ORAL ARGUMENT NOT YET SCHEDULED

Nos. 19-1142 & 19-1147 (consolidated)

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

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF MASSACHUSETTS, CALIFORNIA, DISTRICT OF COLUMBIA, MICHIGAN, AND RHODE ISLAND AS AMICI CURIAE IN SUPPORT OF RESPONDENT

XAVIER BECERRA
Attorney General for the State of California
ROBERT W. BYRNE
Senior Assistant Attorney General
Harrison Pollak
Acting Senior Assistant Attorney General
David A. Zonana
Supervising Deputy Attorney General
Dennis L. Beck Jr.
Theodore McCombs
M. Elaine Meckenstock
Deputy Attorneys General
CALIFORNIA DEPARTMENT OF JUSTICE
600 West Broadway, Suite 1800
(619) 738-9003
Theodore.McCombs@doj.ca.gov

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts
LIAM J. PASKVAN
MEGAN M. HERZOG
Special Assistant Attorneys General
Energy and Environment Bureau
OFFICE OF THE ATTORNEY GENERAL
FOR MASSACHUSETTS
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2954
liam.paskvan@mass.gov

(additional counsel listed on signature pages)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici

All parties, intervenors, and amici appearing in this proceeding are listed in the Petitioners' Opening Briefs in Case Nos. 19-1142 and 19-1147 ("Petitioners' Briefs"), except for amici curiae Massachusetts, California, Michigan, Rhode Island, and the District of Columbia, as well as Sunrun Inc., Tesla, Inc., Vivint Solar Developer, LLC, and ENGIE Storage Services NA LLC.

B. Rulings

References to the rulings at issue appear in the certificate to the Petitioners' Briefs.

C. Related Cases

Amici are aware of no related cases in this Court or any other court involving substantially the same parties or issues.

Dated: February 7, 2020

/s/ Liam J. Paskvan
LIAM J. PASKVAN

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GLOSSARY

Act	Federal Power Act, 16 U.S.C. §§ 824 *et seq*.
APPA	American Public Power Association
Commission or FERC	Federal Energy Regulatory Commission
ISO	Independent System Operator
NARUC	National Association of Regulatory Utility Commissioners
Order 841	*Electric Storage Participation in Markets Organized by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018)
Order 841-A	*Electric Storage Participation in Markets Organized by Regional Transmission Organizations and Independent System Operators*, Order No. 841-A, 167 FERC ¶ 61,154 (2019)
Orders	Order 841 and Order 841-A, collectively
RTO	Regional Transmission Operator

STATUTES AND REGULATIONS

Amici States incorporate by reference the pertinent statutes and regulations attached as addenda to Petitioners' Briefs.

IDENTITY AND INTERESTS OF AMICI CURIAE

Amici are Massachusetts, California, by and through the California Air Resources Board and Attorney General Xavier Becerra, Michigan, Rhode Island, and the District of Columbia (Amici States). Amici States have a substantial interest in protecting the health and welfare of their residents, preserving their natural environments, and strengthening their economies by making the electrical power system cleaner, more reliable, and more resilient. The ability of the federal government to help States promote such a power system is at the heart of this appeal.

Integrating electrical storage resources into the power system is critical to providing increased economic, health, and environmental benefits to the Amici States and their residents, and achieving important state energy policies, including efforts to combat climate change. Order 841 and Order 841-A (collectively, the Orders) further that integration by requiring market operators to allow storage resources to participate fully in the wholesale electricity market, an action that is within the Federal Energy Regulatory Commission's (Commission) authority under the Federal Power Act, 16 U.S.C. §§ 824 *et seq*. (Act).[1] Amici States thus

[1] *See Electric Storage Participation in Markets Organized by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018); *Electric Storage Participation in Markets Organized*

have a substantial interest in the Court's upholding the Orders. Since no party or intervenor fully represents those important interests, the Amici States respectfully present the following arguments for the Court's consideration.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should uphold the Orders' narrow requirement that regional transmission operators (RTOs) and independent system operators (ISOs) amend their rules to enable storage resources to participate and compete fully in the wholesale market, regardless of where such resources interconnect to the power system. Ordering RTOs and ISOs to develop such market rules is within the Commission's authority, exemplifies the established relationship between the Federal Government and the States under the Act, and will better allow the power system and its users to benefit from the unique capabilities of storage resources. The Orders are thus in harmony with the Act and not a departure from it.

Petitioners allege that the Orders exceed the Commission's statutory authority and inappropriately "commandeer the States' administrative processes." NARUC Br. 6; *see also* APPA Br. 15 (alleging the Commission's "usurpation" of state authority under the Act). That depiction of the federal-state jurisdictional

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by Regional Transmission Organizations and Independent System Operators, Order No. 841-A, 167 FERC ¶ 61,154 (2019).

balance is wrong and misleading. The Orders are consistent with the Act, as the wholesale market rule changes they require will help ensure just and reasonable rates and regulate the market practices that produce such rates. The Orders should thus be upheld. As set forth below, however, the Amici States disagree with the Orders' inaccurate statements regarding state jurisdiction. The Court need not, and should not, affirm such language, as it is unnecessary to the Orders' directive and would improperly limit state authority in a manner contrary to the Act.

