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The Transformation from Cooperative Federalism to Exclusive Jurisdiction: Issues in the Evolution of a New Era of Energy Regulation

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The Transformation from Cooperative Federalism to Exclusive Jurisdiction: Issues in the Evolution of a New Era of Energy Regulation

Marisa Del Turco*

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INTRODUCTION

The United States (“U.S.”) electric power industry is experiencing a significant transition due to the opening of wholesale markets to new sources of energy.¹ Innovation and competition in the power sector are

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1. See Darrell Proctor, *FERC Order Backs Grid Market For DERs*, POWER

increasing with the removal of regulation barriers, causing a shift from traditional processes and conventional resources to new technologies necessitating a new regulatory foundation.

Diverse approaches to renewable energy sources and storage systems are currently utilized around the world.² The changing energy demands and rise of environmental issues have inspired new technologies, allowing the industry to continue to evolve and adapt. A global change in energy production developed in the 1800s with the construction of the world's first coal-fired power plant.³ Since the 19th century, nuclear power, coal, natural gas, and petroleum have controlled U.S. energy generation.⁴ However, renewable energy is the fastest-growing energy source, both in the U.S. and globally.⁵ With the increase of reliable energy storage technologies, renewable energy sources will benefit the industry by capturing and storing generated energy to be released back into the grid as demand so requires.

Two emerging systems are predicted to vastly affect the industry: electric storage resources (“ESRs”) and distributed energy resources (“DERs”). The Federal Energy Regulatory Commission (FERC) has promulgated corresponding orders to address these two systems in their transition into the energy sector.⁶ ESRs are addressed in FERC Order 841 and are defined as any “resource capable of receiving electric energy from the grid and storing it for later injection of electric energy back to the

MAG. (Sept. 17, 2020), <https://www.powermag.com/ferc-order-backs-grid-market-for-ders/> [<https://perma.cc/W9SS-YC2Z>].

2. See *Why Energy Storage: Technologies*, ENERGY STORAGE ASS'N, <https://energystorage.org/why-energy-storage/technologies> [<https://perma.cc/9ZXX-GHKE>] (last visited Aug. 16, 2021).

3. Maryssa Barron, *U.S. Energy Markets 101: How Electricity Markets Work*, LEVELTEN ENERGY (Oct. 10, 2019), <https://leveltenenergy.com/blog/clean-energy-experts/energy-markets-101> [<https://perma.cc/6DPX-3YST>].

4. *Energy Sources Have Changed Throughout the History of the United States*, U.S. ENERGY INFO. ADMIN. (July 3, 2013), <https://www.eia.gov/todayinenergy/detail.php?id=11951> [<https://perma.cc/7YDF-DBH7>].

5. *Renewable Energy*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/renewable-energy/> [<https://perma.cc/23QN-SMCY>] (last visited Aug. 16, 2021).

6. See *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 F.E.R.C. ¶ 61,127 (2018) [hereinafter Order No. 841]; *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 172 F.E.R.C. ¶ 61,247 (2020) [hereinafter Order No. 2222].

grid.”⁷ Before FERC Order 841, ESRs were hindered from participating in the energy industry, and this hindrance disincentivized ESR innovation. An example of an ESR is the “Megapack” battery currently being developed by Tesla.⁸ With this new development, Tesla announced a partnership with Pacific Gas and Electric (“PG&E”), one of California’s utilities, to provide a sustainable and reliable alternative to power plants.⁹ The Megapack battery, like any ESR, will help stabilize and support an unreliable electric grid.¹⁰

DERs are addressed in FERC Order 2222 and are defined as “small-scale power generation or storage technologies” located on a local distribution system or behind-the-meter, meaning the electricity is generated or managed in a home or business.¹¹ DERs include solar panels, battery storage, electric vehicles, and thermal storage.¹² FERC also permits DER aggregation, allowing various resources to come together to meet the minimum threshold for participation.¹³ Before FERC Order 2222, DERs were limited from participating and selling their energy back into the energy markets because the electric power industry was not equipped to handle energy from small sources, such as residential solar panels, to the power grid.¹⁴

The FERC Orders regarding ESRs and DERs encourage innovation in the energy sector by allowing greater participation of these new technologies in energy markets. To increase competition and ensure both efficiency and reliability in light of new challenges and technologies, FERC, through these orders, is applying pressure on state and local authorities to include new and diverse energy resources. Many of the

7. Order No. 841, *supra* note 6, at P 29.

8. *See Introducing Megapack: Utility-Scale Energy Storage*, TESLA (July 29, 2019), <https://www.tesla.com/blog/introducing-megapack-utility-scale-energy-storage> [<https://perma.cc/36RP-QHXF>].

9. *Id.*

10. *See id.*

11. FED. ENERGY REGUL. COMM’N, FERC ORDER 2222: A NEW DAY FOR DISTRIBUTED ENERGY RESOURCES (2020) [hereinafter FERC ORDER 2222], <https://www.powermag.com/wp-content/uploads/2020/09/ferc-2222.pdf> [<https://perma.cc/9FEJ-3T5P>]; *Distributed Energy Resources*, ARENA, <https://arena.gov.au/renewable-energy/distributed-energy-resources> (last updated Sept. 15, 2021).

12. Buck B. Endemann, Kimberly Frank, Elias B. Hinckley & Patrick T. Metz, *FERC Issues Landmark Order No. 2222 to Facilitate the Participation of Distributed Energy Resources in Wholesale Markets*, NAT’L L. REV. (Sept. 23, 2020), <https://www.natlawreview.com/article/ferc-issues-landmark-order-no-2222-to-facilitate-participation-distributed-energy> [<https://perma.cc/P8LY-UW8G>].

13. *Id.*

14. *See* Order No. 2222, *supra* note 6, at P 2.

energy sector's new challenges, such as rolling blackouts, are attributable to longstanding issues, like climate change, becoming more detrimental.¹⁵ Climate change can cause severe natural disasters and abnormal rises in temperature, resulting in an increase in electricity consumption.¹⁶ An inevitable societal and economic shift from conventional sources to clean energy sources is necessary to combat these modern challenges.

Texas's failed energy system during the 2021 deep freeze demonstrates the dire need for integration of new energy sources. In February 2021, Texas experienced rolling blackouts caused by an unusually cold winter and severe storms. The demand for energy rose to unprecedented levels which overwhelmed the Texas power grid and caused thousands of people to lose electricity and water for days or, in some cases, weeks.¹⁷

To prevent the recurrence of a similar problem in the future, Texas could invest in energy storage to create a more resilient and stabilized grid while continuing to stay largely disconnected from other energy grids, which consequently avoids federal regulation. By investing in resources that increase grid reliability, Texas will not have to relinquish the individualized structure of its power grid.

This Comment will analyze the extensive history of jurisdictional challenges between FERC and the states in the energy sector as well as the foundational issues triggered by the rise of new technologies, like ESRs and DERs, in light of recent legislation. Accordingly, The United States Court of Appeals for the District of Columbia Circuit's decision on Order 841 in *National Ass'n of Regulatory Utility Commissioners v. FERC (NARUC)* reveals a new era of energy regulation that, on its face, seems to follow the precedent of jurisdictional boundaries but in effect actually extends federal jurisdiction.

Part I of this Comment will provide a historical account of the growth of the energy sector and development of the wholesale and retail markets. Part II will focus on the jurisdictional and regulatory authority of FERC and state governments. The foundation of the energy industry, with the divide in jurisdiction between FERC and the states, has created an

15. See Sonia Aggarwal, *To Prevent Blackouts, California Needs More Clean Energy – and a Bigger, Better Run Grid*, CALMATTERS (Sept. 4, 2020), <https://calmatters.org/commentary/my-turn/2020/09/to-prevent-blackouts-california-need-s-more-clean-energy-and-a-bigger-better-run-grid/> [<https://perma.cc/KV93-CAJ5>].

16. See *id.*

17. David Koenig & Michael Liedtke, *Explainer: Why the Power Grid Failed in Texas and Beyond*, AP NEWS (Feb. 17, 2021), <https://apnews.com/article/why-texas-power-grid-failed-2eaa659d2ac29ff87eb9220875f23b34> [<https://perma.cc/MK2T-RNM8>].

extensive history of both jurisdictional and precedential challenges. Part III will explain FERC Order 841, which removed regulatory barriers for ESRs to enter the wholesale electricity markets. Part IV will analyze *NARUC*, the first challenge to Order 841. Part V will provide an overview of FERC Order 2222. FERC Order 2222 developed out of the D.C. Circuit Court's recent affirmation of Order 841 in *NARUC* which declared that FERC has exclusive jurisdiction over sources' eligibility to participate in wholesale markets.¹⁸ Finally, Part VI will propose a solution for complying with the jurisdictional bounds set by the Federal Power Act while still promoting innovation and growth in the energy industry. The most effective solution is to establish a coordination mechanism between FERC and state entities to ensure efficiency and uniformity across traditional jurisdictional lines.

I. BACKGROUND

A. History of Electricity Markets

The structure of today's U.S. electric power industry encompasses "regulated, unregulated, and partially regulated markets," with various entities participating in different market processes depending on their respective geographic areas.¹⁹ However, an analysis of historic trends of the electric power industry depicts how the market has changed from regulated, vertically integrated monopolies to a deregulated "framework that promotes competition."²⁰

The vertically integrated model²¹ of distribution was established with the construction of the first power plant in the late 19th century.²² Because the existing infrastructure was incapable of delivering electricity, the owner of the power plant built, owned, and operated the first electricity

18. *FERC Opens Wholesale Markets to Distributed Resources: Landmark Action Breaks Down Barriers to Emerging Technologies, Boosts Competition*, FED. ENERGY REGUL. COMM'N (Sept. 17, 2020), <https://www.ferc.gov/news-events/news/ferc-opens-wholesale-markets-distributed-resources-landmark-action-breaks-down> [https://perma.cc/54VY-3KL7].

19. MONICA GREER, *ELECTRICITY MARGINAL COST PRICING: APPLICATIONS IN ELICITING DEMAND RESPONSES* 41 (2012).

20. *Id.* at 39.

21. As explained in the following paragraph, a vertically integrated model is a single utility owning all stages of the flow of electricity, i.e., one utility owns the generation, transmission, and distribution of power. See discussion *infra* Part I.A.

