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Federal Regulatory Challenges for Program Implementers

EPSA v. FERC & FIRSTENERGY v. PJM

John P. Hughes
Vice President – Technical Affairs
Electricity Consumers Resource Council (ELCON)
Washington DC



What Has Happened to Date

EPSA v. FERC

- Opinion by DC Circuit to vacate FERC Order 745 issued on May 23, 2014
- June 11 – FERC seeks *en banc* review by DC Circuit
- September 17 – Court denies FERC petition
- September 22 – FERC seeks stay until December 16, the deadline to seek Supreme Court review
- October 19 – Stay is issued; US Solicitor General to decide whether to ask for review

FIRSTENERGY v. PJM

- FE filed initial complaint at FERC within hours of the DC Circuit decision
- Wanted FERC to direct PJM “to remove all portions of the PJM Tariff allowing or requiring PJM to include demand response as suppliers to PJM’s capacity markets.”
- Within days of court’s denial of *en banc* review, FE filed detailed, amended complaint
- October 22 – Deadline for comments on FE complaint



EPSA v. FERC

Opinion reflects the politicization of the DC Circuit, as two judges (Brown and Silberman) adopting the states' rights position were Reagan and Bush appointees, whereas the dissenting judge supporting FERC was a Carter appointee. The majority held that:

1. Order No. 745 could not be justified under any of FERC's grants of authority under the FPA.
2. FERC is precluded from arguing that it has Federal Power Act Section 205 and 206 jurisdiction because demand response "affects the wholesale market" by lowering the wholesale price and increasing system reliability. The "specific limits" of Section 201 take primacy – that FERC's reach "extend[s] only to those matters which are not subject to regulation by the States. Otherwise, FERC could engage in direct regulation of the retail market whenever the retail market affects the wholesale market, which would render the retail market prohibition useless." The court noted that many areas, including markets outside of the energy space, could "affect" wholesale markets.
3. Even if FERC had authority to promulgate Order No. 745, the Order would still fail in that its method of compensation for DC was arbitrary and capricious under the Administrative Procedure Act. The court found that "FERC failed to properly consider—and engage—Commissioner Moeller's reasonable (and persuasive arguments)."



EPSA v. FERC

- Judge Edwards' lengthy dissent argued that regulating DR in wholesale markets fell within a permissible reading of FERC's statutory authority – that FERC is precluded from regulating retail “sales”, not all matter that might affect retail “markets” – and satisfies the *Chevron* test for construing statutes.
- Further, FERC had reasonably and adequately explained its decision-making – including the level of compensation for DR resources – in Order No. 745.
- Judge Edwards also noted that all five FERC Commissioners had agreed that DR could properly be part of wholesale electric markets, and that Commissioner Moeller's dissent had focused solely on his concern with the proposed method of compensation.

FIRSTENERGY v. PJM

- FE Complaint assumes that all DR is alike, particularly that all DR came from reductions in energy deliveries under retail tariffs regulated under state law.
- Therefore, the holding in *EPSA v. FERC* is applicable to all forms of DR.
- FE also asserts that the *EPSA* holding is generically applicable to other FERC determinations on DR, including (1) prior FERC orders that were not appealed, and (2) FERC's creation of capacity markets, which was appealed and determined to be within the agency's authority.
- There is wide agreement that FE extended the *EPSA* holding beyond the facts and circumstances before the court in *EPSA*.
- A large number of groups representing a wide range of interests filed oppositions to the FE Complaint by the October 22 deadline.



IS IT WHOLESALE OR RETAIL?

- Industrial DR is as often as not the sale for resale of electric energy from generators that are subject to federal, not state jurisdiction (e.g., Alcoa's FPA exemption and PURPA QFs). The manufacturers are curtailing load that would otherwise be served by their own behind-the-meter generation.
- LSEs provide DR in wholesale markets and are not precluded from doing so.
- The questions remain:
 1. Can Curtailment Service Providers (CSP) participate in wholesale markets?
 2. Can retail loads participate directly in wholesale markets?
- As intended by state restructuring laws and/or regulations, the answer to both questions is "Yes."



CONCLUSION: BE CAREFUL WHAT YOU WISH FOR

Some legal authorities have made the following observations:

- “If the reasoning in the DC Circuit majority opinion is applied to the capacity market as FirstEnergy requests, the FERC sanctioning of the capacity market itself, is *ultra vires* agency action, and must be vacated insofar as the FERC would be using the capacity market payments, ... to do indirectly what it cannot do directly, namely luring entities to build new generation or offer their existing generation capacity into the energy markets.” Source: Pennsylvania PUC
- “Rather than give an order to the RTOs, FERC could impose a condition on the wholesale generators. That is, rather than order the RTOs to pay compensation to retail customers (an order which the Court said was outside FERC’s jurisdiction), FERC could condition the wholesale generators’ right to charge market-based rates in RTO markets on the existence of sufficient demand response participation in those markets. ” Source: Scott Hempling