ARGUMENT

I. Storage Resources Have Unique Attributes That Are Critical to the States and Their Electricity Users.

Storage resources make the power system more flexible and responsive to changes in power supply and demand. The storage resources at issue in the Orders, including batteries, can receive a charge from a power plant, a renewable generation resource, or the "vast pool of energy that is constantly moving in interstate commerce" through the electrical transmission network. *New York v. FERC*, 535 U.S. 1, 7 (2002). Then, when needed, storage resources can inject that energy back into the power system, for example, when energy is most valuable to consumers. Storage resources are also compact and scalable to meet large storage need. Those unique attributes make storage resources essential to States' efforts to meet energy policy objectives, while moderating costs for electricity users.

In response to the threat of climate change caused by greenhouse gas emissions, especially from combustion of fossil fuels, and to minimize climate-related damages,[2] many States have adopted policies to reduce greenhouse gas emissions.[3] Those emissions reductions combat climate change and provide economic, social, and health benefits to the States, including a safer and more reliable power system.[4] The States' policies depend largely on developing solar

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[2] *See* Intergovernmental Panel on Climate Change, *IPCC Summary for Policymakers of IPCC Special Report on Global Warming of 1.5 C°* (2018), https://tinyurl.com/y9jxdc39 (emphasizing immediate need to curb greenhouse gas emissions to avoid the most devastating effects of climate change); U.S. Global Change Research Program, *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States* 34, 78 (D. Reidmiller et al., eds., 2018), https://nca2018.globalchange.gov (concluding "[g]reenhouse gas emission from human activities are the only factors that can account for the observed warming over the last century" and "impacts of climate change are already being felt in the United States and are projected to intensify in the future").

[3] *See, e.g.*, Cal. Health & Safety Code § 38566 (mandating that California reduce greenhouse gas emissions economywide to 40% below 1990 levels by 2030); Mass. Gen. Laws c. 21N, § 4(a) (imposing a legally binding requirement on Massachusetts to reduce its greenhouse gas emissions by between 10% and 25% below 1990 levels by 2020 and 80% by 2050); Exec. Order No. 166 (N.Y. 2017) (committing New York to reduce its greenhouse gas emissions by 40% by 2030 and 80% below 1990 levels by 2050); Press Release, D.C. Dep't Energy & Env't, Mayor Bowser Commits to Make Washington, DC Carbon-Neutral and Climate Resilient by 2050 (Dec. 4, 2018), https://doee.dc.gov/release/mayor-bowser-commits-make-washington-dc-carbon-neutraland-climate-resilient-2050.

[4] *See e.g.*, Jennifer A. Burney, *The Downstream Air Pollution Impacts of the Transition From Coal to Natural Gas in the United States*, Nature Sustainability (2020), https://tinyurl.com/tdecfah (concluding that decommissioning of coal-fired generators is associated with reduced pollution concentrations, reductions in mortality, and increases in crop yield).

and wind generation to replace generators that use coal, oil, diesel, or other highly-polluting fossil fuels to produce electricity.[5]

To implement such policies and ensure that electricity is available to meet customer needs, even when the sun is not shining or the wind is not blowing, States require a flexible and responsive power system. Storage resources have this capability and allow for use of stored energy from renewable generation when the power system needs it most, rather than just immediately upon production. By storing excess generated electricity for later use and injecting that supply when the power system needs it, storage resources allow for increased reliance on clean, renewable energy generation.[6]

Storage resources can also be customized to fit in many locations, small or large, such as the basement of a commercial building, or "scaled up" to complement industrial-scale facilities, including large power plants. This capability allows for interconnection of storage to the power system where it is

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[5] *See, e.g.*, Renewable Energy Portfolio Standard Act of 2004, 52 D.C. Reg. 2285 (Mar. 11, 2005) (recognizing "economic, environmental, fuel diversity, and security benefits of renewable energy resources, to establish a market for electricity from these resources in the District of Columbia, and to lower . . . cost to consumers of electricity produced from these resources").

[6] Cal. Energy Comm'n, *Final 2019 Integrated Energy Policy Report* 15-18 (2020), https://efiling.energy.ca.gov/getdocument.aspx?tn=231883 (describing "increasing need for energy storage" to support renewable electricity integration and meet "steep afternoon ramps," when electricity demand increases just as solar generation decreases).

most needed, even in densely populated areas. Unlike peaking generation plants, storage resources do not emit dangerous air pollutants or require delivery of combustible fuels. Moreover, States and localities typically can permit installation of storage resources more quickly than other power system infrastructure, enabling more rapid deployment and delivery of benefits to States and their residents.

Storage resources' capabilities make them an essential complement to States' efforts to promote and sustain a clean energy power system that relies on intermittent solar and wind. Forward-looking policies that facilitate storage resource development are critical. Those policies include measures to ensure that storage resources have the opportunity to participate on fair terms in the federally-regulated transmission network and wholesale markets.

