

Nos. 11-1486 *et al.*

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

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ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,  
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
Respondent.

On Petition for Review from the Federal Energy Regulatory  
Commission

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BRIEF OF *AMICI CURIAE* ENVIRONMENTAL DEFENSE FUND, NATURAL  
RESOURCES DEFENSE COUNCIL, AND CITIZENS UTILITY BOARD IN  
SUPPORT OF RESPONDENT'S PETITION FOR REHEARING *EN BANC*

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## **RULE 26.1 DISCLOSURE STATEMENTS**

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, *amici* make the following disclosures:

Environmental Defense Fund. Environmental Defense Fund (“EDF”) is a not-for-profit organization dedicated to protecting public health and the environment. It does not have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public.

Citizens Utility Board. The Citizens Utility Board (“CUB”) is a statutorily created non-profit organization whose mission is to represent the interests of residential and small commercial utility customers in state and federal regulatory and judicial proceedings. CUB is a membership-funded organization with approximately 100,000 members in Illinois. CUB does not have any parent companies, and no publicly-held company has a 10 percent or greater ownership interest in CUB. CUB does not issue stock.

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the undersigned certifies as follows:

(A) **Parties and Amici.** All parties, intervenors, and *amici* appearing in this Court are listed in the Petition for Rehearing and the Petitioner-Respondent's original brief in this case, No. 11-1486, other than organizations filing this brief as *amici curiae* in support of the Petition for Rehearing *En Banc*.

(B) **Ruling Under Review.** References to the ruling at issue appear in the Petition for Rehearing and the Petitioner-Respondent's original brief in this case, No. 11-1486.

(C) **Related Cases.** References to any related cases appear Petitioner-Respondent's original brief in this case, No. 11-1486.

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\*Authorities upon which we chiefly rely are marked with asterisks.

**GLOSSARY**

|       |   |
|-------|---|
| FERC  | Federal Energy Regulatory Commission                        |
| FPA   | Federal Power Act   |
| NARUC | National Association of Regulatory Utility<br>Commissioners |
| NRDC  | Natural Resources Defense Council                           |
| PJM   | Pennsylvania-New Jersey-Maryland Interconnection            |

**RULE 35 STATEMENT & INTERESTS OF AMICI CURIAE**

*Amici Curiae* Environmental Defense Fund, Citizens Utility Board and Natural Resources Defense Council respectfully submit this brief in support of Respondent Federal Energy Regulatory Commission's ("FERC") Petition for Rehearing *En Banc* of this Court's decision vacating FERC Order 745.<sup>1</sup> *Electric Power Supply Ass'n v. FERC*, Nos. 11–1489 *et al.* (D.C. Cir. May 23, 2014).

Rehearing *en banc* is required to preserve the uniformity of this Court's decisions and resolve issues of "exceptional importance." *See* Fed. R. App. P. 35(a). The majority's conclusion that FERC lacked jurisdiction to issue Order 745 conflicts with previous decisions of this Court interpreting the broad scope of FERC's authority to ensure just and reasonable electric rates, *see, e.g.,* *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 694 (D.C. Cir. 2000) ("*TAPS*"), as well as numerous decisions defining the limited nature of this Court's review. *See, e.g.,* *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). The majority failed to defer to FERC's reasonable interpretation of its authority under the Federal Power Act ("FPA"). Choosing instead to wade into the complex

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(c)(5), *amici* certify that no counsel for any party authored this brief in whole or in part; no party or their counsel contributed money intended to fund preparing and submitting this brief; and no person — other than *amici*, their members and counsel — contributed money intended to prepare and submit this brief.

territory of national energy regulation that is FERC's province, the majority erected novel barriers to the effective regulation and operation of the nation's wholesale power markets. As a result, the existing vibrant market for demand response resources, which provides enormous consumer, health, and environmental benefits, is now in jeopardy.

*Amici* include EDF and NRDC, representing their hundreds of thousands of members concerned with reducing air pollution and securing environmentally sustainable energy policies, and CUB, representing the interests of retail customers in securing reliable, affordable, and environmentally sustainable energy policies. All three organizations filed an *amicus* brief in support of FERC in this case and have participated extensively in proceedings to encourage deployment of cost-effective clean energy resources.

