

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators Docket Nos. RM16-23-001
AD16-20-001

(Issued May 16, 2019)

McNAMEE, Commissioner, *concurring in part and dissenting in part*:

1. Electric energy storage resources (ESRs) have the potential to transform the electricity industry. ESRs will allow the electric transmission system¹ to take full advantage of periods of high generation from intermittent resources, such as wind and solar, and use that energy in times when those resources are not available but energy is needed. Market participation by a growing number of ESRs also will enable greater shifting between generation and load – thereby enhancing reliability and market signals. Within the correct regulatory and policy framework, ESRs can unlock significant economic and market efficiency benefits that have to date eluded the electric industry, its regulators, and – most importantly – consumers. As the Commission stated in Order No. 841, “effective integration of electric storage resources into the RTO/ISO markets would enhance competition and, in turn, help to ensure that these markets produce just and reasonable rates.”² Although I was not on the Commission when Order No. 841 was approved, I support its efforts to promote the participation of ESRs in the wholesale markets.

2. I write separately because I am concerned that, like Order No. 841, today’s order on rehearing fails to recognize the states’ interests in ESRs located behind a retail meter (behind-the-meter) or connected to distribution facilities.³ I believe Order Nos. 841 and

¹ In this statement, I attempt to avoid use of the term “grid” because it is imprecise and can lead to jurisdictional confusion. The majority in today’s order appears frequently to use the term “grid” without distinguishing whether it refers to the transmission system, distribution-level facilities, or both.

² *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127, at P 12 (2018) (Order No. 841).

³ In this statement, I use the term “states” to refer broadly to Relevant Electric

841-A (Storage Orders) are on solid footing when they deal with ESRs connected to the transmission system and how ESRs may participate in the wholesale market, and I concur in those aspects of today's order. I am troubled, however, that the Storage Orders do not fully respect or consider the impact they may have on local distribution systems, the states that regulate those local distributions systems, and local retail customers. To that end, I dissent from today's order. I would have granted the rehearing requests asking the Commission to reconsider: (i) its finding that it has jurisdiction over whether ESRs located behind-the-meter or on the local distribution system are permitted to participate in the RTO/ISO markets through the ESR participation model and thereby asserting jurisdiction over distribution facilities;⁴ and (ii) its failure to provide states the opportunity to opt-out of the participation model created by the Storage Orders.⁵ In response to Order No. 841, the following entities either requested rehearing on or clarification of the Commission's assertion of jurisdiction over, or of its failure to provide an opt-out to the states related to, ESRs: National Association of Regulatory Utility Commissioners (NARUC);⁶ the group consisting of American Municipal Power, Inc. (AMP), the American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA);⁷ Edison Electric Institute (EEI);⁸ Transmission

Retail Regulatory Authorities (RERRAs).

⁴ *See, e.g.*, National Association of Regulatory Utility Commissioners Request for Clarification and Rehearing at 3-8 (NARUC Request for Rehearing); Organization of MISO States Amended Motion for Clarification at 3-6; Pacific Gas and Electric Company Motion for Clarification at 1-3 (PG&E Motion for Clarification).

⁵ *See, e.g.*, Edison Electric Institute Request for Rehearing and Clarification at 7-8 (EEI Request for Rehearing); American Municipal Power, Inc., American Public Power Association, & the National Rural Electric Cooperative Association Request for Rehearing at 3 (AMP, APPA, & NRECA Request for Rehearing).

⁶ *See generally* NARUC Request for Rehearing.

⁷ AMP, APPA, & NRECA Request for Rehearing at 3, 11, 13-15.

⁸ EEI Request for Rehearing at 3-8.

Access Policy Study Group (TAPS);⁹ Organization of MISO States;¹⁰ Pacific Gas and Electric Company;¹¹ and Xcel Energy Services Inc. (Xcel).¹²

3. As set forth below, I conclude the majority has exceeded the Commission's jurisdictional authority by depriving the states of the ability to determine whether distribution-level ESRs may use distribution facilities so as to access the wholesale markets. By doing so, in my view, the Commission claimed jurisdiction over functions and assets reserved by statute to the states. Further, even if the majority thought they could rightly exercise jurisdiction in this matter, I think they should have furthered the path of "cooperative federalism"¹³ by permitting the states to choose whether or not behind-the-meter and distribution-connected ESRs may participate in the wholesale markets through an opt-out provision.