II. Storage Resources Provide Substantial Benefits to States and Their Electricity Users.

Storage resources provide important economic, health, and environmental benefits to the States, their residents, and businesses. A study by the Commonwealth of Massachusetts estimated that by deploying an optimal amount of storage resources by 2020, Massachusetts would receive up to $3.4 billion in benefits over ten years. Mass. Dep't of Energy Resources et al., *State of Charge: Massachusetts Energy Storage Initiative* 86 (2016). Of this amount, reduced system costs would account for approximately $2.3 billion, making the Commonwealth's power system more cost effective through electricity price

reduction, reduced demand, and deferred transmission infrastructure investment costs. *Id*.

Much of those savings result from storage resources' reducing the power system's need for peaking generation units. *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 769 (2016) (explaining that "extremely inefficient" generators, "whose high costs of production cause them to sit idle most of the time" are needed during peak periods of demand); *TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 114 (D.C. Cir. 2013) (defining a "'peaker' power plant" as "a plant that operates only in times of high demand"). Though the RTO or ISO running the power system dispatches peaker units only occasionally—during periods of highest need—electricity customers within the regional market pay generators continually and substantially to maintain peaker availability. Storage resources, however, can provide the same service to the power system, enabling dispatch of stored power "instantly to generate electricity on the grid during a peak period where additional supply is needed . . . replacing the need for natural gas or oil fired peaking generation." Mass. Dep't of Energy Resources et al., *supra*, at 9. In Massachusetts, that alone will result in savings of approximately $1.09 billion over the period from 2020 through 2030, by deferring the cost of new peaking facility construction and avoiding payments to such facilities in the wholesale market. *Id*. at 86. This benefit is not solely economic. Dispatching storage resources instead

of peaking capacity will reduce use of fossil-fuel fired generation, improve air quality, and assist States in reducing emissions of greenhouse gases and other harmful pollutants. *See id*.

Storage resources' ability to rapidly absorb and discharge electricity also allows them to provide "ancillary services" that increase grid reliability, by relieving grid congestion or balancing electricity supply and demand on transmission lines. In a recent demonstration project, for example, the Los Angeles Air Force Base successfully pooled its electric vehicle fleet's batteries—a "behind-the-meter" storage resource—to sell ancillary services in the California ISO's wholesale market.[7] Another project showed storage resources could save ratepayers $17.5 million annually by relieving grid congestion.[8]

In addition to such system- and society-wide benefits, storage resources can provide direct value to customers. For example, where a customer's electricity bill reflects peak usage, a storage resource located behind the customer's meter can reduce peak demand by injecting energy when the customer needs it most, resulting in less electricity drawn from the power system and a lower calculated

[7] Cal. Energy Comm'n, *Final Project Report: Los Angeles Air Force Base Vehicle-to-Grid Demonstration* 1-4 (2018), https://ww2.energy.ca.gov/2018publications/CEC-500-2018-025/CEC-500-2018-025.pdf.

[8] Cal. Energy Comm'n, *Tracking Progress – Energy Storage* 14 (2018), https://www.energy.ca.gov/sites/default/files/2019-12/energy_storage_ada.pdf.

demand charge. Mass. Dep't of Energy Resources et al., *supra*, at 52-56. Where a customer pairs a storage resource with on-site solar, the customer can discharge the storage resource during periods of high demand and when solar production is low (*i.e.*, in the evening). If subject to time-of-use rates that vary throughout the day, the customer can save money by discharging the storage resource to avoid drawing power from the electrical power system during hours of high cost. *Id.* at 124-25.[9]

Deployment of storage resources within a State also benefits the regional wholesale market. For example, the Massachusetts study determined that because storage resources can lower electricity prices in the wholesale market, their deployment could provide $250 million in savings to New England ratepayers outside of Massachusetts over a ten-year period. *Id*. at xi, 86, 103. Deployment of storage resources as modeled by Massachusetts would also result in greenhouse gas emissions reductions equivalent to removing 223,000 cars from the road. *Id*. at xi.

Other States have reached similar conclusions. The California Public Utilities Commission found that storage resources may reduce electricity rates by

[9] Since time-of-use rates are not broadly available to residential customers in Massachusetts at this time, this benefit would currently accrue to customers of the commercial and industrial rate classes. It follows, however, that where other States offer such rates to all customer classes, residential customers would be able to reduce costs through such usage patterns.

shifting demand to times when the price of electricity is lower, as well as create new jobs in manufacturing and installation, benefiting California's economy and providing a new source of tax revenue.[10] The New York Public Service Commission concluded that participation by storage resources in New York's retail and wholesale electricity markets will create 30,000 jobs, increase grid efficiency and resilience, reduce system peak load, and displace fossil-fuel generation.[11]

Recognizing the substantial benefits of storage resources and their importance to the proper functioning of the modern power system, many States have adopted targets for development of storage resources, and require utilities to procure electricity from storage resources.[12]

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[10] Cal. Energy Comm'n, *Tracking Progress – Energy Storage*, *supra* at 1-2 (2018); Cal. Pub. Util. Comm'n, Policy & Planning Div., *Electric Energy Storage: An Assessment of Potential Barriers and Opportunities* 6 (2010), https://tinyurl.com/yxy439p3.