## **ARGUMENT**

### **I. The Panel's Decision Conflicts with the Federal Power Act and Circuit Precedent and Does Not Defer to the Commission's Reasonable Interpretation of its Own Jurisdiction**

The majority decision strips FERC of authority to establish just and reasonable rates for demand response resources in the wholesale energy markets, imposes novel limits on the Commission's jurisdiction that conflict with established Court precedent, and interferes with the Commission's ability to oversee a complex and evolving facet of the nation's wholesale markets.

The FPA vests the Commission with broad jurisdiction over the “sale of electric energy at wholesale in interstate commerce,” 16 U.S.C. § 824(b)(1), and directs the Commission to assure that “all rules and regulations affecting or pertaining to” wholesale electric rates are just and reasonable. 16 U.S.C. §§ 824d(a), 824e(a). Together these provisions give FERC an “inclusive jurisdictional mandate,” *see Municipalities of Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978), that reflects “Congress’ desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.” *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 373 (1988) (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965-66 (1986)). Although the FPA “clearly contemplates state jurisdiction over local distribution *facilities* and retail *sales*,” the statute “is much less clear” about where the states’ jurisdiction ends and the Commission’s begins. *TAPS*, 225 F.3d at 694 (emphasis added). Accordingly, this Court has consistently deferred to the Commission’s reasonable interpretation of its own jurisdiction. *See id.*; *NARUC v. FERC*, 475 F.3d 1277, 1279 (D.C. Cir. 2007).

Even though the majority agrees with FERC that demand response directly affects jurisdictional wholesale rates, and is not a retail “sale of electric energy” excluded from the Commission’s jurisdiction under section 201(b), *Electric Power Supply Ass’n v. FERC*, slip op. at 7-8, the majority refused to follow precedent and

afford the Commission proper deference. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013) (courts must defer to reasonable agency interpretation of ambiguous jurisdictional provisions). For the first time, the majority concluded the section 201(a) limit on Commission authority over matters “subject to regulation by the States” — a phrase that the Supreme Court characterized as a “mere ‘policy declaration’,” *New York v. FERC*, 535 U.S. 1, 22 (2002)<sup>2</sup> — prohibits any Commission action that affects “part of the retail market.” Slip op. at 3-4.

That conclusion conflicts with this Circuit’s previous holdings recognizing that the FPA clearly preserves state powers over regulation of “local distribution facilities” and “retail sales,” neither of which are addressed by Order 745. *See TAPS*, 225 F.3d at 690-91; *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006). That Order 745 may *affect* retail sales does not invalidate the rule. *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009) (upholding capacity requirement affecting wholesale rates, even though it also affected non-jurisdictional generation); *see also NARUC v. FERC*, 475 F.3d at 1281 (“the fact that . . . an order may affect a non-jurisdictional [entity] does not

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<sup>2</sup> In *New York v. FERC*, the Court also suggested that FPA § 201(a)’s reservation of state power over matters traditionally “subject to regulation by the states” does not extend to innovations in electricity markets unanticipated by Congress in 1935. 535 U.S. at 21. Like the unbundled transmissions at issue in *New York v. FERC*, sales by demand response aggregators are a “recent development” that have not historically “been ‘subject to regulation by the states’.” *Id.*

undermine the validity of the Commission's order"). The majority's opinion also ignores that Order 745 explicitly preserves state authority to prevent or limit the participation of demand response resources in wholesale markets. Slip op. at 15 (Edwards, J., dissenting).

The majority's core premise — that demand response resources are part of the "retail market" — also improperly disregards the Commission's expert judgment. Slip op. at 7. That demand response resources involve action *by* retail customers does not make them part of the "retail market." *Id.* Demand response resources covered by Order 745 are bid into wholesale markets for the purpose of balancing wholesale supply and demand. Grid operators treat demand response resources in a manner comparable to conventional generation resources — dispatching those resources when needed, subject to many of the same wholesale market rules as generation. Such developments have changed the landscape of the electric industry since the FPA created "neatly divided" spheres of jurisdiction. *See New York v. FERC*, 535 U.S. at 16. The majority does not give deference to the Commission's expert conclusion that such resources affect the wholesale market and, as such, are within the Commission's jurisdiction.