I. The Commission Lacks Jurisdiction over ESRs Connecting at the Distribution Level or Behind-the-Meter

4. The analysis of whether the Commission has authority to effectively direct the states to permit ESRs to use distribution facilities to reach the wholesale markets begins with the text of the Federal Power Act (FPA).¹⁴ As a creature of statute, the Commission has only that authority Congress has conferred upon it.¹⁵ As relevant here, the FPA grants the Commission jurisdiction to regulate electricity in two areas: (i) "transmission of electric energy in interstate commerce," and (ii) "the sale of electric energy at

⁹ TAPS Request for Rehearing at 1-12.

¹⁰ Organization of MISO States Amended Motion for Clarification at 3-6.

¹¹ PG&E Motion for Clarification at 1-3.

¹² Xcel Request for Rehearing at 6-16.

¹³ See, e.g., *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 779-80 (2016) (*EPISA*) (noting that while the Commission claimed it could negate state decisions, it chose not to do so "in recognition of the linkage between wholesale and retail markets and the States' role in overseeing retail sales. . . . Wholesale demand response as implemented in the Rule is a program of cooperative federalism in which the States retain the last word.")

¹⁴ 16 U.S.C. § 824 (2012).

¹⁵ See, e.g., *Emera Me. v. FERC*, 854 F.3d 9, 25 (D.C. Cir. 2017).

wholesale in interstate commerce.”¹⁶ But the FPA is explicit in stating that the Commission does not have jurisdiction “over *facilities* used for the generation of electric energy or over *facilities* used in local distribution or only for the transmission of electric energy in intrastate commerce”¹⁷ These subjects are reserved to the states.

5. Order No. 841-A mandates that ESRs be permitted to use distribution facilities so that they may access the wholesale electric market.¹⁸ There is no doubt that the participation of ESRs behind-the-meter or on the distribution lines can “affect wholesale rates,” but in order to “affect” wholesale rates such ESRs must first have access to the wholesale market, and they can only do so by using distribution facilities. In my view, the FPA does not provide the Commission with the authority to require that distribution facilities permit ESRs to use those facilities to access wholesale markets.

6. As I set forth in greater detail below, the legal analysis that supports the Commission’s jurisdiction to regulate wholesale rates for demand response (DR) and energy efficiency resources (EERs) is inapposite when considering ESRs. DR and EERs involve customers (or aggregators) voluntarily agreeing to reduce their loads for a certain price, a practice which the Commission and court agree directly affects wholesale rates.¹⁹

¹⁶ 16 U.S.C. § 824(b)(1).

¹⁷ *Id.* (emphasis added). See *Detroit Edison Co. v. FERC*, 334 F.3d 48, 54 (D.C. Cir. 2003) (“Section 201(b)(1) denies FERC jurisdiction over ‘facilities used in local distribution.’ FERC would rewrite the statute to exclude only ‘facilities used *exclusively* in local distribution.’ Such an interpretation would eviscerate state jurisdiction over numerous local facilities, in direct contravention of Congress’ intent.”) (citations omitted); *but cf. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277, 1279, 1282 (D.C. Cir. 2007) (concerning the adoption of a standard interconnection agreement and which can be distinguished on a number of grounds, including that: (i) the distribution facilities were participating in a Commission-filed Open Access Transmission Tariff; and (ii) involved generators larger than 20 megawatts).

¹⁸ Order No. 841-A prohibits states from preventing ESRs from participating in wholesale electric markets, which has the effect of directing that ESRs have access to distribution facilities. *Electric Storage Participation in Markets Operating by Regional Transmission Organizations and Independent System Operators*, Order No. 841-A, 167 FERC ¶ 61,154 at PP 38-49 (2019) (Order No. 841-A).

¹⁹ See *EPSA*, 136 S. Ct. at 774-75 (finding that rules governing wholesale DR directly affect the wholesale rate); *Advanced Energy Economy*, 161 FERC ¶ 61,245, at P 60 (2017) (*AEE*), *reh’g denied*, 163 FERC ¶ 61,030 (2018) (finding that the Commission has jurisdiction over the participation of EERs in organized wholesale

The entity choosing to reduce load through DR or EER is acting behind-the-meter and, by its voluntary act, it literally does not “use” the distribution facilities; it is affirmatively choosing to reduce its consumption of electricity. In the case of an ESR located either behind-the-meter or on the distribution system, the only way it can sell its energy at wholesale is by using distribution facilities to deliver energy to the wholesale market.