[11] N.Y. Pub. Serv. Comm'n, *In the Matter of Energy Storage Deployment* Program, Case 18-E-0130, Order Establishing Energy Storage Goal and Deployment Policy, Order Establishing Energy Storage Goal and Deployment 3 (Dec. 13, 2018).

[12] *See, e.g.*, An Act To Promote Energy Diversity, 2016 Mass. Acts 188 (authorizing Massachusetts' Department of Energy Resources' adoption of a 200-Megawatt-hour energy storage target for electric distribution companies); Cal. Assembly Bill 2514, §§1(c), (d), (e) (2010) (authorizing establishment of viable and cost-effective energy storage systems); Cal. Pub. Util. Comm'n, *Order Instituting Rulemaking Pursuant to Assembly Bill 2514 to Consider the Adoption of Procurement Targets for Viable and Cost-Effective Energy Storage Systems*, R.10-12-007 (Oct. 17, 2013) (requiring California electric utilities to procure 1.325 gigawatts of energy storage capacity resources by 2020); N.Y. Pub. Serv. Comm'n, Case 18-E-0130, In the Matter of Energy Storage Deployment Program, Order

III. The Orders Will Encourage Investment in Storage Resources, Benefiting States and Their Electricity Users.

The Orders remove barriers to storage resources' participation in the wholesale market, and thereby better ensure competition. Order 841 at P 4. The resulting healthy and well-defined markets will increase the benefits of storage resources to States, as fair market rules will encourage investment in storage resource technology and development. Those benefits refute the Petitioners' unsupported attempts to portray the Orders as burdensome to ratepayers. *See* NARUC Br. 4-5.

Expanded market participation will allow for access to additional revenue for storage resources, reduce investment risk, and encourage development.[13] A

Establishing Energy Storage Goal and Deployment Policy (Dec. 13, 2018) (establishing a "comprehensive strategy to encourage the deployment of 1,500 megawatts . . . of energy storage by 2025, and a 2030 energy storage deployment target of up to 3,000MW"); N.J. Assembly Bill 3723, § 1(d) (requiring the New Jersey Board of Public Service to initiate a proceeding and establish a process and mechanism for achieving the goal of 600 megawatts of energy storage by 2021 and 2000 megawatts of energy storage by 2030).

[13] *See* Mass. Dep't of Energy Resources et al., *supra*, at 68 ("An overarching challenge identified by all stakeholders is . . . reliability and certainty of access to, and the magnitude of . . . long and short term revenue streams. The constantly changing regulatory and policy landscape brings the bankability of value streams into question for financiers. Regulatory certainty would provide a long-term policy signal and lead to reduced risk and easier financing."); Md. Dep't of Natural Resources, *Energy Storage In Maryland: Policy and Regulatory Options for Promoting Energy Storage and Its Benefits* (2018), https://dnr.maryland.gov/pprp/Documents/Energy-Storage-In-Maryland.pdf

example, Massachusetts found that deployment of an optimal amount of storage resources to meet retail customer demand could result in total revenue for energy storage projects of approximately $1.1 billion for the ten-year period beginning in 2020. Mass. Dep't of Energy Resources et al., *supra*, at 79. Massachusetts also determined that to attain such revenues, storage resources must be able to participate in the wholesale market. *Id*. at 87-88. The Orders require all RTOs and ISOs to take that step.

The Orders provide a requirement for market design that will bolster investor confidence and encourage development of storage resources. New construction will increase the extent to which storage resources can help States achieve their clean energy and greenhouse gas emissions reduction objectives, and provide more reliable energy to electricity users.

IV. The Orders Can and Should Be Construed to Reflect the Act's Established Dual Regulatory System Dividing Jurisdiction Between the Commission and the States.

Petitioners argue that the Orders encroach on States' traditional jurisdiction to regulate their local power sectors because they do not include an "opt-out" provision. Petitioners misconstrue the States' and the Commission's respective and shared regulatory authority under the Act. The Act itself recognizes state

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(enabling storage to participate more fully in wholesale markets "could increase storage revenue opportunities").

authority. Furthermore, the Commission's decision regarding the opt-out does not alter the States' reserved authority. Read properly, the Orders only require that RTOs and ISOs adjust their market rules to facilitate equal participation by storage resources in wholesale markets. That directive is within the Commission's authority to regulate the rules and practices of the wholesale markets.

To the extent the Orders contain statements purporting to define the limits of state authority to regulate storage resources, the Commission's narrow directive does not rely on such dicta. That language has no lawful effect and is inconsequential to the Court's review of the Commission's valid action requiring rule changes to facilitate participation of storage resources in the wholesale markets.

A. The Commission Acted Within Its Authority Under the Act When It Directed RTOs and ISOs to Revise Their Market Rules to Facilitate Market Participation of Storage Resources.

