

and Independent System Operators (ISOs).⁷ In Order No. 841, the Commission denied requests to allow states to decide whether distribution-level ESRs or those resources located behind a retail meter could participate in RTO or ISO markets.⁸ On rehearing, in Order No. 841-A, a majority of the Commission affirmed these findings and declined to provide the states with an opt-out.⁹

3. I was not a member of the Commission at the time Order No. 841 was issued, but I concurred in part and dissented in part when Order 841-A was issued. Specifically, I stated my support for ESRs and my belief that they have the potential to transform the electricity industry. But to the extent the Commission's Storage Orders exercised authority over the distribution system and behind-the-meter, I concluded:

[T]he 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" 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.¹⁰

4. Therefore, I concluded that the Commission exceeded its statutory authority in the Storage Orders and stated that I would have granted rehearing to reconsider the Commission's assertion of jurisdiction and its failure to provide states the opportunity to opt-out of the participation model created by the Storage Orders.¹¹

⁷ See generally Order No. 841, 162 FERC ¶ 61,127.

⁸ *Id.* P 35.

⁹ Order No. 841-A, 167 FERC ¶ 61,154 at PP 30-56.

¹⁰ McNamee Separate Statement, 167 FERC ¶ 61,154 at P 3 (footnotes & citations omitted).

¹¹ *Id.* PP 2-24.

(continued ...)

5. While I approve NYISO's compliance filing today to the extent it complies with the Commission's Storage Orders, I note that the Storage Orders are presently pending judicial review,¹² and I reiterate my concern with the Commission's assertion of jurisdiction over ESRs interconnecting either to a distribution system or behind-the-meter. Further, I continue to believe the Commission should have included in the Storage Orders an opt-out provision for states.

For these reasons, I respectfully concur.

Bernard L. McNamee
Commissioner

¹² See *Nat'l Ass'n of Regulatory Comm'rs v. FERC*, Nos. 19-1142 and 19-1147 (D.C. Cir. filed July 11, 2019).