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Supreme Court Tackles Regulation of Electric and Natural Gas Markets

Recent and pending Supreme Court decisions may redefine whether federal or state regulators have authority over key aspects of modern electric power and natural gas markets. The Court's rulings will help shape the ongoing transformation of the nation's regulated energy industries and thus have major implications for energy companies.

A Question of Jurisdiction

The Supreme Court cases revolve around federal-state jurisdictional boundaries over major energy conservation strategies such as demand response and incentive pricing for electric generation. The Federal Power Act and the Natural Gas Act assign jurisdiction over interstate wholesale power and natural gas sales to the Federal Energy Regulatory Commission (FERC) and reserve regulation of retail electric and gas markets to the states.

In last year's *Oneok v. Learjet* decision, the Court ruled that FERC's authority under the Natural Gas Act to determine just and reasonable rates for wholesale sales did not preempt state antitrust suits targeting retail price tampering relating to those interstate transactions.

The Court recently heard oral arguments in *FERC v. Electric Power Supply Association*, which centers on whether demand response (voluntary load curtailment) occurs principally in state-regulated retail end-use markets or whether FERC can set demand response rates in wholesale markets. (Husch Blackwell represents one of the demand response petitioners before the Court in this case.) Questions from the Justices suggest that FERC's demand response order may interfere improperly with state jurisdiction over retail power markets.

A few days later, the Supreme Court announced it would take up *CPV Maryland v. PPL EnergyPlus* (consolidated with *Nazarian v. PLL EnergyPlus*), involving a state's ability to set incentive pricing for new generation that is different from the price the same generators would receive in wholesale markets regulated by FERC. The Court's decision to hear the case came despite rulings by two lower appellate courts that pricing mechanisms in New Jersey and Maryland were preempted by federal statute and after the U.S. Solicitor General had argued against further review by the Supreme Court.

What This Means to You

The implications of the Court's decisions are numerous and will affect FERC's power to regulate gas and electricity markets. Although these cases involve some obscure and esoteric aspects of energy markets and regulation, the Supreme Court has generally been open to refereeing jurisdictional squabbles in these key industries that historically have raised difficult federalism issues. At bottom, these cases may be less about energy policy than they are about the construction of fairly old New Deal statutes as applied in the age of market competition and digital technology. While the Court's decisions may bolster state authority, federal legislation or regulation could be revised in response to the potential harm to companies operating in interstate commerce. Other areas where state and federal interests could conflict bear watching: grid reliability, cybersecurity, prevention of energy market pricing manipulation and integration of new energy supplies.

Contact Us

For deeper insight on the above matters and how the Supreme Court's decisions might affect your business, or if you'd like assistance with other regulated energy questions, contact James Hoecker at 202.378.2316.

Clients receive an insider's perspective on energy regulation and pending litigation, thanks to the collective knowledge of our FERC practice team members, including multiple former FERC lawyers (a former FERC chairman among them), the principal legislative draftsman of the Natural Gas Policy Act of 1978, and attorneys with senior-level, in-house counsel backgrounds. We advise on issues pending before federal agencies, including FERC.