7. In Order No. 841, the Commission concluded that because ESRs’ sales and purchases can affect wholesale rates, the Commission therefore has the authority to dictate that ESRs have access to the wholesale market through distribution facilities. But such an approach borders on teleology as legal analysis. The FPA is clear: the regulation of distribution facilities is not within the jurisdiction of the Commission.²⁰ It is only when an ESR is provided access to the wholesale power markets through the distribution facilities that the Commission can exercise its authority; but the Commission cannot mandate that such access be provided on the local distribution facilities. That decision remains with the local distribution utilities and the states that regulate them.

8. I acknowledge that the mere fact that a distribution facility is involved is not dispositive as to whether the Commission can exercise jurisdiction. If a state permits ESRs to connect to the distribution system and sell power at wholesale, the Commission has jurisdiction to regulate those sales. But, the decision – the jurisdiction – to allow the ESRs to physically connect to the distribution system lies with the states.²¹

9. The majority relies on the Supreme Court’s decision in *EP SA* to support their decision to prohibit states from preventing an ESR on a distribution system or behind-the-meter from participating in the RTO/ISO markets through the participation model. In my opinion, *EP SA* is distinguishable from the issues considered by the Commission in Order No. 841. *EP SA* involved whether the Commission had jurisdiction over DR transactions and, if it did, whether the Commission could justify, under specific circumstances, the equal compensation of DR providers and wholesale generation.²² In Order No. 841, the Commission asserted that because ESRs can effect wholesale rates,

markets as a practice directly affecting wholesale rates).

²⁰ 16 U.S.C § 824(b)(1).

²¹ *See, e.g.*, NARUC Request for Rehearing at 4; APA, APPA, & NRECA Request for Rehearing at 10-11. I further consider that this limitation on the Commission’s authority to order the participation of ESRs behind-the-meter or on the distribution system applies with equal force to public power and electric cooperatives that are exempt from Part II of the FPA. *See* 16 U.S.C. § 824(f).

²² *EP SA*, 136 S. Ct. at 767, 771-72.

ESRs must be allowed to connect behind-the-meter and to the distribution facilities in order to participate in the wholesale markets.²³

10. Another important distinction between *EPSA* and the matter before us is that under Order Nos. 719 and 745, as the *EPSA* Court itself recognized, wholesale operators were required to accept “demand response bids from aggregators of electricity consumers, except when the state regulatory authority overseeing those users’ retail purchases bars such demand response participation.”²⁴ Thus, the DR program under review in *EPSA* already provided for an opt-out for the states. Said differently, the *EPSA* Court’s analysis was undertaken in a factual setting in which states already had been provided with an opt-out.²⁵ In fact, the *EPSA* Court concluded that the opt-out feature removed “any conceivable doubt as to its compliance with [FPA section 201(b)’s] allocation of federal and state authority.”²⁶

11. I also note that, when the *EPSA* Court determined that the Commission’s DR regulation did not improperly regulate retail electric sales, it did so by, in part, noting “whatever the effects at the retail level, every aspect of the regulatory plan happens exclusively on the wholesale market and governs exclusively that market’s rules.”²⁷ I believe that the requirement in the Storage Orders that states must permit distribution and behind-the-meter ESRs to use distribution facilities to access the wholesale markets creates a regulatory plan that fails to “happen[] exclusively” on the wholesale market and

²³ As I noted immediately above, the fact that *EPSA* involved DR and not ESRs is a point of important distinction here. *See supra* P 6 *see also infra* PP 17-18.

²⁴ *EPSA*, 136 S. Ct. at 771 (citing *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071, at P 154 (2008) (Order No. 719); *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187, at P 114 (2011) (Order No. 745)).

²⁵ In considering *EPSA*’s arguments that the Commission had “usurped state power,” *id.* at 777, the Court dismissed them noting that the “finishing blow” to those arguments was the Commission’s “notable solicitude toward the States” by “allow[ing] any State regulator to prohibit its consumers from making demand response bids in the wholesale market.” *Id.* at 779 (citations omitted).

²⁶ *Id.* at 780.

