“I believe that this case is the most important case regarding the energy system in this country that the Supreme Court has ever yet to consider.” Strong words from Former Federal Regulatory Energy Commission (FERC) Chairman Jon Wellinghoff [2] (even though the last two landmark cases involving the nation’s electric grid were from 1923 and 1944).

The Supreme Court has agreed to decide whether FERC may regulate “demand response” payments offered to electric utility customers to reduce their electricity use during periods of high demand. State and local governments may save money through participating in demand response programs. But the Electric Power Supply Association argued, and the D.C. Circuit Court of Appeals agreed, that FERC’s Order 745 encroaches on states’ regulatory authority.

Per the Federal Power Act, FERC regulates the wholesale sale of electric energy. States regulate the retail sale of electric energy.

Retail electricity prices remain constant over a period of time regardless of demand. So customers have no price incentive to reduce consumption during those time periods. The purpose of “demand response” is to reduce electricity use when it is most expensive and least clean to produce.

FERC argued that demand response affects wholesale prices. The D.C. Circuit agreed but responded that FERC offered no limiting principle. The price of steel, fuel, and labor also affect the wholesale price of electricity but FERC can’t regulate them. According to the D.C. Circuit, “Demand response—simply put—is part of the retail market. It involves retail customers, their decision whether to purchase at retail, and the levels of retail electricity consumption.”

The Supreme Court will also decide whether Order 745’s compensation level for demand response is too high.

Justice Alito recused himself from participating in the consolidated cases of FERC v. Electric Power Supply Association [3], and EnerNOC Inc. v. Electric Power Supply Association [4].