The Act grants the Commission jurisdiction over interstate electricity transmission and wholesale sales and preserves state authority over the rest of the power sector, including generation, intrastate transmission and distribution, and retail electricity sales. 16 U.S.C. § 824(b); *Elec. Power Supply Ass'n*, 136 S. Ct. at 767. Within the storage context, States retain their police powers to regulate local storage resources, while the Commission has authority to direct RTOs and ISOs to

accept those resources into the wholesale markets, and to establish eligibility requirements and rules governing wholesale market participation.

The Act "delegates responsibility to [the Commission] to regulate the interstate wholesale market for electricity—both wholesale rates and the panoply of rules and practices affecting them." *Elec. Power Supply Ass'n*, 136 S. Ct. at 773. In the Orders, the Commission does precisely what the Act enables it to do, requiring RTOs and ISOs to revise their tariffs so that storage resources can participate in the wholesale markets and compete on an equal footing with traditional wholesale electricity buyers and sellers. *See, e.g.*, Order 841-A at P 39. Amici States agree that the "authority to determine which resources are eligible to participate in the [RTO or ISO] markets," and to establish the rules that determine compensation in those markets, are "fundamental component[s] of the regulation of the [RTO or ISO] markets." *Id.* at P 38; *see also* FERC Br. 30; NARUC Br. 23 (agreeing that Commission has jurisdiction to determine "how" storage resources can participate in wholesale markets, if they do); APPA Br. 15-16 (same).[14] And that is all the Orders do.

[14] That all parties agree the Commission has jurisdiction over wholesale market practices—and thus, of necessity, authority to direct RTOs and ISOs to revise their market rules—is sufficient for the Court to uphold the Orders. Therefore, the Court's analysis need not reach the Commission's other jurisdictional arguments. *See* FERC Br. 48.

The Orders are thus consistent with long-standing judicial interpretation of the Act. For example, in *FERC v. Electric Power Supply Association*, the Supreme Court held that an ISO's formula for compensating certain electric service providers "directly affected" wholesale rates and was thus within the ambit of the Commission's authority. 136 S. Ct. at 774. Here, too, the Commission's determination that storage resources may participate in the wholesale market on equal terms is well within its authority. Storage resources' eligibility to participate in the wholesale markets and the terms under which they do so are "practices" that "directly affect the wholesale rate" under the Act, and fall within the Commission's statutory authority. *Id.*; *see also* 16 U.S.C. § 824e.

B. The Orders Maintain the Act's Well-Established Dual Regulatory System Between the States and the Federal Government.

The Orders are "limited to [RTO and ISO] market rules" and maintain the "ongoing, vital role" of the States in regulating storage resources. Order 841-A at PP 13, 361; *see also* FERC Br. 34 ("The Rule is directed at, and imposes obligations only on, FERC-jurisdictional wholesale market operators."). "[N]othing in Order 841 preempts states' right to regulate the safety and reliability of the distribution system" or to prescribe "interconnection and operating requirements." Order 841-A at P 46.[15]

[15] Likewise, because the Orders only direct the RTOs and ISOs to revise their market rules, the Orders do not "commandeer" state officials by "likely . . .

The Orders also contemplate no change in the decision-making authority of other state agencies that oversee important aspects of energy storage resource development, including siting, safety, environmental permitting and land use, and review of the effects of storage resources on utility operations and planning.[16] FERC Br. 15-17. There are many examples of this complementary relationship involving a host of state actors. Both New York and California, for example, have recently amended their state fire codes to include additional requirements for buildings co-located with storage resources.[17] In short, anything other than wholesale market rules falls "outside the scope" of the Orders. Order 841-A at P 46. That determination comports with the Act's reservation of traditional state jurisdiction over activities occurring outside of the wholesale markets, including

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mandat[ing] changes to some State regulations." NARUC Br. 30. That some States may respond to the Orders by revising their regulations is not a sign of commandeering, but of the ordinary interplay between complementary federal and state regulation. *See Illinois Commerce Comm'n v. FERC*, 721 F.3d 764, 773 (7th Cir. 2013) (holding that ISO tariff allocating costs of new transmission projects among utilities did not commandeer States, but only incentivized utilities to seek state siting approvals).

[16] *MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016) (noting the Commission's intent to "avoid intrusion on the traditional roles of the States in regulating the siting and construction of transmission facilities" under the Act); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 57-58 (D.C. Cir. 2014).