²⁷ *Id.* at 776. *See also supra* P 6 (discussion that DR does not “use” the distribution facilities).

fails to exclusively govern the wholesale market's rules.²⁸ The majority's position in this regard goes beyond the position supported by *EPSA*, which involved determining "how" resources will participate in the wholesale market.²⁹ The issue has been expanded by the majority in this matter to include "whether" ESRs must be permitted to participate in the wholesale market by effectively mandating access to distribution facilities.³⁰

12. In short, I would have granted rehearing to find that the Commission exceeded its jurisdiction by prohibiting states from determining whether ESRs could be connected to distribution facilities.³¹

²⁸ *EPSA*, 136 S. Ct. at 776.

²⁹ This position was argued by some in their requests for rehearing or clarification of Order No. 841. *See, e.g.*, NARUC Request for Rehearing at 6.

³⁰ The issue of whether ESR functions as generation, and therefore is subject to state jurisdiction for construction, siting, and permitting was not addressed by the Storage Orders.

³¹ Additionally, I am concerned that the Commission's denial of rehearing on these issues may be perceived as impermissible commandeering of the states to implement federal policy, which is prohibited by the Constitution. The Storage Orders do not merely pre-empt state authority, but require states to act in or to implement the Commission's direction to permit ESRs to connect to distribution facilities or face untenable impacts to retail electric service. *See infra* pt. II.A. Most local distribution systems are considered public utilities whose rates, terms and conditions are regulated by the state. This means that integration of ESRs – including safety and reliability standards as acknowledged by Order No. 841-A – will require review and action by the states before the distribution utility may implement the Commission's order. *See* Order No. 841-A, 167 FERC ¶ 61,154 at P 42 (acknowledging that states have jurisdiction over the interconnections of certain resources to the distribution system and the requirements reasonably related to those interconnections). It is also possible that a state law may need to be changed so as to permit ESRs to connect to the distribution facilities. Our structure of government under the Constitution prohibits the federal government from requiring states to enact statutes or to regulate on its behalf. *See New York v. United States*, 505 U.S. 144, 175-76 (1992); *Printz v. United States*, 521 U.S. 898, 935 (1997).

II. The Commission Should Have Exercised its Discretion to Include an Opt-Out Provision for the States

13. Regardless of whether the Commission has jurisdiction over ESRs connected to distribution facilities, I would have supported the Commission exercising its discretion to provide an opt-out provision for the states.

14. The majority today also relies on the Commission's order in *AEE* to support their decision to not provide states with an opt-out in Order No. 841.³² In *AEE*, the Commission considered a request for a declaratory ruling that, among other things, found the Commission had exclusive jurisdiction under the FPA to regulate the participation of certain EERs in wholesale electricity markets and that the states lacked the authority to bar or otherwise interfere with the participation of EERs in those markets. The Commission found that it had exclusive jurisdiction "over the participation of EERs in wholesale markets[, and] that RERRAs may not bar, restrict, or otherwise condition the participation of EERs in wholesale electricity markets unless the Commission expressly gives RERRAs such authority" ³³ The Commission also found that Order No. 719 did not require that an opt-out be provided to a state related to the sale of EERs into the wholesale electricity markets.³⁴

15. Importantly, however, the Commission recognized in *AEE* that we "ha[ve] discretion to decide whether to grant states an opt-out from allowing participation of EERs in wholesale electricity markets."³⁵ Moreover, in describing its decision in *AEE* not to provide an opt-out to the states with respect to EERs as it did with DR (as discussed in *EPSA*), the Commission also observed that "[u]nlike demand response resources, EERs are not likely to present the same operational and day-to-day planning complexity that might otherwise interfere with [a Load Serving Entity's] day-to-day operations."³⁶ As set forth below, the Commission's observations in *AEE* persuaded me that it would have been appropriate to provide an opt-out to the states in the Storage Orders.

16. Therefore, while the Commission's exercise of jurisdiction in this matter was inappropriate in my view, even if the Commission had jurisdiction over the participation

³² Order No. 841-A, 167 FERC ¶ 61,154 at PP 37, 50.

³³ *AEE*, 161 FERC ¶ 61,245 at P 57.

³⁴ *Id.*

³⁵ *Id.* P 62.

³⁶ *Id.* P 63.

in the wholesale markets of ESRs connected to the distribution system or behind-the-meter, the Commission could have achieved a more just result by exercising its discretion to offer the states an opt-out provision. As I noted above, among those requesting rehearing in response to the Commission's failure to include an opt-out in the Storage Orders was NARUC, which represents the views of the state utility commissions. In addition, EEI, APPA, AMP, and NRECA similarly challenged the Commission's failure in Order No. 841 to include an opt-out. The memberships of these entities combined represent the vast majority of load serving entities in the United States. It is important to take their concerns seriously and to address them.