22. Barron, *supra* note 3.

grid.²³ A grid is the system that delivers electricity and entails three components: generation, transmission, and distribution. While power plants provide the generation of energy, high-voltage power lines transmit the generated energy to local delivery systems for distribution services to consumers.²⁴ Soon after this innovation, new utilities emerged using the same vertically integrated model.²⁵ The new utilities built their own power plants to provide generation, but they also constructed power lines for transmission and established local delivery systems for distribution.²⁶

However, the construction of several different power lines in the same geographic area sparked safety and reliability concerns.²⁷ Every utility company had their own power lines for the transmission and distribution of energy.²⁸ Consequently, if a problem existed with one utility company's power lines, then those consumers would lose power while others using a different utility would not, causing unreliability and arbitrary blackouts.²⁹ This unreliability, in addition to the overcrowding of power lines, led companies to lobby local and state governments to consolidate the various utility companies to create monopolies.³⁰ Lobbyists argued that "publicly-regulated monopolies could keep prices lower and make the grid more reliable and safe."³¹ The monopolies eliminated competition as individual "utility companies were given the power to own and operate all transmission within a given geographic region."³² Vertically integrated regions still exist today, and such local utility monopolies are regulated by state public utility commissions.³³

Although the goal of creating monopolies with a vertically integrated system was to create a more reliable electricity grid, the American public's electricity demands increased, which once again led to blackouts.³⁴ The

23. *Id.*

24. GREER, *supra* note 19, at 39; *New York v. FERC*, 535 U.S. 1, 5 (2002).

25. *See* Barron, *supra* note 3.

26. GREER, *supra* note 19, at 39; *New York v. FERC*, 535 U.S. at 5.

27. Barron, *supra* note 3.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Kathryne Cleary & Karen Palmer, *US Electricity Markets 101: An Overview of the Different Types of US Electricity Markets, How They Are Regulated, and Implications for the Future Given Ongoing Changes in the Electricity Sector*, RES. FOR THE FUTURE (Mar. 3, 2020), <https://www.rff.org/publications/explainers/us-electricity-markets-101> [https://perma.cc/SAS9-FR GF]; *see also* *New York v. FERC*, 535 U.S. 1, 5 (2002).

34. Barron, *supra* note 3.

grid's continued instability created a lack of trust in the private-utility monopolized structure and led to the establishment of FERC in 1977.³⁵ FERC was established to regulate the transmission of energy, the wholesale sale of energy, and the transportation of energy across borders.³⁶ FERC's mission is to assist customers in obtaining "economically efficient, safe, reliable, and secure energy services."³⁷

B. The Start of Wholesale/Retail Markets

Market restructuring, also referred to as "deregulation," began with FERC Orders 888 and 889. These Orders helped to create a wholesale market by allowing nondiscriminatory access to transmission systems and removing "obstacles to competition in wholesale trades of electricity."³⁸ As discussed above in subpart A, vertically integrated utility companies were the owners of the transmission lines in the U.S., which hindered competition due to the transmission line owner's hesitation in allowing other utilities (generators) to access the transmission lines.³⁹ For the purpose of this Comment, the owner of the transmission power lines is not relevant. Rather, the entity currently possessing jurisdictional control over the transmission power lines is the essential element because Orders 888 and 889 provided open access to the transmission lines regardless of ownership.⁴⁰ These Orders opened up the U.S. electricity system to both generator competition and wider transmission access.⁴¹

Independent System Operators ("ISOs") were formed out of Order 888 when the owners of the transmission lines came together to regulate and share responsibilities.⁴² ISOs were created in part to ensure

35. *Id.*

36. *Id.*

37. *About FERC*, FED. ENERGY REGUL. COMM'N, <https://www.ferc.gov/about/what-ferc> [<https://perma.cc/QRG6-75QW>] (last updated Aug. 19, 2021).

38. *Our History*, ISO NEW ENG., <https://www.iso-ne.com/about/what-we-do/history/> [<https://perma.cc/6CVT-8TKY>] (last visited Aug. 16, 2021).

39. *Restructuring: The Effects of FERC Orders 888, 889, and 2000*, TRANSMISSIVES, <https://transmissives.com/the-story-of-the-grid/restructuring-the-effects-of-ferc-orders-888-889-and-2000/> [<https://perma.cc/RN7Z-V59K>] (last visited Aug. 16, 2021).

40. *See id.*

41. *Id.*

42. *Electric Power Markets*, FED. ENERGY REGUL. COMM'N, <https://www.ferc.gov/industries-data/market-assessments/overview/electric-power-markets> [<https://perma.cc/AF8X-LDH4>] (last updated July 20, 2021); *see also* Barron, *supra* note 3.

nondiscriminatory access to transmission lines.⁴³ Therefore, FERC has regulatory authority over the transmission power lines even if they do not own the physical lines.

Along with facilitating open-access, ISOs and Regional Transmission Organizations (“RTOs”) operate the transmission system and promote competition among generators who are also wholesale market participants.⁴⁴ ISOs and RTOs are similar and often grouped together or used interchangeably. FERC Order 2000, “encouraged utilities to join [RTOs] which, like an ISO, would operate the transmission systems and develop innovative procedures to manage transmission equitably.”⁴⁵ Accordingly, RTOs generally perform the same functions as ISOs, but RTOs cover a larger geographic area.⁴⁶

RTOs and ISOs “operate in deregulated electricity markets.”⁴⁷ They are neutral, nonprofit, independent entities not affiliated with other market players,⁴⁸ and they “manage [geographic] segments of the federal grid.”⁴⁹ As previously mentioned, there are some parts of the country still operating under vertically integrated monopolies “with a single entity in charge of the generation, transmission, and delivery of electricity to customers within a geographic region.”⁵⁰ However, RTO regions supply two-thirds of the nation’s electricity.⁵¹

In the 1900s and 2000s during the RTO and ISO restructuring, states chose whether to continue regulating under vertically integrated monopoly utilities or to join or form an RTO or ISO.⁵² Therefore, electric utilities can either be “regulated and operate as vertically integrated monopolies with oversight from state public utility commissions, or they can operate in

43. *Independent System Operator (ISO)*, PRACTICAL LAW GLOSSARY, Westlaw (2020).

44. *Electric Power Markets*, *supra* note 42.

45. *Id.*

46. *See Independent System Operator (ISO)*, *supra* note 43.

47. *Id.*

48. GREER, *supra* note 19, at 54.

49. Nat’l Ass’n of Regul. Util. Comm’rs v. FERC, 964 F.3d 1177, 1182 (D.C. Cir. 2020) (citing *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 136 S. Ct. 1288, 1292 (2016); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 5 (D.C. Cir. 2002)).

50. Josiah Neeley & Devin Hartman, *Fact Sheet on Options for Enhancing Regional Competition in Wholesale Electricity*, R ST. (Sept. 29, 2020), <https://www.rstreet.org/2020/09/29/fact-sheet-on-options-for-enhancing-regional-competition-in-wholesale-electricity> [<https://perma.cc/4JZG-2HYE>].

51. *Electric Power Markets*, *supra* note 42.

52. Devin Hartman, *Traditionally Regulated vs. Competitive Wholesale Markets*, R ST. (Aug. 18, 2016), <https://www.rstreet.org/2016/08/18/traditionally-regulated-vs-competitive-wholesale-markets/> [<https://perma.cc/WDQ9-GZ2M>].

deregulated markets where electric energy prices are set by the market with some federal oversight of wholesale market operations.”⁵³

Most states opted for the latter and subsequently deregulated or restructured their electricity systems.⁵⁴ This restructuring required utilities to sell their generating assets, which in turn created independently owned energy generators.⁵⁵ However, the utilities maintained their transmission and distribution power line assets, and power lines are natural monopolies.⁵⁶ Consequently, the utilities retained ownership of the assets, but the monopolistic operation of the power lines became subject to government regulation.⁵⁷ These natural monopolies for transmission are now either regulated by FERC through an RTO or ISO or by the states through public utility commissions.⁵⁸ This regulatory concept within deregulated markets created two separate markets: a wholesale market and a retail market—where “generators (companies that generate electricity) sell electricity into a wholesale market, and retail energy suppliers purchase this electricity to sell it to customers.”⁵⁹ FERC has jurisdiction over the wholesale market and sales while the states have jurisdiction over the retail market and sales.

To further explain the distinction between wholesale and retail markets, wholesale electricity markets are administered by RTOs and ISOs.⁶⁰ Wholesale energy is energy bought from electricity generators who sell it in the wholesale markets to then be resold to retail suppliers. The retail suppliers then purchase the energy to fulfill their respective local demand.⁶¹ After the electricity is bought by the retail suppliers, it can be distributed to consumers through the retail market.⁶² In sum, “[t]he

53. Cleary & Palmer, *supra* note 33 (emphasis omitted).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*; see discussion *infra* Part II.

59. Customer First Renewables, *Regulated & Deregulated Energy Markets*, INFOCAST, <https://infocastinc.com/market-insights/solar/regulated-deregulated-energy-markets> [<https://perma.cc/D993-JBNC>] (last visited Aug. 16, 2021).

60. Elise Caplan, *How Wholesale Markets Affect Retail Rates*, AM. PUB. POWER ASS’N (Jan. 5, 2018), <https://www.publicpower.org/periodical/article/how-wholesale-markets-affect-retail-rates> [<https://perma.cc/GX7R-Q8KR>].

61. *Wholesale Energy – Definition and Meaning*, MKT. BUS. NEWS, <https://marketbusinessnews.com/financial-glossary/wholesale-energy-definition-meaning> [<https://perma.cc/KRH2-SZTN>] (last visited Aug. 16, 2021).