[17] *See, e.g.*, Cal. Code Regs. tit. 24, § 608 (adopting supplement to state fire code regarding stationary storage lithium ion battery systems); N.Y. Comp. Codes R. and Regs. tit. 19, §§ 1220.1(b), 1221.1(b), 1225.1(b), 1227.1(b).

retail sales, local distribution and transmission, and generation facilities. *See* 16 U.S.C. §§ 824(a), (b)(1).[18]

Consistent with Justice Sotomayor's concurring opinion in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), the interplay between state and federal regulators over storage resources is not an anomalous or "impermissible tension," but part of an established "complementary administrative framework" under the Act. *Id.* at 1300. Rather than causing an unworkable collision of federal and state actors or commandeering of regulatory authority, as Petitioners suggest, the Orders rely on the same "dual regulatory system between the states and federal government" seen in other contexts not directly related to storage resources. *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018). This established federal-state interplay under the Act is "marked by interdependence," wherein the Commission responds to state regulation and the States respond to federal action within their respective domains, each influencing

[18] The Commission's determination is consistent with its limited approach in other contexts of complementary federal-state jurisdiction. *See, e.g.*, *Advanced Energy Economy*, 161 FERC ¶ 61,245 at P 63 (2017) (holding that the Commission's jurisdiction over participation of energy efficiency resources in the wholesale market did not lessen state regulators' "strong interest in maintaining and promoting retail energy efficiency programs," and that "wholesale [energy efficiency resources'] participation should not affect [State] ability to oversee how utilities operate those programs or how the costs of such programs are allocated to retail customers").

the other without intruding on the other's jurisdiction. *Hughes*, 136 S. Ct. at 1301 (Sotomayor, J. concurring). Properly read and implemented, the Orders are consistent with this established Commission practice.

This Court recognizes the complementary federal-state relationship under the Act within the regional transmission planning context. Within the federal jurisdiction domain, RTOs and ISOs determine regional needs for new transmission infrastructure and allocate costs of new facilities among the members of the RTOs or ISOs, according to Commission-prescribed rules. *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d at 52, 57-58. Those regional plans often respond to state public policy requirements impacting transmission load (*e.g.*, state laws requiring deployment of rooftop solar). Once those regional entities determine the transmission need, however, projects meeting that need must obtain state-level approvals, including from state siting boards.[19]

[19] *See, e.g.*, *MISO Transmission Owners v. FERC*, 819 F.3d at 336 (noting the Commission's intent to "avoid intrusion on the traditional roles of the States in regulating the siting and construction of transmission facilities" under the Act); *South Carolina*, 762 F.3d at 57-58 (distinguishing between Commission authority over the transmission planning "process" and "substantive outcomes" concerning "what needs to be built, where it needs to be built, and who needs to build it," made by "decision-makers in each planning region"); *Petition of NSTAR Electric Company d/b/a Eversource Energy for Approval to Construct Overhead/Underground 115 kV Transmission Line in Boston, Dedham, and Needham, Massachusetts Pursuant to G.L. c. 164, § 69J*, Mass. Energy Facilities Siting Bd. EFSB-16-02 (May 18, 2018) (approving petition of incumbent public

Thus, in 2010, the Commission approved the Midwestern ISO's tariff amendment creating a new category of transmission projects and allocating costs of those projects among that ISO's members. *Midwest Independent System Operator Inc.*, 133 FERC ¶ 61,221 (2010). In turn, merchant transmission service providers constructing transmission lines pursuant to the tariff applied for and received necessary permitting from the Missouri Public Service Commission.[20]

Throughout the regional transmission planning process, the Commission's regulatory actions respond to and significantly impact how state agencies behave, but are confined to the narrow jurisdiction the Act grants the Commission. Likewise, the Orders are consistent with the Act's dual regulatory structure—despite the actions state-level entities may take in response—because they only require adoption of revised wholesale market rules. The Orders thus allow for federal and state actors to govern storage resources in the complementary manner envisaged by the Act.

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utility to construct an additional 115-kilovolt transmission line to meet ISO needs assessment).

[20] *See, e.g.*, Mo. Pub. Serv. Comm'n, *In the Matter of the Application of Ameren Transmission Company of Illinois for Other Relief or, in the Alternative, a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage a 345,000-volt Electric Transmission Line from Palmyra, Missouri, to the Iowa Border and Associated Substation Near Kirksville, Missouri*, File No. EA-2015-0146, Report & Order (Apr. 27, 2016).

C. The Orders Do Not Invade State Jurisdiction to Regulate Storage Resources, Despite the Lack of an Explicit "Opt-Out."

Petitioners do not contest the Commission's authority to direct RTOs and ISOs to revise their market rules, which is all the Orders do. Rather, Petitioners challenge the Orders for what they do *not* do: explicitly carve out an exception for storage resources in States that adopt laws or regulations to prevent such resources from participating. Although the Commission included an opt-out in a prior order regarding demand response resources,[21] the absence of such a provision in the Orders does not intrude upon state authority. Since the Commission lacks regulatory authority over intrastate activities in the power sector, state authority over those activities exists, whether or not the Commission adopts a regulation acknowledging it.

The traditional state jurisdiction described above (*supra* Parts IV.A & B) predates the Act, and existed before—and independent of—any regulation the Commission adopts. The Supreme Court's historical review of federal electricity regulation in *New York v. FERC*, 535 U.S. 1 (2002), makes that clear. Before the Act's passage in 1935, States possessed "broad authority" to regulate the public

[21] The demand response resource program "opt-out" appears as the final clause of the provision obligating RTOs and ISOs to accept compliant bids from demand response resources on a basis comparable to other resources, "unless not permitted by the laws or regulations of the relevant electric retail regulatory authority." 18 C.F.R. § 35.28(g)(1)(i).

utilities operating power plants, transmission, and distribution, subject only to the constitutional limits on state regulation of interstate commerce. *Id.* at 5. The Act preserved this state authority while granting federal regulators jurisdiction over interstate wholesale sales and transmission. *Id.* at 20-21. The Commission can neither enlarge nor diminish state jurisdiction in a regulation. "An agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Id.* at 18 (quoting *Louisiana Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986)).

