IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Electric Power Supply Association, *et al.*, Petitioners,	)	
v.	)	Nos. 11-1486, *et al*.
Federal Energy Regulatory Commission, Respondent.	)	

MOTION OF FEDERAL ENERGY REGULATORY COMMISSION TO STAY ISSUANCE OF MANDATE

Pursuant to Rules 27 and 41(d) of the Federal Rules of Appellate Procedure and Circuit Rule 41(a)(2), Respondent Federal Energy Regulatory Commission ("Commission" or "FERC") moves this Court for a stay of issuance of the mandate in this case, pending the federal government's consideration of whether to file, and possible future filing of, a petition for a writ of certiorari in the Supreme Court. The mandate ordinarily would issue on September 24, 2014 (Fed. R. App. P. 41(b)), in light of this Court's denial of the Commission's petition (and other petitions) for rehearing *en banc* on September 17, 2014. Consistent with Rule 41(d), this Court's May 23, 2014 decision in *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) ("Opinion"), presents a substantial legal question and raises significant implications for wholesale electricity market stability and grid reliability. It should not become immediately effective.

Briefly, the Opinion held that the Commission lacks jurisdiction under the Federal Power Act to promulgate a Rule[1] setting the just and reasonable compensation applicable to wholesale demand response resources participating in organized wholesale energy markets. Op. at 3, 14. The Opinion reasoned that the Act reserves to the States authority over "the retail market," that "[d]emand response – simply put – is part of the retail market," *id*. at 11, and that FERC's plenary authority over "practices . . . affecting" wholesale rates does not extend to the Rule. *Id*. at 8-10. Judge Edwards, writing in dissent, took an entirely different view, concluding that "there is no doubt that demand response participation in wholesale markets and the . . . market rules concerning such participation constitute 'practice[s] . . . affecting' wholesale rates" within FERC's jurisdiction. Dissent at 4.

The Commission sought rehearing *en banc*, solely as to the issue of jurisdiction, but not the specific compensation level set by the Rule (which was also vacated by the Opinion). Petition at 15. The Court also received five additional petitions for rehearing *en banc* from a number of States and various industry members and representatives, and an *amicus* brief in support of rehearing by various environmental organizations. On September 17, 2014, the Court issued

[1] *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, Final Rule, FERC Stats. & Regs. ¶ 31,322, 134 FERC ¶ 61,187, *on reh'g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011) (together, "Rule").

an order allowing consideration of the *amicus* brief, but issued additional orders denying all petitions for rehearing. Specifically, "a majority of the judges eligible to participate did not vote in favor of the" Commission's petition, and no judge requested a vote on the other petitions.

ARGUMENT

A stay of issuance of the mandate, under Federal Rule 41(d)(2) and Circuit Rule 41(a)(2), is appropriate here: this case presents a substantial legal question and a stay is supported by good cause, consistent with the public interest. *See United States v. Microsoft Corp*., No. 00-5212, 2001 WL 931170 (D.C. Cir. Aug. 17, 2001) (reciting standard). The Court should grant this Motion to preserve the status quo, while the Commission and the Solicitor General, individually and collectively, consider whether to file a petition for a writ of certiorari.[2] Absent an extension of time from the Supreme Court, such a petition for certiorari would be due within 90 days of this Court's denial of rehearing, or by December 16, 2014. No decision on whether to petition for certiorari has yet been made, either by the Commission or the Solicitor General.

[2] The ultimate decision whether the federal government will petition the Supreme Court for a writ of certiorari lies not with the Commission, but with the Solicitor General and the Department of Justice. *See* 28 U.S.C. § 518; 42 U.S.C. § 7171(i); 28 C.F.R. § 0.20.

1. This Case Presents Substantial Legal Issues

Obviously, the Commission, having taken the remarkable step of petitioning for rehearing *en banc*, *see* FERC Pet. at 1 (explaining rarity), believes, for the reasons already articulated in its unsuccessful petition, that the case raises substantial legal (and policy) questions. So too, presumably, do the other unsuccessful petitioners for rehearing – a diverse mix of industry, commercial, retail, state and environmental interests.

