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March 1, 2015 (/full-blog/manche)

The Demand for a Supreme Court Response: Electric Power Supply Association v. FERC (/full-blog/manche)

By: Sandy Manche, Staff Member

Demand response, a “reduction in the consumption of electric energy by customers . . . in response to an increase in the price of electric energy or to incentive payments,”^[i] is good for society because it incentivizes reductions in electricity usage, thereby decreasing the use of natural resources. Did the Federal Power Act (“FPA”)^[ii] grant the authority to regulate demand response pricing to the federal or state government? The Federal Energy Regulatory Commission (FERC) has asked the Supreme Court to rule on this jurisdictional question.



(<http://energy.gov/articles/power-marketing-administrations-leading-nation-s-transition-21st-century-electric-grid>)

On March 15, 2011, the FERC issued Order No. 745, requiring independent system operators and regional transmission organizations to pay “market price,” to “demand response resources participating in an organized wholesale energy market,”^[iii] for reductions in consumption.^[iv] However, the FERC ruling was vacated on March 23, 2014 by the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) in *Electric Power Supply Ass’n v. FERC*.^[v] The D.C. Circuit ruled that the FERC had exceeded its powers.^[vi] Noting that the FPA splits the “jurisdiction over sale and delivery of electricity between the federal government and the states on the basis of the type of service being provided and the nature of the energy sale,”^[vii] the court ruled that although demand response “affects the wholesale market,”^[viii] the states have exclusive jurisdiction over the regulation of the retail market.^[ix] However, in *New York v. FERC*,^[x] the Supreme Court recognized that “the landscape of the electric industry has changed since the enactment of the FPA, when the electricity universe was ‘neatly divided into spheres of retail versus wholesale sales’”^[xi] Deregulation continues to change the landscape.

On January 15, 2015, the U.S. Solicitor General filed a writ of certiorari requesting the Supreme Court to review the ruling in *Electric Power Supply Ass’n*.^[xii] The FERC contends it has authority to “regulate the rules used by operators of wholesale- electricity markets to pay for reductions in electricity consumption and to recoup those payments through adjustments to wholesale rates”^[xiii] because, under the *Chevron* doctrine, the correct interpretation of the statutory text is that the FPA does not deny FERC the authority.^[xiv] The FERC argues that the FPA grants it the authority to “regulate any rule, regulation, practice, or contract affecting [a wholesale] rate,”^[xv] and that “[t]he payments to demand-response providers” do affect wholesale rates because the payments “are recouped directly from the rates paid by purchasers of wholesale electricity.”^[xvi]

Although the issue is whether regulation of demand response pricing is a power granted to the federal government or to the states, the FERC noted that “optimal use of demand response in wholesale-electricity markets . . . is likely to produce lower electricity prices”^[xvii] and GTM Research has estimated that the D.C. Circuit court’s decision could reduce demand response growth significantly.^[xviii]

[i] 18 C.E.R. § 35.28 (2015).

[ii] 16 U.S.C. § 791a (2014).

[iii] Order No. 745, *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 F.E.R.C. ¶ 61,187 (2011).

[iv] *Id.*

[v] 753 F.3d 216 (D.C. Cir. 2014).

[vi] *Id.* at 225.

[vii] *Id.* at 219.

[viii] *Id.* at 221.

[ix] *Id.*

[x] 535 U.S. 1 (2002).

[xi] *Id.* at 16.

[xii] Petition for Writ of Certiorari, *Elec. Power Ass’n*, 753 F.3d 216 (No. 14-840), available at <http://www.ferc.gov/legal/court-cases/appellate-briefs.asp>.

[xiii] *Id.* at 1.

[xiv] *See id.* at 19-21.

[xv] *Id.* at 20.

[xvi] *Id.* at 21.

[xvii] *Id.* at 31.

[xviii] See Gavin Bade, Obama Administration to Appeal to Supreme Court on FERC Order, Utility Dive (Dec. 8, 2014), <http://www.utilitydive.com/news/obama-administration-to-appeal-to-supreme-court-on-ferc-order-745-ruling/341335/>

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631 SOUTH LIMESTONE, LEXINGTON, KY
40508 (859) 257-4747 BLOG.KJEANRL@GMAIL.COM ([MAILTO:BLOG.KJEANRL@GMAIL.COM](mailto:BLOG.KJEANRL@GMAIL.COM))