Moreover, as the Commission recognizes, States may exercise their authority even where the resulting regulation might impede storage resources' wholesale market access. When States regulate within their domain, they do not intrude impermissibly on the Commission's authority "even when their laws incidentally affect areas within FERC's domain." *Hughes*, 136 S. Ct. at 1290. Thus, for example, state laws with secondary effects on wholesale markets are not preempted.[22] Accordingly, the Orders recognize that state laws incidentally

[22] *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) ("[B]ecause states retain authority over power generation, a state policy that affects [wholesale] price[s] only by increasing the quantity of power available for sale is not preempted by federal law."); *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 101 (2d Cir. 2017) (holding an "incidental effect on wholesale prices" does not amount to regulation of the wholesale markets).

impacting storage resources' access to the wholesale markets remain valid. Order 841-A at P 13 ("[N]othing in Order No. 841 overrides state laws or tariff requirements that might prohibit or limit an electric storage resource interconnected with the distribution system or behind a retail meter from directly accessing the wholesale market.").

Nor would those state laws implicate the exceptional scenario in *Hughes*, where the State "interfere[d] with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable." *Hughes*, 136 S. Ct. at 1299. A state law limiting resources' access to wholesale markets would not disregard the rate or attempt to replace it, as the law invalidated in *Hughes* did. At most, such a law could alter the balance of electricity supply and demand—an incidental impact that federal courts deem permissible. *Star*, 904 F.3d at 524; *Allco Fin.*, 861 F.3d at 101.

Thus, the local, intrastate activities of storage resources fall under the States' traditional police powers, as preserved by the Act. The Commission's decision not to acknowledge that state authority through an explicit opt-out clause does not encroach on state authority.[23] *See* FERC Br. 18 ("The Rule on review does not take away any power that States had before the Rule.").

[23] If the Court accepts Petitioners' position that an opt-out is necessary to preserve state jurisdiction, it should remand the Orders to the Commission without vacatur so as not to disrupt the significant beneficial effects of the Orders and

D. The Court Should Give No Effect to Inaccurate and Unnecessary Accounts of State Jurisdiction in This Proceeding.

In rejecting Petitioners' request for an explicit storage opt-out provision, however, the Commission complicated an otherwise clear application of the Act's jurisdictional framework and characterized the kinds of regulations that States could, in its view, adopt. The Orders' discussion of those regulations is neither complete nor accurate. Because the opt-out provision Petitioners seek is unnecessary to protect state authority, the Court should affirm the Orders and clarify that States retain all authority the Act preserves for them to regulate storage resources.

In recognizing States' authority to regulate storage resources in a way that could limit wholesale market access, the Commission only discussed a single scenario, in which States with retail storage programs could compel storage resources to choose between participating in a retail program or the wholesale market. *See* Order 841-A at P 41. The Commission opined that States could prohibit a storage resource from selling the same capacity twice (*i.e.*, once to a retail storage program and again on the wholesale market). The Commission also

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contingent investments by industry. *See EME Homer City Generation v. Envtl. Prot. Agency*, 795 F.3d 118, 132 (D.C. Cir. 2015) (remanding without vacating where vacatur risked substantial disruption to trading markets for emissions budgets deemed invalid by the Court).

noted that a State could prohibit resale of electricity purchased at retail into the wholesale market. *Id*. at P 46 n.125; FERC Br. 17, 43-44. But such plainly lawful regulations are not the *only* instances of a permissible state prohibition and the Court should not construe the Orders' limited discussion as a definitive articulation of the limits of state authority.

For example, a State could exercise its traditional authority over the distribution system by requiring storage capacity to be reserved for use in relieving local grid congestion.[24] As another example, during last year's wildfire season, a California investor-owned utility shut off electricity during dry, windy conditions to mitigate fire risks posed by the possibility of downed power lines. States, acting within their powers under the Act, could greatly mitigate the impacts of such shut-offs on critical electricity consumers, such as hospitals or emergency services by directing local storage resources to reserve capacity for such events.[25] Those regulations would require energy stored by local resources to be used at the local

[24] In a less strict version of this example, the California Public Utilities Commission requires storage resources to grant such local grid congestion relief and other grid "reliability services" priority over selling such capacity into the wholesale market. *Decision on Multiple-Use Application Issues*, Cal. Pub. Util. Comm'n D.18-01-003 (Jan. 11, 2018).