The substantial legal question can be summarized as follows: Under the Federal Power Act, where does the jurisdictional line between federal and state governments lie with regard to regulation of demand response, a technologically-advanced electric grid service with impacts on both wholesale and retail rates? As FERC argued in its Petition, the panel Opinion incorrectly drew this jurisdictional line, and failed to respect and reconcile consequences that are both adverse and substantial for consumers, the industry and energy markets. In particular, the Petition explained that the Opinion's finding on jurisdiction is inconsistent with this Court's own precedent, and that it is also inconsistent with Supreme Court precedent broadly interpreting FERC's plenary, exclusive authority over "practices . . . affecting" jurisdictional rates. *See Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 371 (1988) ("FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates."); *Schneidewind v. ANR Pipeline*

Co., 485 U.S. 293, 308 (1988) (state law is preempted where "FERC's authority to regulate and fix practices affecting rates allows the agency to address" such matters); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (state authority is limited to "those [sales] which Congress has made explicitly subject to regulation by the States") (quoting *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-216 (1964)). Judge Edwards, writing in dissent, would have affirmed the Commission's approach as a reasonable interpretation of its statutory authority.

Nonetheless, the Court, by majority vote, has determined that the issues presented fail to meet the Court's stringent standards for rehearing *en banc*. Whether the issues presented warrant Supreme Court review is another matter – something that the Commission and the Solicitor General are (or will be) considering, but have not yet decided, and need additional time to consider without the added burden of the Court's decision immediately taking effect.

Several recent developments, since the date of the May 23, 2014 Opinion, require particular consideration. First, two other courts of appeals have issued decisions that uphold the supremacy of the Commission's exclusive authority to regulate wholesale rates, and practices directly affecting wholesale rates, over state initiatives affecting FERC-jurisdictional rates. *See PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476-77 (4th Cir. 2014) (invalidity of Maryland law

promoting new generating capacity); *PPL EnergyPlus, LLC v. Solomon*, Nos. 13-4330, *et al*. (3d Cir. Sept. 11, 2014) (invalidity of New Jersey law). (The successful petitioners in these two cases are members of the Electric Power Supply Association, the lead petitioner in the instant case.)

Second, the Supreme Court recently granted a petition for a writ of certiorari in a case raising a substantially similar issue, arising from the parallel statutory jurisdictional grant in the Natural Gas Act. In that case, the Ninth Circuit narrowly interpreted the reach of FERC's "practices . . . affecting" jurisdiction, concluding that it did not preempt state antitrust law claims arising from manipulation of price indices that affect both FERC-jurisdictional and non-jurisdictional transactions. *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716 (9th Cir. 2013) *cert. granted*, 134 S. Ct. 2899 (U.S. 2014). While the federal government filed an *amicus* brief in opposition to certiorari, it argued that the court of appeals erred in narrowly construing FERC's authority. (Merits briefs have not yet been filed.) *See U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1302 (Rehnquist, C.J., in chambers) ("There is a reasonable probability that four Justices will eventually grant certiorari in this case. The Court has already granted certiorari in [another case] which raises the identical issue" in a different context.).

2. Good Cause Supports Staying the Mandate

Under Rule 41, the Court generally balances the equities in evaluating whether good cause supports a stay of issuance of the mandate pending consideration of a petition for certiorari. *See Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1129 (D.C. Cir. 1978). Here, the balance of the equities weighs heavily in favor of a stay. Implementation of the panel Opinion's jurisdictional finding holds significant financial, market stability, and electric grid reliability implications. *See* FERC Petition at 13-15. Before this Court, Petitioners have alleged no irreparable harm flowing from maintaining the status quo pending completion of judicial review proceedings. In this light, FERC and the federal government should be permitted time to consider appropriate next steps. If the federal government decides to file a petition for a writ of certiorari, the Supreme Court should be given the opportunity to address this important jurisdictional question, without compelling FERC, the industry and the public to commence implementation – anticipated to be a complex process with significant market and financial implications – of the Opinion in the interim.

There appears to be universal agreement that demand response plays an important role in wholesale energy markets. Many of the Petitioners[3] expressly

[3] On rehearing before FERC, certain Petitioners stated that they "are not opposed to, and, indeed, fully support, participation by diverse resources, including DR resources, in wholesale energy markets administered by independent system

recognized this before the agency. Both the Dissent and the Opinion, albeit to a lesser extent, recognize that demand response in wholesale energy markets plays an important role in supporting competition, reducing wholesale prices, mitigating market power, and ensuring system reliability. *See* Op. at 8 ("Demand response will also increase system reliability.") and 13 (demand response has a "significant impact on the wholesale market"); *see also* Dissent at 9 ("benefits of demand response participating in wholesale markets are beyond reproach"). As FERC explained in the Rule, markets "function[] effectively only when both supply and demand can meaningfully participate." Order No. 745 P 57 (quoting prior rulemaking), JA 114. As FERC indicated in its Petition (at 13-14), the disruptive effect of the Opinion depends on the scope of its jurisdictional ruling. It is unclear whether the panel majority intended simply to invalidate the Rule, for lack of jurisdiction, to the extent it offers a particular high level of compensation for demand response resources participating in particular energy markets, or whether the panel majority intended its jurisdictional ruling to reach beyond the particular rulemaking on review and to extend to other levels of compensation or to capacity and ancillary markets as well. *See* PJM Interconnection, L.L.C. Pet. at 5 (noting the "jurisdictional holding is potentially boundless").