62. *Market for Electricity*, PJM LEARNING CTR., <https://learn.pjm.com/electricity-basics/market-for-electricity.aspx> [<https://perma.cc/ZQ2J-KFS3>] (last visited Aug. 16, 2021).

purchase and sale of electricity to resellers (entities that purchase goods or services with the intention to resell them to someone else) is conducted in the wholesale market, while the purchase and sale of electricity to consumers is done in the retail market.”⁶³

Comprehensively, RTOs and ISOs have functional control over the transmission process for sales accessing the wholesale market, but RTOs and ISOs do not own the transmission line assets.⁶⁴ RTOs and ISOs “purchase power from generators, resell it to electric distribution utilities, who then resell it again to end-use [consumers].”⁶⁵ RTOs and ISOs are regulated by FERC and not by the states, meaning the RTO and ISO regulations are set by FERC-approved tariffs and not by state public utility commissions.⁶⁶

II. JURISDICTIONAL ANALYSIS

As the electric power industry developed from vertically integrated participation models with a single utility owning the generation, transmission, and distribution facilities into deregulated markets, the jurisdictional line between FERC and the states started to overlap, creating uncertainty.⁶⁷ Generally, power is either controlled by the state in the retail market, distribution, and generation processes or controlled by FERC in the wholesale market and interstate transmission process.⁶⁸

Power has conventionally traveled in one direction. Thus, with conventional generation of energy and the traditional industry structure, it could generally be determined where the energy was located in the power supply chain from the generators to the end consumers.⁶⁹ The location of power would determine what market the sale was in, retail or wholesale, which subsequently determined who had regulatory control over that

63. *Id.*

64. AM. PUB. POWER ASS’N, WHOLESAL ELECTRICITY MARKETS AND REGIONAL TRANSMISSION ORGANIZATIONS 1 (2017), https://www.publicpower.org/system/files/documents/wholesale_electricity_markets_and_regional_transmission_organizations_1.pdf [<https://perma.cc/69YJ-W4DG>].

65. Seth Blumsack, *Regional Transmission Organizations*, PENN. ST. COLL. EARTH & MIN. SCIS., <https://www.e-education.psu.edu/eme801/node/535> [<https://perma.cc/68RB-KKYC>] (last visited Aug. 16, 2021).

66. *Id.*

67. JEFFREY S. DENNIS ET AL., ENERGY ANALYSIS & ENV’T IMPACTS DIV. LAWRENCE BERKELY NAT’L LAB’Y, FEDERAL/STATE JURISDICTIONAL SPLIT: IMPLICATIONS FOR EMERGING ELECTRICITY TECHNOLOGIES 7 (2016), <https://eta-publications.lbl.gov/sites/default/files/lbnl-1006675.pdf>.

68. *Id.* at 8.

69. *Id.*

power, states or FERC.⁷⁰ When energy is a part of “wholesale sales of generated power between utilities in interstate commerce and the associated high-voltage transmission of electric energy in interstate commerce,” then FERC has jurisdiction.⁷¹ Once the energy reaches the distribution level, which consists of local distribution systems where consumers buy and receive energy, the states would then have jurisdictional control.⁷²

Thus far, this Comment has discussed the history of the conventional process of energy delivery, stated the purpose of FERC’s creation, and touched on jurisdictional uncertainty in the transition to a deregulated energy market. However, to understand the significance of the jurisdictional tension, which has been the subject of continued litigation, it is essential to first understand how FERC was created and also how jurisdiction is authorized.

A. The Federal Power Act

The Department of Energy Organization Act of 1977 established the Department of Energy in the executive branch.⁷³ Within the Department, under Title IV, Congress created FERC.⁷⁴ Within this Title, Congress under the Federal Power Act (FPA) transferred authority from the Federal Power Commission (FPC) to FERC.⁷⁵ The FPA is the federal statute governing the “wholesale transmission and sale of electric power, as well as the regulation of hydroelectric power.”⁷⁶ The FPA establishes a framework for FERC’s regulation in different energy industries, including the buying, selling, and transmitting of wholesale energy.⁷⁷

FERC’s jurisdictional limits regarding regulation of electric energy are set forth in Part II of the FPA.⁷⁸ FERC’s jurisdiction encompasses “the transmission of electric energy in interstate commerce” and “the sale of electric energy at wholesale in interstate commerce.”⁷⁹ FERC has

70. *Id.*

71. *Id.*

72. *Id.*

73. S. REP. NO. 95-367 (1977) (Conf. Rep.).

74. *Id.*

75. *Id.*

76. ADAM VANN, CONG. RES. SERV., THE LEGAL FRAMEWORK OF THE FEDERAL POWER ACT 1 (2020), <https://crsreports.congress.gov/product/pdf/IF/IF11411>.

77. *Id.*

78. *Id.*

79. *Id.* (quoting 16 U.S.C. § 824(b)).

jurisdiction “over all facilities for such transmission or sale of electric energy.”⁸⁰ Further, any rates or charges by a public utility “for or in connection with the transmission or sale of electric energy subject to [FERC’s jurisdiction], and all rules and regulations affecting or pertaining to such rates and charges shall be just and reasonable.”⁸¹ FERC, on its own motion or complaint, can initiate a proceeding to determine if any rate, charge, or classification is unjust or unreasonable.⁸² The term “sale of electric energy at wholesale” for purposes of the FPA “means a sale of electric energy to any person for resale.”⁸³ Overall, FERC has authority to regulate “wholesale electricity rates and any rule or practice ‘affecting’ such rates.”⁸⁴

FERC’s jurisdiction is limited in all other areas not specifically delegated to it under the FPA.⁸⁵ Accordingly, FERC does not have jurisdiction over “any other sale of electric energy or [to] deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.”⁸⁶ Congress, unless specifically provided for elsewhere in the FPA, further granted the states jurisdiction “over facilities used for the generation of electric energy or over facilities used in local distribution or . . . for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.”⁸⁷

B. Jurisdictional Boundaries

With jurisprudential support, the FPA established a “bright line” rule of federal jurisdiction over the transmission and wholesale sale of energy on the one hand and state jurisdiction over the generation, distribution, and retail sale of energy on the other.⁸⁸ A separation of state and federal

80. 16 U.S.C. § 824(b)(1).

81. *Id.* § 824d(a).

82. *Id.* § 824e(a).

83. *Id.* § 824(d).

84. *Nat’l Ass’n of Regul. Util. Comm’rs v. FERC*, 964 F.3d 1177, 1181 (D.C. Cir. 2020) (quoting *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 265 (2016) (quoting 16 U.S.C. §§ 824(b), 824e(a))).

85. *See* 16 U.S.C. § 824(b)(1).

86. *Id.*

87. *Id.*; *see also Nat’l Ass’n of Regul. Util. Comm’rs*, 964 F.3d at 1182.

88. *DENNIS ET AL.*, *supra* note 67, at v.

authority exists with “clear jurisdictional lines of dual sovereignty.”⁸⁹ In 1964, the Supreme Court recognized that Congress intended to draw a distinct, easily ascertainable line between state and federal jurisdictions and made case-by-case jurisdiction analysis effectively irrelevant.⁹⁰ The Supreme Court further dictated that this bright line jurisdictional rule was done in the FPA by making federal “jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.”⁹¹ The FPA created a field preemption because the federal government through the FPC had authority over wholesale sales, and if a state regulation fell within this realm, it would be preempted.⁹² However, since the enactment of the FPA, the electric power industry has evolved into a process more complex than a simple categorization of energy into wholesale or retail sales.⁹³

Prior to Order 888, a “comingling” test was established in 1972 to differentiate between wholesale and retail sales and stated that facilities fall under FERC jurisdiction if any portion of the electricity is transmitted across state lines, which essentially covers almost all of the electricity in the U.S.⁹⁴ As applied, this test meant that “wholesale sales or transmission services that use the interconnected interstate transmission system are generally considered to be in interstate commerce.”⁹⁵ Thereafter, FERC issued Order 888, which was upheld in *New York v. FERC*.⁹⁶ As previously explained, many new energy sources lacked access to transmission lines, resulting in anti-competitive interstate energy markets.⁹⁷ This problem led to the expansion of FERC’s authority over the transmission of energy and Order 888’s providing of “equal access” to power lines.⁹⁸ More importantly, in upholding Order 888, the Supreme Court established that the regulation of transmission, which had previously been subject to state regulation, and the regulation of wholesale sales were now both under

89. Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 402 (2016).

90. *See* Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964).

91. *Id.*

92. Rossi, *supra* note 89, at 417.

93. *See id.* at 429 (citing *New York v. FERC*, 535 U.S. 1, 16 (2002)).

94. DENNIS ET AL., *supra* note 67, at 11.

95. *Id.*

96. *Id.* (citing *New York v. FERC*, 535 U.S. 1).

97. *See* Rossi, *supra* note 89, at 428 (citing *New York v. FERC*, 535 U.S. at 8–9, 9 n.6).

98. *Id.* (citing *New York v. FERC*, 535 U.S. at 10–11).

FERC's jurisdiction.⁹⁹ The Court reasoned that even the retail transmission of energy supporting a retail sale transaction is electricity in interstate commerce "because of the nature of the national grid."¹⁰⁰ The Court reached this conclusion because the language of the statute does not limit "FERC's *transmission* jurisdiction to the wholesale market, although the statute does limit FERC's *sale* jurisdiction to that at wholesale."¹⁰¹ In clarifying its holding, the Court reiterated that it was not redefining jurisdictional lines; however, it is now established that FERC essentially has jurisdiction over any transmission of energy and wholesale sales, while the states have jurisdiction over the distribution of retail energy and retail sales. FERC has control over the transmission process because it has jurisdiction over interstate commerce, and the transmission of energy on the national grid's interconnected transmission lines constitutes transmission in interstate commerce.¹⁰²

FERC thereafter continued to expand its wholesale jurisdiction under Order 745, which was again supported by the Supreme Court in *FERC v. Electric Power Supply Ass'n (EPSA)*.¹⁰³ In *EPSA*, the Supreme Court created a test for determining state and federal jurisdiction. Instead of the Court starting the jurisdictional analysis with the traditional bright-line approach,¹⁰⁴ the majority acknowledged that the energy industry had changed since the passage of the FPA, and FERC's role in ensuring just and reasonable rates had evolved.¹⁰⁵ Thus, the test analyzes the scope of FERC's regulatory authority in three parts.¹⁰⁶ First, the court determines whether the disputed issue directly affects wholesale rates.¹⁰⁷ Second, the court establishes that FERC has not regulated retail sales.¹⁰⁸ Third, the court reviews whether "the contrary view would conflict with the [FPA's]

99. *See id.* at 429 (citing *New York v. FERC*, 535 U.S. at 21).

100. DENNIS ET AL., *supra* note 67, at 12 (quoting *New York v. FERC*, 535 U.S. at 17).

101. *Id.* (quoting *New York v. FERC*, 535 U.S. at 17).