A. An Opt-Out Provision Would Reduce the ESR-Related Burden on States and Local Utilities

17. The Storage Orders will likely result in day-to-day operational impacts on the distribution system greater than those presented by EERs or DR, but without providing states an opportunity to avoid these impacts by allowing them to opt-out. In my view, there are fundamental differences between DR and EERs, on the one hand, and ESRs on the other. As noted above, DRs and EERs reflect a customer's decision voluntarily not to consume electric energy, whereas ESRs reflect an injection (generation) or consumption (load) of energy from behind-the-meter and onto distribution facilities. An ESR'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 ESR's activities may impact the operations of distribution-level facilities as well as their safety and reliability in a manner that DR's and EERs' voluntary decision not to consume electricity does not. As noted in comments filed in this record, voluntary customer reductions in load have a very different impact on the distribution system from the "bidirectional trafficking of energy across the distribution grid" of ESRs.³⁷ The real physical and operational impacts ESRs have on the distribution system in my estimation weigh in favor of the Commission exercising its discretion to provide an opt-out to the states in this matter.

18. I am concerned that the Storage Orders potentially will create complications for, and impact the day-to-day operations and management of, the distribution system – as well as its safety and reliability – in a manner that is in fact *greater* than the impact of demand response resources because ESRs actually inject energy into the system. One commenter in its request for rehearing recognized that states "should be entitled to *more* deference with respect to electric storage resources that inject power into the distribution system and can dramatically re-shape load curves, thereby creating more significant operational, safety, and reliability concerns for retail customer interconnections and

³⁷ See Xcel, Comments, Docket Nos. RM16-23-000 and AD16-20-000, at 8 (filed Feb. 13, 2018).

distribution systems.”³⁸ Similarly, another set of commenters argued, “[b]ecause ESRs can inject energy into the grid, unlike demand response, there is arguably an even greater need for preservation of the states’ authority over rules for participation in order to ‘maintain the safety and the reliability of the distribution system or their use of [ESRs] on their systems.’”³⁹ These comments identify material operational concerns as well as hardships in guaranteeing the safety and reliability of the distribution system that under observations made in *AEE* weigh in favor of exercising the Commission’s discretion for providing an opt-out provision in the Storage Orders.

19. We must also consider that the operational, safety and reliability concerns highlighted by commenters may increase costs to the states or distribution utilities and, ultimately, to consumers. Order No. 841 holds that “state responsibilities include, among other things, retail services and matters related to the distribution system, including design, operations, power quality, reliability, and system costs.”⁴⁰ However, the majority in Order No. 841-A dismisses the issue of increased cost on the distribution system as “outside the scope of this proceeding” and argues that “we are not changing the responsibilities of the distribution utilities.”⁴¹ I disagree. Based on the record, it is clear that many parties feel strongly that the Storage Orders do in fact increase their responsibilities, and if the majority does not want to address these issues in this proceeding, then they should at least provide an option for states to avoid these costs by opting out.

20. As one party noted in its request for rehearing, the Storage Orders “impose significant new costs on distribution companies and raise questions about cost recovery from retail customers in retail rates to accommodate the wholesale market participation of electric storage resources[,]”⁴² and “distribution utilities will be required to allow storage resources to use their wires to transmit energy to and from the electric transmission grid, imposing new stresses on the distribution system and imposing added costs on the distribution utilities.”⁴³ Yet, instead of confronting issues involving new stressors to

³⁸ TAPS Request for Rehearing at 4 (emphasis in original).

³⁹ APA, APPA, & NRECA Request for Rehearing at 15 (quoting Order No. 841, 162 FERC ¶ 61,127 at P 36).

⁴⁰ Order No. 841, 162 FERC ¶ 61,127 at P 36.

⁴¹ Order No. 841-A, 167 FERC ¶ 61,154 at P 156.

⁴² Xcel Request for Rehearing at 9.

