In an 6-2 decision in *FERC v. Electric Power Supply Association* [2] the Supreme Court ruled that the Federal Energy Regulatory Commission (FERC) has the authority to regulate wholesale “demand response” and that demand response bidders may receive the same compensation as electricity producers.

“Demand response” is a practice in which operators in wholesale markets pay electricity consumers to not use power at certain times.

Energy is more expensive and inefficient to produce at certain times (like hot days). Nonetheless retail electricity rates remain stable providing no incentive for electric consumers to reduce their demand at these times. So, FERC blessed wholesale market operators using demand response to reduce energy use during peak times and to lower wholesale electricity prices.

Per the Federal Power Act, FERC regulates wholesale rates of electricity but states regulate retail rates. Electric Power Supply Association (EPSA) argued that through demand response FERC is “effectively” setting retail prices because when a consumer is deciding whether to buy electricity at retail the consumer will now consider both the cost of making the purchase and the cost of forgoing a demand response payment.

The Court disagreed with this argument stating that “the rate is what it is”: “the price paid, not the price paid plus the cost of a foregone economic opportunity.”

To make its point, Justice Kagan, writing for the majority, analogized EPSA’s argument to a “familiar scenario.” If a flight is overbooked and an airline offers $300 to passengers willing to take a later flight, passengers who don’t accept the offer and paid $400 for their ticket would not say now that they paid $700 for their ticket.

No matter what they bid, successful demand response bidders receive the wholesale rate. EPSA argued that they are receiving a “double-payment” and that they should only receive the wholesale price less the savings they net by not buying electricity on the retail market.

FERC reasoned that demand response bidders should receive the same compensation as electricity generators because they are providing the same value. The Court concluded that FERC’s judgment wasn’t “arbitrary and capricious” because regulating energy is technical and FERC provided reasons supporting its position and responded to EPSA’s proposed alternative.

The Court will decide another energy case later this term *Hughes v. Talen Energy Marketing* [3]. The issue in that case is whether federal law preempts a fixed-rate contract to build a power plant.

It is probably fair to characterize this case as a mixed bag for states. States argued [4] in this case that FERC was encroaching on their authority to regulate retail electricity rates. But as consumers of electricity states [5] will benefit from lower rates resulting from demand response.

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