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

103. DENNIS ET AL., *supra* note 67, at 14–15; *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260 (2016).

104. *See* Rossi, *supra* note 89, at 434 (citing *Elec. Power Supply Ass'n*, 577 U.S. at 265–67).

105. *Elec. Power Supply Ass'n*, 577 U.S. at 267–68.

106. *See id.* at 276.

107. *See id.*

108. *Id.* at 276–77.

core purposes.”¹⁰⁹ The first two parts of the analysis ensure that the proposed rule complies with the FPA’s plain language.¹¹⁰

FERC Order 745 was an expansion of FERC Order 719 which attempted to eliminate barriers for demand response participation in wholesale markets.¹¹¹ Demand response is a process in which RTOs and ISOs have allowed retail end-users of electricity to submit offers.¹¹² More specifically, FERC required RTOs and ISOs to amend their rules to allow “an aggregator of retail customers . . . to bid demand response on behalf of retail customers directly into the RTO’s or ISO’s organized wholesale markets, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate.”¹¹³ The Supreme Court in *EPSA* noted that “wholesale market operators treat those [demand response] offers just like bids from generators to increase supply.”¹¹⁴ Order 719 implemented a state opt-out policy “allowing any state regulatory body to prohibit consumers in its retail market from taking part in wholesale demand response programs.”¹¹⁵ FERC offered this opt-out provision to avoid overriding state restrictions on retail consumers’ participation in the wholesale demand response programs.¹¹⁶ FERC’s purpose for the program was to not challenge state jurisdictional authority.¹¹⁷ Rather, it was to recognize the relationship between wholesale and retail markets and the states’ general authority over retail sales.¹¹⁸

Additionally, FERC Order 745 required that energy from demand response resources be compensated at market price.¹¹⁹ Accordingly, Order 745 set a single price standard for demand response resources in RTO and ISO markets, contrary to the prior approach that allowed each RTO and

109. *Id.* at 277.

110. *Id.*

111. *See* DENNIS ET AL., *supra* note 67, at 14.

112. *Id.* at 13.

113. *Wholesale Competition in Regions with Organized Electric Markets*, 129 F.E.R.C. ¶ 61,252 at P 5 (2009).

114. DENNIS ET AL., *supra* note 67, at 13 (quoting *Elec. Power Supply Ass’n*, 577 U.S. at 270).

115. *Elec. Power Supply Ass’n*, 577 U.S. at 275.

116. Delia Patterson, *FERC Jurisdictional Creep*, AM. PUB. POWER ASS’N (Mar. 28, 2018), <https://www.publicpower.org/blog/ferc-jurisdictional-creep> [<https://perma.cc/7GEC-NFRR>].

117. *Id.*

118. *Elec. Power Supply Ass’n*, 577 U.S. at 286–88.

119. DENNIS ET AL., *supra* note 67, at 14.

ISO to develop its own compensation mechanism.¹²⁰ This extension of FERC's jurisdiction was up for review in *EPSA*.

Applying the three-part test illustrated above, the Court first concluded that FERC's jurisdiction over demand response bids directly affected wholesale rates.¹²¹ The Court adopted the precedential statutory construction of "limiting FERC's 'affecting' jurisdiction to rules or practices that 'directly affect'" wholesale rates.¹²² The FPA granted FERC with authority over actions affecting wholesale rates to ensure that the rates are just and reasonable.¹²³ The Court reasoned that compensating demand response bids lowers wholesale prices, thus directly affecting wholesale rates.¹²⁴ Second, the Court concluded that Order 745 does not purport to regulate electricity sales in the retail market.¹²⁵ The Court noted that FERC has authority to regulate what occurs on the wholesale market, and if doing so affects retail rates, then there is no bar on jurisdiction imposed.¹²⁶ Lastly, the Court concluded that the *EPSA*'s position would conflict with the FPA's core purpose.¹²⁷

In regard to the state opt-out program, the Court stated that the Order's wholesale demand response scheme is a "program of cooperative federalism"¹²⁸ and further eliminated any doubt that FERC was noncompliant with the FPA.¹²⁹ The opt-out program's characterization as one of cooperative federalism seems to have assisted Order 745 in surviving the jurisdictional challenge.¹³⁰ The concept of a state opt-out

120. *Id.* (citing *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 F.E.R.C. ¶ 61,187 at P 14 (2011)).

121. *Elec. Power Supply Ass'n*, 577 U.S. at 276; see also DENNIS ET AL., *supra* note 67, at 15.

122. *Elec. Power Supply Ass'n*, 577 U.S. at 278 (quoting *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004)).

123. *Id.* at 277.

124. *Id.* at 279.

125. *Id.* at 277.

126. *Id.* at 281–82.

127. *Id.* at 277. *EPSA* suggested that both the states and FERC lacked jurisdiction over wholesale demand response. *Id.* This would result in no entity having jurisdiction to regulate, which contradicts the purpose of protecting against superfluous prices and administering effective transmission of energy. *Id.*

128. Cooperative federalism occurs when state, local, and federal governments share governmental authority rather than having one sector dominate a certain area of policy. *Cooperative Federalism Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/c/cooperative-federalism> [<https://perma.cc/9BKN-ALWU>] (last visited Aug. 16, 2021).

129. *Elec. Power Supply Ass'n*, 577 U.S. at 288.

130. DENNIS ET AL., *supra* note 67, at 16.

program was partially addressed in other recent affirmations of FERC's extensive jurisdictional reach.¹³¹

The historical significance of the jurisdictional challenges and the industry's evolution is illustrated in the shift from an "exclusive sphere of federal authority" to a more "modern preemption analysis."¹³² The precedential cases also establish a foundation for future jurisdictional challenges. However, even with such a foundation, uncertainty still exists in the jurisdictional divide as the energy industry continues to evolve.

The energy sector will soon completely shift from traditional models and sources of energy to unprecedented territory with the introduction of new technologies to the RTO and ISO markets. Recent decisions and scholars have both subsequently recognized "the decline of the bright-line approach and rise of concurrent jurisdiction."¹³³ However, with the recent affirmation of FERC Order 841 and Order 2222 that followed, concurrent jurisdiction is transforming into exclusive FERC jurisdiction by sidelining states in what will be the future of the energy industry. FERC continues to reshape the electric power industry by issuing orders and exercising its authority under the FPA.

III. FERC ORDER 841

ESRs are an emerging system allowing for efficient energy storage.¹³⁴ Electric storage is extremely adaptable and diverse in terms of what it can offer the energy industry. The energy industry has been accustomed to a system that flows unilaterally and has different facilities for one specific purpose, but an ESR is capable of fulfilling the roles of a generation, transmission, and/or distribution facility on its own. ESRs are distinct from traditional sources because they have unique physical and operational characteristics, including the ability to both inject energy into the grid and to receive energy from it.¹³⁵ Additionally, the energy industry has traditionally operated by consuming the energy as soon as it is produced.¹³⁶ The expansive use of ESR technology does not operate in this traditional way and can have impactful consequences to the generation, transmission,

131. See, e.g., *Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1183–84 (D.C. Cir. 2020).

132. Rossi, *supra* note 89, at 418.

133. *Id.* at 428.

134. *Nat'l Ass'n of Regul. Util. Comm'rs*, 964 F.3d at 1182.

135. *Id.* (quoting Order No. 841, *supra* note 6, at PP 2, 7).

136. See SPP STAFF, SW. POWER POOL, INC., *ELECTRIC STORAGE RESOURCES 2* (2020), <https://spp.org/documents/61602/electric%20storage%20%20white%20paper.pdf> [<https://perma.cc/3DFF-VCJB>].

and distribution processes.¹³⁷ However, ESRs do not directly supply new energy; instead, they have the ability to both support and qualify as any of the three processes.¹³⁸

An ESR can act as both a generation and a transmission facility.¹³⁹ An ESR acts as a generator by injecting stored energy into the transmission grid.¹⁴⁰ By buying energy from the grid or receiving energy from an electric generator, ESRs can store generated energy until such time that increased demand necessitates its release.¹⁴¹ This increases efficiency within the system because when demand is high, the ESR can assist the traditional generators in providing the requisite amount of energy. Additionally, an ESR can act as a transmission facility and be “interconnected to the transmission system.”¹⁴² ESRs can also be connected at the distribution level and can receive from and inject energy into the wholesale market by going through the state’s distribution system.¹⁴³ Consequently, an ESR can participate in both wholesale RTO and ISO markets and retail, behind-the-meter jurisdictions.¹⁴⁴ Consequently, jurisdictional authority is dependent on the market in which the ESR is participating.

The rules surrounding participation in the energy industry were designed with traditional sources in mind. These rules create barriers and ineligibility concerns and also preclude the use of new technologies, with the main barrier being “resources that are technically capable of providing services are precluded from competing with resources that are already participating in the RTO [and] ISO markets.”¹⁴⁵ This barrier to participation inhibits market competition because the energy sector is categorically excluding new sources, which subsequently disincentivizes innovation in new technologies. The purpose of RTO and ISO markets is to enhance competition to ensure just and reasonable rates. Thus, FERC set out to remove these barriers to participation because they were directly affecting wholesale rates and competition.¹⁴⁶

137. *Id.*

138. *Id.*

139. *Id.* at 6.

140. *Id.* at 2.

141. *Id.* at 6.

142. Order No. 841, *supra* note 6, at P 82. As discussed in Part II, FERC generally has jurisdiction over the transmission process through the RTO and ISO markets.

143. *Id.* at P 9.

