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Supreme Court Upholds FERC's Authority Over Demand Response Payments

The U.S. Supreme Court, in a 6-2 decision issued January 25, 2016, in *FERC v. Electric Power Supply Association*, upheld FERC Order No. 745 and ruled that the Federal Energy Regulatory Commission (FERC) has authority to establish demand response rules and rates in wholesale electric-power markets. Wholesale demand response programs pay for commitments to reduce use of power during periods of high electricity demand.

Order No. 745 requires wholesale market operators to pay demand response providers the same rate that is paid to electric power generators so long as the “net benefits test” is met. FERC developed the test to ensure that accepted demand response bids actually save consumers money. The Court of Appeals for the District of Columbia had vacated Order No. 745, ruling among other things that FERC had overstepped its authority because the order directly interfered with the states’ exclusive right to regulate the retail electricity market.

Currently, wholesale electricity rates are established through competitive auctions administered by wholesale market operators. The Supreme Court found that demand response aggregation under the Order involves practices that directly affect wholesale rates: Demand response lowers wholesale electricity prices by displacing higher-priced electric generation. FERC’s regulation of demand response compensation under Order No. 745, the Court reasoned, is a valid exercise of the agency’s “just and reasonable” wholesale rate authority under the Federal Power Act (FPA). The Court also concluded that FERC has not regulated retail sales as parties challenging the Order had maintained. Their position, explained the Court, would actually “subvert” the

FPA and “flout” its core purposes of protecting “against excessive prices” and ensuring effective transmission of electric power.

The Court also upheld FERC’s decision to compensate demand response providers at the locational marginal price (LMP), the same price paid to generators. The Court reasoned that FERC addressed arguments for and against LMP “seriously and carefully,” which the Court was unwilling to second-guess.

Justice Kagan delivered the opinion of the Court, joined by Justices Roberts, Kennedy, Ginsburg, Breyer and Sotomayor. Justices Scalia and Thomas dissented, and Justice Alito recused himself.

Several national demand response providers petitioned the Supreme Court along with FERC to defend the Order and federal authority over demand response payments. Husch Blackwell’s Marvin Griff represented one of the demand response petitioners in this case.

What This Means to You

The Supreme Court decision brings greater certainty to an area of FERC regulation that has been under attack for many years. However, demand response payments by wholesale market operators are just one of the pricing components under a complex regulatory regime potentially available to large energy users. Our federal regulatory team can help you assess and receive the benefits of this and other federally regulated wholesale market initiatives to best meet your energy needs.

Contact Us

For additional information on how the ruling might impact your business or your clients, contact Husch Blackwell’s energy regulatory group or James Hoecker, former FERC chairman and Senior Counsel and Energy Strategist with Husch Blackwell, at 202.378.2316.