[25] Cal. Energy Comm'n, *Final 2019 Integrated Energy Policy Report* 157-160 (describing planned and demonstrated uses of local energy storage resources to create resilient "micro-grids" serving hospitals, senior living facilities, and remote reservations during shut-offs or severe storms).

level and would necessarily preclude those resources from selling reserved energy in the wholesale market. That consequence, however, would not encroach on the Commission's jurisdiction. In each of these examples, the State would regulate only at the generation, distribution, and retail levels and the regulations would not disregard or replace the wholesale electricity rate.

The Commission also used inaccurate language in the Orders when it declared that "a state may not . . . broadly prohibit[] all retail customers from participating in RTO/ISO markets." Order 841-A at P 41. Given the coordinate state and federal domains in electricity regulation, the Commission should not have approached the question categorically, in the abstract. *See Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (observing, "within a complementary administrative framework," the "congressionally designed interplay between state and federal regulation" must not be confused "for impermissible tension that requires pre-emption," and warning against "talismanic" formulations as an "infallible constitutional test or an exclusive constitutional yardstick"). Neither should the Court. The Orders impose no such constraint on state authority, categorical or otherwise, because, as discussed above, the Commission merely required RTOs and ISOs to implement wholesale market rules. Neither could a Commission order override the Act and impose such a categorical constraint on state authority.

The suspect language in the Orders is overbroad and unripe because it preemptively rules out a host of regulations that States could properly enact. For instance, as noted above, a state regulation could legitimately direct all retail customers facing peak wildfire conditions to reserve energy storage capacity for an imminent power shut-down. That would arguably "broadly prohibit[] [them] from participating in RTO/ISO markets" and "take away [the] storage resources' voluntary choice" to sell electricity into the wholesale market. Order 841-A at P 41; FERC Br. 44-45. But it is likewise the type of police power regulation that incidentally limits participation in the wholesale market, without targeting and replacing the wholesale rate. The Act preserves state authority to enact such laws.

In any event, if a State storage resource regulation encroached on the Commission's jurisdiction, such encroachment should be resolved through coordination between federal and state stakeholders (*see* discussion *supra* in Part IV.B); or, if amicable resolution is not possible, through a challenge to that law—not hypothetically and through blanket proclamation in a rulemaking.[26] *See* FERC Br. 21 (stating that "a future dispute over whether a specific state law is preempted

[26] *See, e.g.*, *Am. Petroleum Inst. v. Envtl. Prot. Agency*, 683 F.3d 382, 387 (D.C. Cir. 2012) (prudential ripeness doctrine requires an issue fit for resolution, protecting "the agency's interest in crystallizing its policy before that policy is subject to judicial review, and the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting").

can be resolved in an appropriate future case"); *id*. 57, 61 (arguing a "hypothetical state prohibition" "would" be preempted and "would likely conflict" with federal policy). The Court does not issue advisory opinions, and this case presents no question of federal preemption of state law that now requires resolution. *Id*. at 27-28 (noting lack of ripe controversy between any state law and the Orders). Preemption is a matter for courts to decide when the issues are ripe for adjudication and on a complete factual record, not for the Commission to anticipate in the abstract.

CONCLUSION

The Court should affirm the Orders on the simple grounds presented by their limited scope. They direct only that RTOs and ISOs revise their wholesale market rules to facilitate storage resources' equal participation. As States retain their traditional authority over local storage resources, the Orders cannot, and do not, preclude States from adopting storage regulations that impact wholesale access, with or without an explicit opt-out provision. Because the market rules required by the Orders appropriately reflect the Commission's and the States' shared responsibility for regulating the electricity sector, and will provide substantial benefits to the States and their electricity customers, Amici States urge the Court to deny the petitions for review.

Dated: February 7, 2020

Respectfully submitted,

STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General for the State of California
Robert W. Byrne
Senior Assistant Attorney General
Harrison Pollak
Acting Senior Assistant Attorney General
David A. Zonana
Supervising Deputy Attorney General
Dennis L. Beck, Jr.
Theodore McCombs
M. Elaine Meckenstock
Deputy Attorneys General
CALIFORNIA DEPARTMENT OF JUSTICE
600 West Broadway, Suite 1800
San Diego, California 92101
(619) 738-9003
Theodore.McCombs@doj.ca.gov

Attorneys for the State of California, by and through the California Air Resources Board and Attorney General Xavier Becerra

COMMONWEALTH OF MASSACHUSETTS

By its attorneys,

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts

/S/ Liam J. Paskvan
LIAM J. PASKVAN, NO. 62205
MEGAN M. HERZOG
Special Assistant Attorneys General
Energy and Environment Bureau
OFFICE OF THE ATTORNEY GENERAL OF MASSACHUSETTS
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2954
liam.paskvan@mass.gov

DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General for the District of Columbia
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
(202) 727-6287

STATE OF MICHIGAN

DANA NESSEL
Attorney General of Michigan
P.O. Box 30212
Lansing, Michigan 48909
(517) 335-7628

STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General of Rhode Island
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400

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Dated: February 7, 2020

/s/ Liam J. Paskvan
Liam J. Paskvan

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/s/ Liam J. Paskvan
Liam J. Paskvan