Ultimately, the majority faults Order 745 for its purported lack of a "limiting principle" — speculating that if Order 745 were upheld, the Commission could regulate "any number of areas, including the steel, fuel, and labor markets." Slip

op. at 3. This Court has already carefully circumscribed the Commission's jurisdiction under FPA section 206. *See Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) (“CAISO”) (limiting the Commission's power to “regulat[ing] rates, charges, classifications, and closely related matters”). Order 745 is a reasonable exercise of the Commission's traditional jurisdiction to establish just and reasonable rates for resources in wholesale energy markets. It falls well within the limits articulated in *CAISO*.

## **II. The Panel's Jurisdictional Decision Raises Issues of Exceptional Importance**

The majority decision raises questions of “exceptional importance” regarding the scope of FERC's authority and the nation's wholesale energy markets. Fed. R. App. P. 35(a)(2). FERC has been approving wholesale tariffs with demand response provisions since at least the year 2000. Since the publication of Order 745, participation of demand response resources in the wholesale energy and capacity markets has dramatically increased.<sup>3</sup> Numerous participants have engaged in the marketplace based on settled expectations of its structure and functioning; these expectations have been consistently reinforced by both FERC and this Court. *See Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d

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<sup>3</sup> PJM Interconnection, *2012 Economic Demand Response Performance Report: Analysis of Economic DR participation in the PJM wholesale energy market after the implementation of Order 745* at 2 (Mar. 25, 2013) (total demand response greater in 7 months following Order 745 than in previous 3 years).



735 (D.C. Cir. 2012) (dismissing challenges to FERC Order 719 provisions concerning demand response). Demand response has become a vital resource that grid operators rely upon to balance the flow of electricity in real time, meet long-term capacity needs, and maintain system reliability. The majority decision upsets these settled expectations and market practices.

But the adverse impacts of the panel's decision reach even further. Demand response reduces harmful air pollution by avoiding dispatch of inefficient, high-emitting generation during times of peak electricity demand. Avoiding the use of just 10% of peaking plants would avoid 100-200 million metric tons of greenhouse gases annually, in addition to other harmful pollutants such as nitrogen oxides and sulfur dioxide. *See* Corrected Brief for *Amici Curiae* Environmental Defense Fund et al. in Support of Respondent FERC at 23, *Electric Power Supply Ass'n v. FERC*, (Nos. 11-1486, *et al.*).

The majority's decision jeopardizes these valuable health and economic benefits. Other litigants are already seeking to stretch the majority decision's flawed rationale to further erode the Commission's authority. *See, e.g.*, Complaint, *FirstEnergy Service Co. v. PJM Interconnection, LLC*, FERC Docket No. EL14-55-000 (May 23, 2014) (seeking to extend the panel's reasoning to the multibillion dollar PJM capacity market). The majority's flawed interpretation makes it likely that the Court will again be asked to address these questions, further underscoring

the “exceptional importance” of these issues and the need for rehearing *en banc*.

*Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1341 (D.C. Cir. 1981)

(rehearing *en banc* appropriate where “issue(s) likely to affect many other cases”).

### **CONCLUSION**

FERC’s petition should be granted.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rules of Appellate Procedure 29(d) and 35(b)(2), I hereby certify that the foregoing **Brief of *Amici Curiae* Environmental Defense Fund, Natural Resources Defense Council, and Citizens Utility Board in Support of Respondent's Petition for Rehearing *En Banc*** contains 7.5 pages and 1,678 words not including the tables of contents and authorities and the certificate of compliance.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 8th day of July, 2014, the foregoing **Brief of *Amici Curiae* Environmental Defense Fund, Natural Resources Defense Council, and Citizens Utility Board in Support of Respondent's Petition for Rehearing *En Banc*** was served upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail.

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