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operators ("ISO") and regional transmission organizations ("RTO"). Request for Agency Rehearing at 2, JA 1214.

A wide range of parties join the Commission in bringing the Court's attention to the substantial, adverse ramifications of implementing the Opinion. Thirteen parties filed five separate petitions for *en banc* rehearing of the Opinion. In addition, a group of environmental non-profit organizations filed an *amicus* brief in support of FERC's Petition. (While denying rehearing, the Court nonetheless granted a motion for leave to file the environmental brief.) Several state regulatory authorities and state consumer advocates, not parties to the Court proceeding, offered statements of support for FERC's Petition.[4]

Each of these pleadings and statements highlights the importance of continued demand response participation in wholesale markets. PJM Interconnection, L.L.C., the non-profit operator of the regional grid in 13 Mid-Atlantic and Midwestern states, emphatically urges that the Opinion "threatens an abrupt withdrawal from regional power arrangements of a resource that, by virtue of its contributions to the reliability and low cost of power delivery, has become deeply integrated into the wholesale markets and multi-state operations of regional grid operators." PJM Pet. at 1. PJM explains that FERC first approved demand response participation in PJM's markets in 2000, and it, like other grid operators, has increasingly relied upon demand response for reliable grid operation. As PJM

[4] Many of these statements are cited in the petition for rehearing *en banc* filed by the Maryland Public Service Commission and the California Public Utilities Commission (at 1 n.1).

stressed, for the 2014 summer peak, "demand response providers had committed over 8,000 megawatts" of demand response. *Id*. at 8. By comparison: a typical new power plant would offer 300 to 700 megawatts, and 8,000 megawatts is the highest recorded peak usage for Washington, D.C. and the Maryland suburbs. *Id*. PJM emphasizes that "demand response repeatedly has proven its value" *id*. at 4, with PJM and the grid operators in New York and New England deploying emergency demand response for a full 13 days, in 2013, to respond to system emergencies and weather events, including unseasonal heat waves and the Polar Vortex. *Id*. at 10-11.

The state regulatory authorities of Maryland, California and, separately, Pennsylvania emphasize that demand response is essential to state conservation goals, and that removal of demand response would burden certain State initiatives and otherwise adversely affect FERC and the States' abilities to ensure just and reasonable rates. Maryland and California Pet. at 8-13; Pennsylvania Pet. at 12-15. Rather than burdening the States, Pennsylvania points out that "demand response service participation in the wholesale markets is the only mechanism currently available that provides appropriate and timely price signals to a meaningful number of end-use customers." Pennsylvania Pet. at 13. Echoing State concerns, the *amicus* environmental groups point out the contributions of demand response to conservation efforts, explaining that demand response service "reduces harmful air

pollution by avoiding dispatch of inefficient, high-emitting generation during times of peak electricity demand." Brief of *Amici Curiae* Environmental Defense Fund, *et al*. at 7.

Providers of demand response services, for their part, emphasize that, by invalidating demand response in energy markets, and potentially all wholesale markets, the Opinion "would have anticompetitive impacts, diminish bulk power system reliability, harm the environment, and cause higher prices for consumers as . . . different state regulators attempt to find . . . substitutes." Intervenors Supporting FERC Pet. at 15; *see also* California Independent System Operator Pet. at 9 ("If multiple state authorities were to issue conflicting regulations regarding demand response, it would be difficult, if not impossible, for [regional operators] to accommodate those diverse regulations in their markets.").

As reflected in the views of this array of parties, the weight of the public interest lies with staying the mandate pending the federal government's consideration of whether to petition for certiorari. Whether the Opinion is read narrowly or broadly, its implementation will involve both setting new prospective rules and unwinding demand response participation in certain wholesale markets – a task with significant market and financial implications that go far beyond the typical burdens of litigation that courts ordinarily find inadequate to support

injunctive relief. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

CONCLUSION

The Commission respectfully requests that the Court stay issuance of the mandate in this case, pending consideration of whether to petition for certiorari to the Supreme Court.

Respectfully submitted,

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September 22, 2014

Electric Power Supply Ass'n, *et al*. v. FERC **Docket No. RM10-17**
D.C. Cir. No. 11-1486, *et al*.

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 22nd day of September 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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