local distribution systems to access that marketplace was a secondary and “permissible effect” of FERC’s direct regulation of federal wholesale rates.⁶⁹ The court thereby distinguished between an unlawful exercise of direct authority over the local distribution systems themselves and a lawful regulation of the federal wholesale market that had secondary effects upon the local systems.⁷⁰ The court determined that Order No. 841 fell into the latter category as a permissible exercise of FERC’s authority.⁷¹ Because Order No. 841 had not directly regulated the local distribution systems, and because “[s]tates remain[ed] equipped with every tool they possessed prior to Order No. 841” to regulate their systems, the court reasoned that FERC had not unlawfully regulated state-controlled facilities.⁷²

Continuing on that theme, the court addressed petitioners’ argument that Order No. 841 deprived them of at least one such tool, “the ability to close their facilities to local ESRs” that desired to transport energy to wholesale markets, an argument posited to show interference with their jurisdictional rights.⁷³ However, the court stated that because federal law gives FERC “exclusive authority to determine who may participate in the wholesale markets,” qualification for participation is a field preempted by federal law and the Supremacy Clause.⁷⁴ Accordingly, the court reasoned that states may lawfully set conditions on the terms by which ESRs provide retail service or access wholesale markets; however, states may not take actions “aim[ed] directly at destroying FERC’s jurisdiction” by inhibiting FERC’s ability to “regulate comprehensively and effectively” over its exclusive jurisdiction.⁷⁵ In other words, the court regarded a state action prohibiting ESRs from accessing wholesale markets as an action designed to destroy FERC’s jurisdiction over the resource.⁷⁶

Because FERC’s order did not directly regulate local distribution systems, and because FERC has exclusive and preemptive jurisdiction over the criteria for accessing wholesale markets, the court concluded that Order No. 841 did not “‘usurp state power’ nor [did] it impose a new ‘reasonably related’ test that re-

69. *NARUC*, 964 F.3d at 1187.

70. *Id.* at 1185-87.

71. *Id.*

72. *Id.*

73. *Id.*

74. *NARUC*, 964 F.3d at 1187. For a contrasting approach to this analysis, see *supra* note 19, discussing Justice Scalia’s criticism of the second and third legs of the analysis applied in *FERC v. EPSA*. Additionally, it is not explained why the D.C. Circuit went through the exercise of discussing pre-emption where there is no State statute, regulation, or order against which the court can measure the extent of the pre-emption. Consider this question: if FERC had decided differently, and in its own order granted states the ability to opt-out, could FERC’s own decision have been pre-empted under Supremacy Clause review on a facial challenge? The answer should seemingly be no, because it is the Commerce Clause rather than the Supremacy Clause that controls Congress’s authority over FERC. An alternative approach could be to decline pre-emption review at all until a party brings an action in which an actual state statute or rule is in question.

75. *NARUC*, 964 F.3d at 1187-88.

76. *Id.*

draws the jurisdictional divide between FERC and the States.”⁷⁷ Thus, the court answered the second question of the *EPSA* test by finding that FERC had not “unlawfully regulate[d] matters left to the states.”⁷⁸

3. The D.C. Circuit’s Conclusion Was Consistent with the FPA’s Core Purposes

Next, the court addressed the third and final *EPSA* question to determine whether its conclusions were consistent with the FPA’s “core purposes of curbing prices and enhancing reliability” in wholesale markets.⁷⁹ The court stated that because FERC had not “perpetuated federal policy goals to the detriment of the statutory authority granted to the states,” the court’s decision was “consistent with the FPA’s purpose of maintaining” the jurisdictional line between FERC and the states “while ensuring that FERC can carry out its duty of ensuring just and reasonable federal wholesale rates.”⁸⁰ The D.C. Circuit concluded that because the challenged FERC orders “do nothing more than regulate matters concerning federal transactions – and reiterate ordinary principles of federal preemption,” the Orders did not “facially exceed FERC’s jurisdiction” under the FPA.⁸¹

B. The D.C. Circuit Held that FERC Did Not Act Arbitrarily or Capriciously in Rejecting a State Opt-Out

Alternatively to the jurisdictional claims, the petitioners argued that “even if FERC has the authority to prevent states from broadly prohibiting local ESR participation” in wholesale markets, its decision to do so in Order No. 841 was “arbitrary and capricious” under the APA.⁸² Here, the petitioners relied heavily on *EPSA* and the state opt-out included by FERC in that case to argue that FERC had not adequately explained its decision not to include such an option in Order No. 841.⁸³

The court held that FERC’s decision to reject a state opt-out was “adequately explained” because it had weighed the costs of state administrative and operational burdens against the benefits of “enabling broad ESR participation” in wholesale markets.⁸⁴ The court noted that although petitioners might disagree with FERC’s calculation of costs and benefits, such determinations are “the kind of reasonable agency prediction” about the effect regulatory decisions may have to which courts “ordinarily defer.”⁸⁵ Because the D.C. Circuit Court found that

77. *Id.* at 1188 (internal citations omitted).

78. *Id.* at 1186, 1188.

79. *Id.* at 1186 (quoting *EPSA*, 557 U.S. at 276).

80. *NARUC*, 964 F.3d at 1189.

81. *Id.* (further acknowledging that while Petitioners’ facial challenge failed, “as-applied” challenges would likely follow “as States try to navigate this line”).

82. *Id.*

83. *Id.*

84. *Id.* at 1189-90; *see also* Order No. 841-A, *supra* note 3, at P 56 (stating FERC’s conclusion that “Order No. 841 found that the benefits of removing barriers to the participation of electric storage resources in RTO/ISO markets are significant and, in light of those benefits, we are not persuaded to adopt an opt-out that could limit that participation”).

85. *NARUC*, 964 F.3d at 1190.

FERC had “adequately explained” its decision to reject a state opt-out, it held that the agency had not acted “arbitrarily and capriciously” in violation of the APA.⁸⁶

In concluding its opinion, the D.C. Circuit determined that FERC had not “run afoul of the [FPA’s] jurisdictional bifurcation” or otherwise acted arbitrarily and capriciously.⁸⁷

IV. CONCLUSION

As this note demonstrates, the courts’ interpretation of the FPA’s jurisdictional provisions continues to play a key role in development of the United States electric grid. The D.C. Circuit’s opinion in *NARUC* reflects an additional instance in which courts have interpreted FERC’s “affecting” jurisdiction under section 824e(a) of the FPA utilizing the analysis in *EPSA*. As regulators in federal and state-level markets implement FERC’s rule and integrate ESRs and other emerging technology, *NARUC* reflects a significant court’s approval of FERC using its broad authority to physically expand the electric grid in atypical ways and to meet the challenges of a rapidly evolving wholesale electricity marketplace.

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86. *Id.* at 1189.

87. *Id.* at 1190.

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