⁴³ *Id.*

distribution systems arising from ESRs – including injections of energy at the distribution level – the majority merely repeats the fact that distribution companies and states will still regulate safety and reliability.⁴⁴ But the majority misses the point, as those safety and reliability regulations can be challenging and expensive tasks. For example, in discussing the 100 kW minimum size threshold for participation, EEI expressed concerns with the potential impacts of an influx of ESRs:

There is concern that the number of ESRs that could potentially seek to participate in the wholesale market at the proposed threshold could become so voluminous that they: 1) exceed the ability of RTOs/ISOs to manage this volume of resources, 2) exceed the ability of [distribution utilities] to address various reliability, operational and interconnection mat[t]ers given that smaller resources are far more likely to interconnect to distribution, and 3) impose implementation costs significantly greater than corresponding benefits, particularly in regions where resources of the 100 kW size have other “compensation” options such as net energy metering.⁴⁵

21. The majority also should not dismiss concerns over equity or cost allocation. When a distribution utility is concerned that it “will need to harden the underlying distribution system to support bidirectional power flows and pay for substantial metering upgrades”⁴⁶ to accommodate ESRs, and that the associated costs “could be trapped at the distribution level and allocated to end-users rather than wholesale market participants[,]”⁴⁷ in my view the Commission should not flatly disclaim involvement. The majority is willing to assert jurisdiction over the distribution system through the participation model, but they are unwilling to confront or take responsibility for the practical ramifications of their decisions.

22. Given the complexities and uncertainties mentioned above, the Commission should have included an opt-out provision. Further, the fact that ESR-related costs may not yet be well-known and may come in different forms (e.g., potential upgrades to

⁴⁴ Order No. 841, 162 FERC ¶ 61,127 at P 36; Order 841-A, 167 FERC ¶ 61,154 at P 46. As noted *supra* in footnote 31, the imposition of this burden by the Commission raises potential questions of unconstitutional commandeering of the states.

⁴⁵ EEI Request for Rehearing at 9.

⁴⁶ Xcel Request for Rehearing at 23.

⁴⁷ *Id.* at 24.

components of the distribution system, increased administrative effort and time on the part of distribution utilities and states, etc.) supports the argument for an opt-out provision. It is these potential problems that provide the Commission with the reason to exercise its discretion to provide the states an opt-out provision with respect to ESRs.

B. An Opt-Out Provision Would Improve Transparency and Allow Non-Participating States to Experiment and Innovate

23. Further, Order No. 841 has the potential to stymie innovation in ESRs behind-the-meter or connected at the distribution level. NARUC filed comments stating that “[u]tility-scale energy storage is now shifting from a few experimental programs to prominent State-prompted deployments such as those in California, with more and more States looking expand the use of energy storage resources”⁴⁸ and urging the Commission to “avoid inhibiting State efforts to build on these successful installations and encourage system operators to include storage in their integrated planning.”⁴⁹ As with other policy approaches under a system of cooperative federalism, in my view it is important for the Commission to acknowledge that we do not have all the answers, and states play a vital role as policy laboratories when it comes to broad initiatives that have significant state-by-state details to be ironed out. Further, in general, I believe it is unwise for a federal administrative agency to implement a top-down policy when the needs of a state or distribution utility call for a tailored approach.

24. Finally, one of the important obligations of our government is to provide and encourage transparency to citizens as to who in government is responsible to the people. In the complex and overlapping jurisdictions of electricity, a retail customer with a complaint or question about his or her bill or service may find it difficult to know whom to contact about that service. When service involves the distribution system, it is natural for a customer to call the local utility or the state public utility commission. The Commission should be cognizant that, by denying states an opt-out provision with respect to the Storage Orders, the majority is not only placing a burden on the distribution utility or the state to address any impacts of ESRs on the distribution system, they are in effect asking the distribution utility or state to take ownership of and accountability for that burden.

III. Conclusion

25. I firmly believe that, within the correct regulatory and policy framework, ESRs have the potential to transform the electricity industry by unlocking significant economic and market efficiency benefits. And I firmly support the efforts of the Storage Orders to

⁴⁸ NARUC Request for Rehearing at 8.

⁴⁹*Id.*

promote the participation of ESRs in the wholesale markets. However, as I stated above, I read our jurisdictional authority differently than the majority, and I would have granted rehearing of Order No. 841 on the issues of jurisdiction and exercising the Commission's discretion to include an opt-out provision for states related to ESRs located behind-the-meter or connected to distribution facilities.

For these reasons, I respectfully concur in part and dissent in part.

Bernard L. McNamee
Commissioner