144. SPP STAFF, *supra* note 136, at 6.

145. Order No. 841, *supra* note 6, at P 2.

146. *Id.*

FERC issued Order 841 on February 15, 2018, which requires service markets operated by RTOs and ISOs to establish a participation model of market rules allowing for the participation of ESRs.¹⁴⁷ The rule requires RTOs and ISOs to revise their tariffs to establish a participation model accommodating the unique physical and operational characteristics of ESRs.¹⁴⁸ Along with other requirements, each RTO and ISO in their tariff provisions must ensure that the ESR using the participation model is able to provide all services that it is capable of providing.¹⁴⁹

RTO and ISO markets created a participation model that effectively functions as a set of market rules.¹⁵⁰ These models are not designed for newer technological advancements but rather favor traditional generation sources, like power plants, which can limit the participation of new sources.¹⁵¹ RTOs and ISOs generally have tariff provisions that “apply to all market participants,” but they also create specific tariff provisions for individual resources when those resources require unique treatment.¹⁵² These specific tariff provisions are what FERC refers to as a participation model.¹⁵³

FERC defines an ESR as “a resource capable of receiving electric energy from the grid and storing it for later injection of electric energy back to the grid.”¹⁵⁴ FERC states that this definition is intended to cover any ESR regardless of the medium.¹⁵⁵ Order 841 adds that “resources that are interconnected to the transmission system, distribution system, or behind the meter” are also included in this definition.¹⁵⁶ This is a broad definition to ensure market rules are not favoring a particular electric storage technology but are allowing participation and access to any electric storage technology.¹⁵⁷

Comments in response to FERC’s Notice of Proposed Rulemaking raised concerns regarding “the jurisdictional implications of including

147. *Id.* at P 1.

148. *Id.* at P 3.

149. *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 167 F.E.R.C. ¶ 61,154 at P 4 (2019) [hereinafter Order No. 841-A].

150. *Nat’l Ass’n of Regul. Util. Comm’rs v. FERC*, 964 F.3d 1177, 1182 (D.C. Cir. 2020).

151. *Id.*

152. Order No. 841, *supra* note 6, at P 3.

153. *Id.*

154. *Id.* at P 29.

155. *Id.*

156. *Id.*

157. Order No. 841-A, *supra* note 149, at P 5.

[ESRs] connected at the distribution level in the definition.”¹⁵⁸ In administrative law, the notice of proposed rulemaking process is the stage in rule promulgation during which entities can submit comments on the proposed rule, and the agency is required to take these comments into consideration before finalizing the rule.¹⁵⁹ Accordingly, commenters requested that FERC more expressly confirm state jurisdiction over matters regarding distribution systems and the ability of ESRs to participate at that level.¹⁶⁰ This led commenters to assert that FERC should “allow states to decide whether [ESRs] in their state that are located on the distribution system or behind a retail meter are permitted to participate in the RTO [and] ISO markets through the electric storage resource participation model proposed.”¹⁶¹ FERC rejected this proposal in its final rule stating, “[b]y including all electric storage technologies, and by allowing resources that are interconnected to the transmission system, distribution system, or behind the meter to use the participation model for electric storage resources, we are ensuring that the market rules will not be designed for any particular electric storage technology.”¹⁶²

FERC is promoting innovation and growth in the energy sector by allowing new sources to enter the grid. The problem lies in the state distribution facilities’ reluctance to allow the new sources falling under the ESR definition to use their distribution facilities to reach the federal wholesale market. Furthermore, FERC disagreed with commenters who asserted that the definition of an ESR should be limited to those ESRs that are interconnected to the transmission system.¹⁶³ FERC reasoned that ESRs connected to the state distribution system already participate in the RTO and ISO markets, and there are traditional sources not directly connected to the transmission system which are currently participating in the RTO and ISO markets.¹⁶⁴

Order 841’s purpose is to further expand the inclusion of various types of participation in the wholesale market. Excluding sources connected to the distribution system is contrary to that purpose. There are many different sources of energy connected to state distribution systems that participate in the RTO and ISO markets today. Consequently, FERC did

158. Order No. 841, *supra* note 6, at P 26.

159. See OFF. FED. REG., A GUIDE TO THE RULEMAKING PROCESS 6 (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/JMG6-GTFB>].

160. Order No. 841, *supra* note 6, at P 26.

161. *Id.* at P 27.

162. *Id.* at P 29.

163. *Id.* at P 31.

164. *Id.*

not allow states to decide whether ESRs connected to the distribution system or located behind a retail meter “are permitted to participate in the RTO [and] ISO markets through the electric storage resource participation model.”¹⁶⁵ However, states have authority over distribution systems; thus, allowing FERC to have authority over sources that are connected to the state distribution system is an expansive reach of FERC’s jurisdiction. With this, FERC affirmed that it has exclusive jurisdiction over the wholesale markets and thus also has control over participation in the wholesale markets.¹⁶⁶

On May 16, 2019, FERC issued Order 841-A, which addressed various petitions for rehearing and clarification on Order 841.¹⁶⁷ Petitioners raised the issues mentioned above and further stated that FERC should provide retail market authorities the option of an opt-out, similar to the one for demand response in Order 719.¹⁶⁸ Several petitioners asked FERC for a rehearing and clarification on its denial of these concerns for a state opt-out and denial of allowing states to prohibit ESRs located on the distribution system or behind-the-meter from participating in RTO and ISO markets.¹⁶⁹ The petitioners contended that not allowing for an opt-out constitutes a violation of the FPA.¹⁷⁰

Additional concerns were raised regarding the potential need for distribution facilities to upgrade their systems to manage and allow for the additional number of diverse energy sources.¹⁷¹ The Order could require fundamental changes to distribution systems to the detriment of the states’ markets.¹⁷² These additional administrative burdens would be borne by the states because they have control over and thus are responsible for the operations, management, reliability, and safety of the distribution systems.¹⁷³ FERC was unpersuaded by these arguments, explaining that the contentions which state that Order 841 would require “distribution utilities to establish expensive processes to assist the market participation of distribution-connected and behind-the-meter” ESRs are not accurate.¹⁷⁴ FERC reasoned that it is not *directly* imposing new requirements on the

165. *Id.* at P 35.

166. Order No. 841-A, *supra* note 149, at P 9.

167. *Id.* at P 1.

168. *Id.* at P 11; *see also* FERC v. Elec. Power Supply Ass’n, 577 U.S. 260, 260 (2016).

169. Order No. 841-A, *supra* note 149, at P 12.

170. *Id.*; *see* 16 U.S.C. § 824.

171. Order No. 841, *supra* note 6, at P 262.

172. *Id.* at P 43.

173. Order No. 841-A, *supra* note 149, at P 18.

174. *Id.* at P 45.

distribution utilities to allow for the participation of ESRs in RTO and ISO markets.¹⁷⁵ In other words, FERC is not directly requiring that ESRs have access to the states' distribution system, but rather the states cannot prohibit the ESRs from accessing the distribution systems because that would invade FERC's jurisdiction over the wholesale markets.¹⁷⁶

FERC asserts that the states are still left with the authority to regulate distribution systems, including the "design, operations, power quality, reliability, and system costs."¹⁷⁷ Moreover, states still have the authority to regulate the distribution systems' terms of access as long as such regulations do not "aim[] directly at the RTO/ISO markets."¹⁷⁸ FERC states that this reasoning aligns with the FPA principles of cooperative federalism because when ESRs are participating in RTO and ISO markets and "interconnected with the distribution system," the ESR is still under the state's authority.¹⁷⁹ Thus, Order 841 is not regulating the distribution systems nor is it directly regulating the "right of access to the distribution system itself," but it does mandate that the states cannot prohibit access to them.¹⁸⁰

In Order 841-A, FERC generally affirmed Order 841 and simultaneously denied rehearing on "Order No. 841's lack of State opt-out for local ESRs."¹⁸¹ In affirming the Order, FERC explained that: (1) it has the authority to determine what sources participate in the wholesale markets;¹⁸² (2) Order 841 does not directly regulate any retail sales;¹⁸³ (3) that states cannot prohibit retail customers from participating in wholesale

175. *Id.* at P 47.

176. *Id.*

177. *Id.* at P 42 (quoting Order No. 841, *supra* note 6, at P 36).

178. *Id.* at P 41 (citing *Advanced Energy Economy*, 163 F.E.R.C. ¶ 61,030 at P 37 (2018) (finding that a provision directly restricting retail customers' participation in RTO and ISO markets, even if contained in the terms of retail services, nonetheless intrudes on the Commission's jurisdiction over the wholesale markets); *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 386 (2015) (finding that the proper test for determining whether a state action is preempted is "whether the challenged measures are aimed directly at interstate purchasers and wholesalers for resale or not.")).

179. *Id.* at P 48.

180. *Id.*

181. *Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1183 (D.C. Cir. 2020) (citing Order No. 841-A, *supra* note 149).

182. *Id.* at 1183-84 (citing Order No. 841-A, *supra* note 149, at P 38).

183. *Id.* at 1184 (citing Order No. 841-A, *supra* note 149, at P 41).

markets;¹⁸⁴ and (4) that the Order does not hinder state authority to regulate their distribution systems.¹⁸⁵ Petitions for review followed.¹⁸⁶

IV. *NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS V. FEDERAL ENERGY REGULATORY COMMISSION*

National Ass'n of Regulatory Utility Commissioners v. FERC marked the first challenge to Order 841 in a petition for review. The court consolidated two cases filed by the National Association of Regulatory Utility Commissioners (NARUC) along with other entities collectively referred to as “Local Utility Petitioners.”¹⁸⁷ NARUC and the Local Utility Petitioners argued that FERC’s inflexible framework over state and local facilities caused injury.¹⁸⁸

Petitioners argued that FERC exceeded its jurisdictional authority by precluding states from “‘broadly prohibiting’ local ESRs from participating in RTO [and] ISO markets.”¹⁸⁹ NARUC additionally contended that not including a state opt-out provision invaded states’ authority and “‘commandeer[ed] the state[s’] administrative processes.”¹⁹⁰ The Local Utility Petitioners argued that even if FERC had jurisdictional authority, the failure to include a state opt-out option was otherwise arbitrary and capricious under the Administrative Procedure Act (APA).¹⁹¹ The court, thus, had to determine whether Order 841 violated the FPA’s jurisdictional division or constituted an arbitrary and capricious agency action under the APA.¹⁹²

The court used the three-prong test from the Supreme Court in *EPSCA*¹⁹³ to address the exceeding-jurisdiction challenges petitioned for

184. *Id.* (citing Order No. 841-A, *supra* note 149, at P 41).

185. *Id.* (citing Order No. 841-A, *supra* note 149, at P 48).

186. *Id.*

187. *See id.* NARUC is “an association representing the interests of state utility commissions charged with regulating the electric utilities in their respective jurisdictions.” *Id.* The Local Utility Petitioners consist of “local electric utilities that own or operate local distribution systems” and have a managerial role in behind-the-meter ESR connections to local distribution systems. *Id.* at 1185. The Local Utility Petitioners contended that “[t]hey bear the operational burdens of those ESRs delivering electricity to federal wholesale markets.” *Id.*

188. *See id.*

189. *Id.* at 1184 (quoting Order No. 841-A, *supra* note 149, at P 41).

