



Supreme Court Upheld Implementation of Demand Response Program

The U.S. Supreme Court upheld a federal rule aimed at encouraging industrial consumers to cut electricity use, in a victory for the Obama administration and environmentalists and a blow to power generators.

The justices, in a 6-2 vote on Monday, January 25th, said the Federal Energy Regulatory Commission acted within its authority with the order, which sets rates for “demand response” payments to large electricity users that cut consumption. The court also upheld the formula used by FERC.

EnerNOC Inc., the top U.S. provider of energy conservation services, jumped as much as 86 percent in New York trading. Shares of independent power producers fell, led by Dynegy Inc., which declined as much as 12 percent.

In challenging the rule, the biggest U.S. energy operators were aiming to bolster their profits. A decision against FERC would have benefited NRG Energy Inc., FirstEnergy Corp., Talen Energy Corp., Calpine Corp., Public Service Enterprise Group Inc. and American Electric Power Co.

EnerNOC backed the FERC rule, as did major energy consumers, including aluminum producer Alcoa Inc.

The case centered on the U.S. Federal Power Act, which lets FERC regulate rates only at the wholesale level and leaves retail regulation in the hands of the states. The disputed FERC rule requires wholesale-market operators to use the rate they pay generators to similarly compensate large consumers that cut use during periods of high demand.

‘Excessive Prices’

Writing for the majority, Justice Elena Kagan said the FERC rule directly affects wholesale rates, doesn’t regulate retail sales and squares with the broad goals of the Federal Power Act.

That statute “aims to protect ‘against excessive prices’ and ensure effective transmission of electric power,” Kagan wrote. “FERC has amply explained how wholesale demand response helps to achieve those ends, by bringing down costs and preventing service interruptions in peak periods.”

White House spokesman Frank Benenati called the ruling “good news for consumers, clean energy, reliability and the overall economy.”

“This decision allows us to continue realizing billions in annual savings from innovative incentives and business models that ensure we use our electricity system efficiently,” he said.

Trade groups representing the power industry said FERC was making a transparent attempt to regulate retail sales and was overcompensating energy users.

‘Less-Reliable System’

“Excessive subsidies for demand response programs unfairly tilt the playing field to the disadvantage of generators,” George Lewis, a spokesman for Talen Energy, said in a phone interview. “That ultimately could result in a less-reliable system.”

A federal appeals court sided with generators, saying the agency had gone beyond its authority.

Advocates of demand response say it can cut air pollution and reduce the need to build additional power plants. Demand response helped the electrical grid maintain reliable service when the system faced potential supply shortages during the Polar Vortex cold snap in January 2014, according to PJM Interconnection LLC, which runs the mid-Atlantic grid.

“This is a great day for clean energy and the health of a more affordable, stronger power grid,” the environmental group Earthjustice said in a statement.

Trade Group

John Shelk, president of the Washington-based Electric Power Supply Association, said in an e-mail that he wasn’t immediately available to provide comment and is reviewing the court’s decision. The trade group led the legal challenge to the FERC rule.

Some of the trade group’s member companies expressed support for the ruling, however.

The court decision has no “meaningful effect” on Exelon Corp.’s effort to raise revenue at some money-losing nuclear plants, spokesman Paul Elsberg said Monday in a statement.

“We support demand response as a valuable tool for our customers to manage their energy costs,” Elsberg said.

NRG Energy spokeswoman Karen Cleeve said in a statement that the ruling allows FERC “to ensure wholesale markets produce healthy, competitive price signals.”

American Electric Power spokeswoman Melissa McHenry said in a statement that her company’s “main concern with demand response was that it was being compensated in the markets in the same way as a power plant, but not held to the same availability and performance criteria.”

Concerns Unresolved

Changes in PJM market rules in 2015 “made demand response more accountable” while leaving some concerns unresolved, she said.

Calpine won’t comment, said spokesman Brett Kerr. A representative of Public Service Enterprise Group didn’t immediately respond to queries.

Although the disputed FERC rule applied only to the energy market, the case is likely to have ramifications for demand response in the capacity market, which is where generators are paid for commitments to provide power three years in the future. In that market, proponents say demand response could save as much as \$9 billion a year.

‘Broad Definition’

“The court has shown it’s taking a pretty broad definition of FERC jurisdiction,” Jay Rhame, who manages \$2.5 billion in energy stocks at Reaves Asset Management in Jersey City, New Jersey, said in a telephone interview. “Anything that looks like it can be construed as affecting wholesale power prices seems like it falls under FERC jurisdiction as of this court ruling.”

PJM, which runs the nation’s largest grid and has the highest amount of demand response of all the regional markets, paid major power consumers \$584.6 million through September in return for commitments to drop electricity consumption during periods of peak use. In return for actually cutting use, power curtailment service providers collected \$6.84 million this year.

PJM, whose network stretches from Washington to Chicago, covering all or parts of 13 states plus the District of Columbia, secured commitments of about 11,000 megawatts of power reductions in an annual auction held in August. That’s about enough power to run New York City on all but the hottest summer days.

PJM said Monday in a statement it was pleased by the decision. “Demand response brings value to competitive wholesale markets and is a vital component of electric system reliability,” the company said.

Dissenting Justices

Justices Antonin Scalia and Clarence Thomas dissented. Scalia said FERC had overstepped its bounds by regulating retail sales of electricity.

“Fiddling with the effective retail price of electric energy, be it through incentive payments or hypothetical credits, regulates retail sales of electric energy no less than does direct rate-setting,” Scalia wrote.

Justice Samuel Alito didn’t take part in the case. Although Alito gave no reasons, his most recent financial disclosure report indicates that he or his wife owns shares of Johnson Controls Inc., whose EnergyConnect subsidiary helped defend the FERC rule.

The cases are FERC v. Electric Power Supply Association, 14-840, and EnerNOC v. Electric Power Supply Association, 14-841.

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