

GRID:**High court hands FERC major victory in demand-response case**

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Federal electricity regulators scored a huge win yesterday when the Supreme Court upheld a controversial rule aimed at encouraging energy conservation in wholesale power markets through a practice known as demand response.

In a 6-2 opinion (No. 14-840), the high court reversed a May 2014 lower court decision that knocked down the Federal Energy Regulatory Commission's 2011 rule (Order 745) requiring that power users be paid for committing to scale back electricity use at times of peak demand at the same rate as electric generators.

The [decision](#) marks a win for the Obama administration, environmentalists and clean energy backers who supported the FERC rule.

It gives "broader jurisdiction to the Federal Power Act and the federal government vis-à-vis states' rights over the energy industry," said Stephen Humes, a partner with Holland & Knight in New York.

"This decision means that consumers will continue to see the significant benefits of demand response, which enhances competition in the markets, reduces wholesale prices and helps make the grid more reliable," said FERC Chairman Norman Bay.

It also bolsters the business of companies such as Opower, EnerNOC Inc. and Johnson Controls that have aggressively crafted product offerings for commercial and industrial customers, especially in the nation's organized electricity markets run by independent system operators.

Future disputes

At the heart of the court's analysis in yesterday's decision is whether the demand-response rule actually regulates retail electricity sales, an area reserved for state overseers under the Federal Power Act.

The court found that the rule does not stray into the off-limits retail territory. Writing for the majority, Justice Elena Kagan reasoned that FERC designed the demand-response rule to reduce wholesale electricity rates; the effect of that policy on retail sales is merely incidental.

"Yet a FERC regulation does not run afoul of [federal law] just because it affects -- even substantially -- the quantity or terms of retail sales," the opinion says. "It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other."

Every aspect of the demand-response rule governs the wholesale market, Kagan wrote, adding that the rule rightly advances the agency's core mission of holding down prices and ensuring electric reliability.

Chief Justice John Roberts and Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor joined in the majority. Justice Samuel Alito recused himself from the case.

Justices Antonin Scalia and Clarence Thomas disagreed, arguing that the fact that most demand-response participants are consuming electricity rather than reselling it undermines FERC's assertion that it is not meddling in the retail market.

"The demand-response bidders here indisputably do not resell energy to other customers," Scalia wrote in the dissent. "It follows that the rule does not regulate electric-energy sales 'at wholesale,' and [federal law] therefore forbids FERC to regulate these demand-response transactions."

Legal experts noted that the majority's movement away from a "bright line" test separating state and federal jurisdiction may be influential in future disputes over FERC's regulatory authority.

"Traditionally, courts have applied a 'bright line' analysis to distinguish FERC's role ... and the states' role," said Dorsey & Whitney LLP attorney Joseph Hall in an email. "Those lines are becoming increasingly more difficult to distinguish because of the inter-relationship between wholesale and retail markets, development of RTOs/ISOs and increasing federal involvement in

generation resource planning."

In separate litigation, the Supreme Court is considering whether state incentive programs for new power generation infringe on FERC's authority over wholesale markets. Government lawyers handling that case have generally favored the bright-line approach to determining state and federal jurisdiction, arguing that a retail program in Maryland affects wholesale markets and therefore oversteps state authority.

Scalia noted in his dissent yesterday that the government's bright-line position in the Maryland case seems to square with his own.

But ClearView Energy Partners analysts wrote in a memo yesterday that the decision does not "provide definitive insight into how the Court will rule on that case."

'Probably helps states'

Officials at the nation's largest grid operator, PJM Interconnection, said in a statement that while they will have to study the court's decision, "the ruling supports the continued participation of demand response in competitive wholesale markets."

"We're pleased with that outcome," PJM continued. "Certainty and continuity are important in markets. Demand response brings value to competitive wholesale markets and is a vital component of electric system reliability."

The Electric Power Supply Association, which was the lead plaintiff in the case, is "not commenting" for now, said President and CEO John Shelk.

The American Public Power Association, another leading plaintiff, expressed disappointment.

Joe Nipper, senior vice president of regulatory affairs, said, "Retail rates are the responsibility of state and local jurisdictions. APPA and the utilities it represents strongly support demand response and energy efficiency, but we will continue to argue against federal agencies overstepping the limits of their jurisdiction."

"The court's decision appears to stand for the proposition that energy conservation measures can be valued in both a retail context and, in different circumstances, a wholesale context," said Travis Kavulla, president of the National Association of Regulatory Utility Commissioners.

"Personally, I believe that to be true, although as a legal precedent it may serve to blur the already fuzzy line between state and federal jurisdiction. As the court observes, the respective province of FERC and state utility commissions generates a steady flow of jurisdictional disputes because -- in point of fact if not of law -- the wholesale and retail markets in electricity are inextricably linked," he said.

The decision was praised by the Natural Resources Defense Council, Advanced Energy Management Alliance, Advanced Energy Economy, Sierra Club and Environmental Defense Fund, among others.

Holland & Knight's Humes said the ruling could very well have other effects.

It "probably helps states" as they weigh compliance options for U.S. EPA's Clean Power Plan. Even though efficiency measures such as demand response are not explicitly a tool EPA suggested for states to meet emissions reduction goals for carbon, if the ruling had gone the other way, "we would have been left with a fractured state-by-state approach to bring the benefits of demand response to the market," Humes said.

The decision should also push down electric capacity prices in wholesale markets, he said.

"There was no one in the case that argued that demand response did not help electric reliability and did not lead to lower wholesale capacity prices," Humes said. "Everyone agreed in the case that demand response has a positive effect on the cost of rates to customers."

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