190. *Id.*

191. *Id.*; (citing 5 U.S.C. § 706(2)(A)).

192. *See Nat’l Ass’n of Regul. Util. Comm’rs*, 964 F.3d at 1185.

193. *See FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260 (2016).

review in *NARUC*.¹⁹⁴ First, the court determined whether the challenged action at issue directly affected wholesale rates.¹⁹⁵ Next, the court looked at whether the Commission had regulated state-regulated facilities.¹⁹⁶ Lastly, the court ensured its conclusion did not contradict the FPA and determined whether the contrary view would “conflict with the Act’s core purposes.”¹⁹⁷

First, the court quickly determined that the challenged action—FERC prohibiting states from imposing broad participation bans—directly affected wholesale rates.¹⁹⁸ Order 841 targets ESR participation in wholesale markets and is “intentionally designed to increase wholesale competition, thereby reducing wholesale rates.”¹⁹⁹ Second, the court addressed “whether Order No. 841 unlawfully regulates matters left to the States.”²⁰⁰ Petitioners argued that not allowing states to block ESRs from accessing the federal market was FERC directly regulating state distribution systems, a matter left to state authority under the FPA.²⁰¹ The court disagreed with the petitioners’ contention because FERC was “not regulating matters of access,” and the Order itself was not directly regulating those distribution systems.²⁰² States still have managerial authority over their distribution facilities and systems.²⁰³ However, Petitioners further argued that having the “authority to manage and oversee their distribution systems” meant they should also have the “ability to close their facilities to local ESRs seeking to transport electric energy to the wholesale markets.”²⁰⁴

The court responded that local ESRs would be required to use state distribution systems if they choose to participate in the federal market, and the court concluded that this “is the type of permissible effect of direct regulation of federal wholesale sales that the FPA allows.”²⁰⁵ Since FERC has exclusive authority over the determination as to who can participate in

194. See *Nat’l Ass’n of Regul. Util. Comm’rs*, 964 F.3d at 1185–86.

195. *Id.* at 1186 (citing *Elec. Power Supply Ass’n*, 577 U.S. at 276).

196. *Id.* (citing *Elec. Power Supply Ass’n*, 577 U.S. at 276–77).

197. *Id.* (quoting *Elec. Power Supply Ass’n*, 577 U.S. at 277).

198. See *id.*

199. *Id.*

200. *Id.*

201. See *id.* at 1186–87.

202. *Id.* at 1187.

203. *Id.*

204. *Id.*

205. *Id.*

wholesale markets, the Supremacy Clause, not Order 841, precludes states from interfering.²⁰⁶

The court then proceeded to explain the concept of field preemption²⁰⁷ and declared that the language of Order 841-A is merely a restatement of federal preemption principles.²⁰⁸ The court cited *Oneok* as authority to explain that preemption is dependent on “the *target* at which the State *aims*.”²⁰⁹ The court continued by listing multiple cases that applied preemption principles to the FPA’s two jurisdictional spheres to stress that preemption concepts are commonly used in these cases.²¹⁰ The court ultimately concluded that “NARUC’s argument that a local ESR does not participate in the federal wholesale market (and thus cannot fall with FERC’s authority) until after it navigates through State-regulated facilities fails.”²¹¹ This holding is different from what was traditionally applied and expanded FERC’s jurisdiction.

The court used the reasoning from *Northern Natural Gas Co. v. State Corp. Commission of Kansas* and stated that any state action that directly aims at matters under FERC’s jurisdictional authority or at matters that affect FERC’s ability to regulate matters under this jurisdictional authority invades exclusive federal jurisdiction and is thus invalid.²¹² Accordingly, the court declared that preemption is to be applied in this case, and Order

206. See *id.* (citing *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015)).

207. The Supreme Court has explained that in determining the scope of preemption courts in their statutory analysis must look to congressional intent found predominantly in the statute’s text. JAY B. SYKES & NICOLE VANATKO, CONG. RES. SERV., FEDERAL PREEMPTION: A LEGAL PRIMER 3 (2019). There is field preemption, conflict preemption, and express preemption. Field preemption is where Congress’s intent was “that the federal government occupy an entire field of regulation.” *Id.* at 17. This is where there is “no room for states to supplement it” or “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Id.* at 17–18 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Conflict preemption occurs when it is impossible to comply with both the federal and state law, or the state law would “pose an obstacle to the ‘full purposes and objectives’ of Congress.” *Id.* at 23–24. Express preemption occurs when “a federal statute or regulation contains explicit preemptive language.” *Id.* at 2.

208. See *Nat’l Ass’n of Regul. Util. Comm’rs*, 964 F.3d at 1187; see also Order No. 841-A, *supra* note 149, at P 41.

209. *Nat’l Ass’n of Regul. Util. Comm’rs*, 964 F.3d at 1187 (quoting *Oneok*, 575 U.S. at 386).

210. See *id.* at 1187–88.

211. *Id.* at 1187.

212. *Id.* at 1187–88 (citing *N. Nat. Gas Co. v. State Corp. Comm’n of Kan.*, 372 U.S. 84, 91–92 (1963)).

841 does not redraw the jurisdictional boundaries as the petitioners contended nor does it “usurp[] state power.”²¹³ The court explained that “[s]tates continue to operate and manage their facilities with the same authority they possessed prior to Order No. 841.”²¹⁴ The court reiterated its consistent recognition of the distinction between “a State’s regulations ‘aimed directly’ at matters in FERC’s jurisdiction, ‘and those aimed at’ fulfilling a State’s own jurisdictional obligations.”²¹⁵ However, state regulations aimed directly at matters under FERC’s jurisdiction cannot be upheld because they hinder the achievement of effective federal regulations.²¹⁶

The court then addressed the third prong of the *EPSA* jurisdictional test: whether a ruling in FERC’s favor would conflict with the core purposes of the FPA.²¹⁷ The court concluded that FERC has not preserved federal goals to the “detriment of the statutory authority granted to the States,” therefore, its “determination [was] consistent with the FPA’s purpose of maintaining the respective zones of jurisdiction while ensuring that FERC [could] carry out its duty of ensuring just and reasonable federal wholesale rates.”²¹⁸ The court reasoned that Orders 841 and 841-A²¹⁹ regulate matters concerning wholesale markets and reiterate the core principles of federal preemption.²²⁰ As such, both Orders are within FERC’s jurisdictional bounds and are not facially invalid under the FPA.²²¹

The court’s second challenge was determining if the Orders were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²²² The Local Utility Petitioners contended that even if FERC “has the authority to prevent States from broadly prohibiting local ESR participation in federal markets, its decision to exercise that authority in Order No. 841 was arbitrary and capricious.”²²³ Under this low threshold, the rule must be upheld if FERC analyzed the relevant issues

213. *See id.* at 1188 (quoting *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 282 (2016)).

214. *Id.*

215. *See id.* (quoting *N. Nat. Gas Co.*, 372 U.S. at 94).

216. *See id.*

217. *See id.* at 1189.

218. *Id.* (citing *Elec. Power Supply Ass’n*, 577 U.S. at 289–90).

219. Hereinafter “the Orders.”

220. *Nat’l Ass’n of Regul. Util. Comm’rs*, 964 F.3d at 1189.

221. *Id.*

222. *Id.* (quoting 5 U.S.C. § 706(2)(A)).

223. *Id.*

and explained their actions by demonstrating that there is a rational connection between the relevant facts and subsequent agency action.²²⁴

The Local Utility Petitioners relied on the state opt-out program in *EPSA* as the foundation for its argument.²²⁵ However, even the petitioners recognized that the state opt-out provision in *EPSA* was not the reason the court upheld FERC's jurisdiction in that case.²²⁶ Additionally, even if *EPSA* adequately supported future FERC orders, the court could not "substitute [its] own judgment for that of the [agency]."²²⁷ Further, FERC's exclusion of an opt-out provision in Order 841 was sufficiently addressed in Order 841-A where it expressly discussed these issues.²²⁸

The Local Utility Petitioners finally argued that FERC did not address the increased burden on the state distribution systems' "safety and reliability with energy flowing in two directions."²²⁹ However, the court noted that FERC did address the "additional administrative burdens" and concluded that the benefits of the program outweighed any potential additional burdens.²³⁰ Therefore, the FERC Orders did not constitute an arbitrary and capricious agency action and thus were not in violation of the APA.²³¹

V. FERC ORDER 2222

Following FERC Order 841 and the D.C. Circuit's recent affirmation of FERC's broad authority in *NARUC*, FERC finalized Order 2222 regarding DERs on September 17, 2020. This Order's enactment was predictable because FERC stated in Order 841 that it planned to remove barriers for DER aggregations in the RTO and ISO markets, but it did not

224. See *id.* (citing *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016)). The court had the authority under section 706(2)(A) of the APA to invalidate the Order if the arbitrary and capricious standard had been met. See 5 U.S.C. § 706(2)(A). The APA authorizes "judicial review of agency action[s]." JARED P. COLE, CONG. RES. SERV., AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 2 (2016). The standard for review for such actions is the arbitrary or capricious standard, which judges use "when reviewing the factual basis for agency rulemaking." *Arbitrary-or-Capricious Test*, CTR. FOR EFFECTIVE GOV'T, <https://www.foreffectivegov.org/node/2625> [<https://perma.cc/53ZT-7X4H>] (last visited Aug. 16, 2021).

225. See *Nat'l Ass'n of Regul. Util. Comm'rs*, 964 F.3d at 1189.

226. *Id.* at 1190.

227. *Id.* (quoting *Elec. Power Supply Ass'n*, 577 U.S. at 292).

228. See *id.*

229. *Id.*

230. See *id.*; see also Order No. 841-A, *supra* note 149, at P 45.

231. See *Nat'l Ass'n of Regul. Util. Comm'rs*, 964 F.3d at 1190.

have enough information to do so at that time.²³² However, Order 841 and Order 2222 operate in conjunction to open the energy market to a mass amount of possible sources allowed to participate in the wholesale market.

DERs “are small-scale power generation or storage technologies.”²³³ These may include things such as electronic storage, electric vehicles and their charging equipment, and rooftop solar panels.²³⁴ DERs are another rising energy source due to their “behind the meter” systems, meaning “the electricity is generated or managed ‘behind’ the electricity meter in the home or business.”²³⁵ Consumers with DER assets can sell power back to the grid or allow their storage systems to help stabilize the grid.²³⁶

Order 2222 also removes the barriers to participation of DER aggregators in the RTO and ISO markets.²³⁷ “Aggregations” are groups of small DERs that are represented by an aggregator as a single resource in the RTO and ISO markets.²³⁸ FERC maintains that the existing RTO and ISO market rules are unjust and unreasonable because of the barriers the rules pose to DER participation, which in turn reduces competition and jeopardizes the existence of just and reasonable rates in the market.²³⁹ FERC defines DERs as “any resource located on the distribution system, any subsystem thereof or behind a customer meter.”²⁴⁰ Similar to Order 841, Order 2222 is broadly defined to include many different energy sources.

Supporters of the Order asserted that FERC has jurisdiction over DERs and DER aggregators under both the *EPISA* jurisdictional test and the FPA.²⁴¹ These public comments contended that even if upgrades to the distribution systems and corresponding state laws resulted from the Orders’ implementation of allowing for DER participation, the upgrades do not infringe on states’ jurisdiction because FERC does not directly require states to make these changes.²⁴² In contrast, other commentators sought further clarification and reform on the jurisdictional boundaries to limit FERC’s control over participation in the RTO and ISO markets to “preserve state and local authority over retail sales, generation facilities,

232. Order No. 841, *supra* note 6, at P 5.

233. FERC ORDER 2222, *supra* note 11.

234. *Id.*

235. *Id.*

236. *Id.*

237. *See* Order No. 2222, *supra* note 6, at P 1.

238. Endemann, Frank, Hinckley & Metz, *supra* note 12, at 1.

239. Order No. 2222, *supra* note 6, at P 1.

240. *Id.* at P 1 n.1.

241. *See id.* at P 41.

242. *See id.* at P 34.

and local distribution facilities.”²⁴³ FERC clarified that under Order 2222, it is only asserting jurisdiction on sales by DER aggregators into the RTO and ISO markets and not over the DER source itself.²⁴⁴

FERC reiterated the arguments from Orders 841 and 841-A, stating that FERC still recognizes state and local managerial and jurisdictional authority over retail services and their distribution systems.²⁴⁵ This includes the “design, operations, power quality, reliability, and system costs.”²⁴⁶ Furthering the principles outlined in Order 841, FERC contended that nothing in Order 2222 preempts state and local authorities from regulating the distribution systems’ safety and reliability.²⁴⁷ With this, the DERs would still have to comply with the “applicable interconnection and operating requirements” of the distribution systems.²⁴⁸

Comments in opposition argued for a state opt-out provision for DERs similar to what was articulated in Order 841 with ESRs.²⁴⁹ Here, FERC once again declined to include an opt-out for broad prohibition of DERs’ participation in the RTO and ISO markets.²⁵⁰ FERC did, however, add an opt-in system for small utilities.²⁵¹ FERC reasoned that resources located on the distribution system or behind-the-meter are “essential to [FERC’s] ability to fulfill its statutory responsibility to ensure that wholesale rates are just and reasonable.”²⁵² FERC furthered that it is only exercising jurisdiction over the “transactions occurring on the wholesale market.”²⁵³ Pursuant to the D.C. Circuit’s holding in *NARUC*, FERC emphasized it “has jurisdiction to decide which entities may participate in wholesale markets.”²⁵⁴ FERC also found that removing barriers in order to benefit

243. *See id.* at P 35.

244. *See id.* at P 43.

245. *See id.* at P 44 (citing Order No. 841, *supra* note 6, at P 36; Order No. 841-A, *supra* note 149, at P 42).

246. *Id.* (citing Order No. 841, *supra* note 6, at P 36; Order No. 841-A, *supra* note 149, at P 42).

247. *Id.* at P 44 (citing Order No. 841-A, *supra* note 149, at P 46).

248. *Id.*

249. *See id.* at P 52.

250. *See id.* at P 56.

251. *Id.* (“[W]e add § 35.28(g)(12)(iv) to the Commission’s regulations to provide that RTOs/ISOs may not accept bids from distributed energy resource aggregators aggregating customers of small utilities unless the relevant electric retail regulatory authority allows such customers of small utilities to participate in distributed energy resource aggregations (i.e., to opt in).”).

252. *Id.* at P 57.

253. *See id.* at P 58.

254. *Id.* (citing Nat’l Ass’n of Regul. Util. Comm’rs v. FERC, 964 F.3d 1177, 1187 (D.C. Cir. 2020)).

“reliability, transparency, and market-related” services outweighed any burdens that might result from compliance with the Order.²⁵⁵ FERC was not persuaded because state and local authorities already have existing means to address such concerns and burdens.²⁵⁶

Like Order 841, Order 2222 is ripe for judicial challenges on jurisdictional grounds that may require FERC to “defend the rule before the courts.”²⁵⁷ There are still technological upgrades and reforms that must occur before Order 2222’s implementation, but it is a step in the right direction, encouraging the development of new technologies, business models, and services for cleaner and more sustainable energy markets.²⁵⁸

VI. PROPOSAL

In light of Order 2222, Order 841, and the D.C. Circuit’s foreshadowing future litigation in *NARUC*, jurisdictional challenges are far from over. Throughout its decision, the D.C. Circuit reiterated that its holding did not foreclose all state and local challenges.

It was not necessary for the court in *NARUC* to address potential issues that may arise with new state regulations, as the scope of that case was limited to a facial challenge to Order 841. A facial challenge prevails and thus renders the challenged action facially invalid when “no set of circumstances exist under which the [order] would be valid.”²⁵⁹ In *NARUC*, the Order itself was facially challenged rather than a challenge to an individual state regulation. With this, the court held that even though the petitioners failed to meet their burden for a facial challenge, states are “free to challenge the Orders as applied to their own state regulations or imposed conditions.”²⁶⁰ Therefore, state commissioners will have to

255. *See id.* at P 60.

256. *See id.* at PP 60–61.

257. Endemann, Frank, Hinckley & Metz, *supra* note 12, at 1; *see Participation of Distributed Energy Resource Aggregations in Markets Operated By Regional Transmission Organizations and Independent System Operators*, 174 F.E.R.C. ¶ 61,197 (2021); *see Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 175 F.E.R.C. ¶ 61,227 (2021).

258. Endemann, Frank, Hinckley & Metz, *supra* note 12, at 1.

259. Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 658 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also Nat'l Ass'n of Regul. Util. Comm'rs*, 964 F.3d at 1185.

260. *Nat'l Ass'n of Regul. Util. Comm'rs*, 964 F.3d at 1188–89 (quoting *Ass'n of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012)).

determine the scope and applicability of federal preemption under the FPA when regulating their distribution systems pursuant to the new Orders.

Accordingly, it must be determined if a state law claim falls within the state's jurisdictional authority under the FPA.²⁶¹ The Supreme Court has explained that, in a determination regarding the scope of federal preemption, the courts must look to congressional intent when conducting their statutory analysis.²⁶² The court in *NARUC* followed well-established precedent, in addition to congressional intent, in determining whether a state was regulating retail sales or attempting to regulate wholesale sales. The main consideration in *NARUC* was the principle established in *Oneok*—to analyze “the target at which the state-law claim aims.”²⁶³ However, the scope of preemption should still be construed narrowly when considering Congress's intent, and the FPA's²⁶⁴ preservation of state authority to regulate matters not within federal jurisdictional controls.²⁶⁵ With this in mind, the court still found that preemption should apply to the facial challenge. Furthermore, conflict preemption must also be applied narrowly to “prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role.”²⁶⁶ Conflict preemption will be significant in future litigation when challenges are brought by state and local authorities.

The courts in *Oneok* and *EPSA* both promoted concurrent jurisdiction rather than a bright-line rule of dual sovereignty.²⁶⁷ The D.C. Circuit in *NARUC* relied on these and other cases that applied preemption principles to issues regarding the FPA's two separate jurisdictional spheres.²⁶⁸ Thus, it would appear that *NARUC* is no different from precedent in the past decade in its shifting of the jurisdictional framework to cooperative federalism.

However, as evidenced by Orders 841 and 2222, FERC's jurisdiction is becoming more extensive with each new order. In Order 841, FERC clearly found that states were not allowed to prohibit ESRs connected to

261. See 16 U.S.C. § 824(b)(1).

262. See SYKES & VANATKO, *supra* note 207, at 3.

263. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 374 (2015).

264. See 16 U.S.C. § 824(b).

265. See *Oneok*, 575 U.S. at 383; see also *Nat'l Ass'n of Regul. Util. Comm'rs*, 964 F.3d at 1188.

266. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 515 (1989).

267. See Rossi, *supra* note 89, at 405.

268. See *Nat'l Ass'n of Regul. Util. Comm'rs*, 964 F.3d at 1188–89.

the distribution systems from participating in the wholesale markets.²⁶⁹ FERC explained that it is not regulating state distribution systems by not allowing this prohibition because states are not required to restructure their systems to comply with the technical requirements needed to allow ESRs and DERs to participate in the wholesale RTO and ISO markets. However, FERC is requiring that each RTO and ISO “establish a participation model that *ensures eligibility* to participate in the RTO [and] ISO markets in a way that recognizes the physical and operational characteristics of electric storage resources.”²⁷⁰ Therefore, ESRs and DERs do not necessarily have to have access to the distribution systems, but a state does not have the authority to prohibit such access. This distinction is one way FERC is attempting to avoid future jurisdictional challenges.

The difference between *being unable to prohibit* a source from using the system versus having to have a system, or participation model, that *would allow* a source to use the system if it so chooses is immaterial because it reaches the same result. Either way, state and local utilities will have to upgrade and change the regulations of their distribution systems in order for new sources to reach the RTO and ISO markets, if and when they so desire. While it is necessary to have these Orders to ensure growth and innovation in the industry, the Orders also effectively operate as a back-door route for FERC to have a level of control over state and local distribution systems.

Moreover, as previously illustrated, the conventional system is not equipped to allow a mass amount of diverse resources to use the distribution systems,²⁷¹ and the way FERC is forcing the foundation to change is through its Orders removing the barriers to RTO and ISO markets.²⁷² As a result, states must also change their distribution systems in order to remain in compliance.²⁷³ Although FERC is not directly regulating distribution systems that are outside its jurisdiction, FERC is pressuring the states to make the foundational changes needed to allow for new sources in the energy market.²⁷⁴ Therefore, the problem still exists as to the jurisdictional limits imposed by the FPA in its application to new and emerging issues. The difference now is that these Orders, along with confirmation of FERC’s broad authority in *NARUC*, no longer emphasize

269. See Order No. 841-A, *supra* note 149, at 61,952 (McNamee, Commissioner, concurring in part and dissenting in part).

270. *Southwest Power Pool, Inc.*, 169 F.E.R.C. ¶ 61,048 at P 17 (2019) [hereinafter *Southwest Power Pool*] (emphasis added).

271. See DENNIS ET AL., *supra* note 67, at 9.

272. See Order No. 841, *supra* note 6, at P 53.

273. See *id.*

274. See *id.*

cooperative federalism, and the new changes allow for a much greater volume of energy sources into the industry.²⁷⁵

In *NARUC*, the D.C. Circuit found that states can still prohibit ESRs connected to the distribution system from “participating in the interstate and intrastate markets simultaneously,” effectively forcing ESRs to choose a market to participate in.²⁷⁶ However, FERC rejected suggestions that resources would have to choose a market to exclusively participate in, contending that this would limit technically capable resources from participation in both markets.²⁷⁷ Therefore, ESRs can choose which market to participate in but cannot participate in both markets simultaneously. Moreover, FERC cannot preempt state authority over the distribution sector and retail sales, even if their regulations impact wholesale rates²⁷⁸—which is one way that states can hinder ESRs, DERs, and any emerging technologies from reaching the RTO and ISO markets.²⁷⁹

The significance of this exists within the court’s confirmation that FERC has “exclusive authority to decide who may participate in the wholesale electricity markets,” and FERC has decided to allow anything that falls under the broad definitions of ESRs and DERs to participate.²⁸⁰ States will be met with difficulty if they challenge this exclusive jurisdiction as it is more expansive and requires more from the states to comply.²⁸¹ As a result, states will create regulations that may be beneficial for their distribution systems but in return hinder participation in the wholesale market, so litigation is likely to arise.²⁸² Rather than cooperative federalism that was cautiously considered in the past, the energy industry is now entering into a new era of regulation characterized by exclusivity. However, even in light of these recent decisions, the FPA continues to

275. *DENNIS ET AL.*, *supra* note 67, at 9.

276. *See Nat’l Ass’n of Regul. Util. Comm’rs v. FERC*, 964 F.3d 1177, 1188 (D.C. Cir. 2020).

277. *See Southwest Power Pool*, *supra* note 270, at P 163 (citing Order No. 841-A, *supra* note 149, at P 142; Order No. 841, *supra* note 6 at P 324).

278. *See Nat’l Ass’n of Regul. Util. Comm’rs*, 964 F.3d at 1188; *see also* *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 279 (2016).

279. *Nat’l Ass’n of Regul. Util. Comm’rs*, 964 F.3d at 1188.

280. Brett A. Snyder, Lamiya N. Rahman & Jane Thomas, *D.C. Circuit Upholds FERC’s Rules Encouraging Electric Storage Participation in Wholesale Markets*, BLANK ROME (July 16, 2020), <https://www.blankrome.com/publications/dc-circuit-upholds-fercs-rules-encouraging-electric-storage-participation-wholesale> [<https://perma.cc/SL24-J39S>]; *see also Nat’l Ass’n of Regul. Util. Comm’rs*, 964 F.3d at 1187.

281. *See* Order No. 841, *supra* note 6, at P 262.

282. *See* Snyder, Rahman & Thomas, *supra* note 280.

emphasize the importance of the states and FERC each holding respective and distinct roles in the energy industry.²⁸³

The underlying purposes behind FERC's Orders are completely valid. A shift in the foundation of the energy sector must occur in order to promote innovation and efficiency for the future of the industry. The problems in the current foundation, as well as new technologies to combat these problems, are only going to become more prevalent. The system must function to both respect jurisdictional lines and still promote much needed innovation to allow for the emergence and success of new technologies. This can be achieved by encouraging coordination between FERC and state facilities to ensure efficiency and transparency.²⁸⁴

Each RTO and ISO will have to make a compliance filing with FERC for review, and FERC will thereafter accept or reject it depending on its ability to meet the criteria in the Orders. Order 841's criteria mandates that the participation model may not limit participation to any particular type of source, must "ensure that the RTO/ISO is able to dispatch a resource" in all ways the resource is capable of providing, and that the model is based on the unique "physical and operational characteristics" of ESRs.²⁸⁵ Therefore, the RTOs and ISOs within FERC's jurisdiction have flexibility in creating a participation model for ESRs to reach the RTO and ISO markets, but they must follow the stated criteria and not create barriers to participation of any new source.²⁸⁶ Similar criteria exists for DERs, as Order 2222 flourished out of Order 841. However, distribution systems under state regulation will be left attempting to comply with these Orders, resulting in uncertainty as to if and when their regulations will be preempted.²⁸⁷ Coordination between FERC and state facilities would mitigate some of the potential litigation over the reoccurring issues surrounding preemption and jurisdictional boundaries.²⁸⁸

In regard to ESRs' use of state and local distribution systems, FERC stated that it may be appropriate, and they will consider a general wholesale distribution service rate, tariff, or other rate mechanism on a case-by-case basis for the distribution center servicing ESRs to access the RTO and ISO markets.²⁸⁹ When the U.S. energy market restructured from vertically integrated markets to deregulated markets, FERC eventually

283. See 16 U.S.C. § 824(b)(1); 18 C.F.R. § 35.28 (2020).

284. See DENNIS ET AL., *supra* note 67, at A-3.

285. *Southwest Power Pool*, *supra* note 270, at P 40.

286. See *id.* at P 41.

287. See DENNIS ET AL., *supra* note 67, at A-6.

288. See *id.* at 29.

289. *Southwest Power Pool*, *supra* note 270, at P 150 (citing Order No. 841-A, *supra* note 149, at P 123).

gained jurisdiction over the transmission sector; this is partially analogous to FERC's newly established jurisdictional authority. In the transmission context, FERC does not own the transmission assets, but it does pay the owner for use of the asset and also retains control over who has access to it. This restructuring process expanded federal jurisdiction and simultaneously limited state jurisdiction in order for the energy industry to continue to adapt and operate efficiently—a similar issue to what FERC faces now.

As previously discussed, the circumstances the Supreme Court dealt with in *New York v. FERC* regarding open access to transmission lines is similar to the problem at hand with open access to the RTO and ISO markets for new resources. However, in the *New York v. FERC* case, the problem was the transmission of energy rather than the sale of energy, which the FPA expressly limits.²⁹⁰ Nevertheless, Order 888 was finalized pursuant to FERC's jurisdictional power under the FPA and stemmed from an earlier proposed rule requiring “that public utilities owning and/or controlling facilities used for the transmission of electric energy in interstate commerce have on file tariffs providing for nondiscriminatory open-access transmission services.”²⁹¹ Order 888's final rule ultimately went even further to apply the “open access requirements to retail transmissions” as well.²⁹²

FERC made sure to explain that “virtually all distribution and consumption of electric energy is clearly distinguishable from [FERC's] responsibility to ensure open and non-discriminatory interstate transmission service[s].”²⁹³ FERC recognized in Order 888 that the states maintained control over local distribution facilities, and the rule only applied to the transmission component of the transaction.²⁹⁴ However, the

290. See *New York v. FERC*, 535 U.S. 1, 2 (2002) (“No statutory language limits FERC's *transmission* jurisdiction to the wholesale market, although the statute does limit FERC's *sales* jurisdiction to that market.”).

291. *Id.* at 10 (quoting Notice of Proposed Rulemaking, *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, [1988-1999 Proposed Regs.] F.E.R.C. STATS. & REGS. ¶ 32,514, 60 Fed. Reg. 17,662 (1995)).

292. *Id.* at 11 (citing *Promoting Wholesale Competition Through Open-Access Non-discriminatory Transmission Services by Public Utilities Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540, 21,571 (1996) (to be codified at 18 C.F.R. pts. 35, 385) [hereinafter Order No. 888]).

293. Order No. 888, *supra* note 292, at 21,626.

294. See *id.*

Order stated that if a transaction occurred as a part of the state's participation model for retail sales, then it may be "appropriate to have a separate retail transmission tariff to accommodate the design and special needs of such" a program.²⁹⁵ Under these circumstances, FERC stated it would "defer to state requests for variations from the FERC wholesale tariff to meet these local concerns, so long as the separate retail tariff is consistent with [FERC's] open access policies and comparability principles reflected in the tariff prescribed by this Final Rule."²⁹⁶ Even though this case clearly illustrates that a distinction exists between FERC's jurisdiction over the transmission of energy and the states' jurisdiction over the distribution of energy, the idea that states can file a separate tariff provision with FERC to accommodate specific circumstances is a way FERC, in the spirit of cooperative federalism, could assist the states in drawing the jurisdictional line.

CONCLUSION

The foundation of the energy industry must adapt to the rise of ESRs, DERs, and other non-traditional sources in order to maintain the grid's reliability and effectiveness. History has proven that an unstable grid leads to jurisdictional changes, and the next change is upon us. A significant structural change must occur in order to adapt to new technologies and challenges while still upholding the jurisdictional limits set out in the FPA. FERC is gaining jurisdictional ground with each order that it promulgates, similar to the jurisdictional takeover of the transmission lines. Cooperation must exist between FERC and the states in order to replace the current unproductive cycle of repetitive litigation. It is evident FERC will continue to exercise its jurisdiction without cautious consideration on how those decisions will affect state distribution systems, as that is the change the energy industry must make to stabilize the grid and promote innovation to combat emerging challenges. Therefore, a cooperation mechanism must exist for this transition, and FERC should aid in this transition by allowing states to utilize tariff provisions for distribution regulations. This process has been utilized in the past and, if implemented in this context, will continue to benefit the future of the energy power industry in its structural transition.

295. *Id.* at 21,627.

296. *Id.*