

Nos. 11-1486 *et al.*

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

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

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Review from the Federal Energy Regulatory
Commission

MOTION FOR INVITATION TO FILE 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*

Vickie L. Patton
General Counsel
ENVIRONMENTAL DEFENSE
FUND
2060 Broadway
Suite 300
Boulder, CO 80302
Tel. (303) 447-7215
Email: vpatton@edf.org

Tomás Carbonell
Senior Attorney
ENVIRONMENTAL DEFENSE
FUND
1875 Connecticut Ave., NW
Suite 600
Washington, DC 20009
Tel. (202) 572-3610
Email: tcarbonell@edf.org

*Counsel for Amicus Curiae Environmental Defense Fund**

Dated: July 8, 2014

*Additional counsel listed on inside cover

Peter Zalzal
Senior Attorney
ENVIRONMENTAL DEFENSE
FUND
2060 Broadway
Suite 300
Boulder, CO 80302
Tel. (303) 447-7214
Email: pzalzal@edf.org

Michael Panfil
Attorney
ENVIRONMENTAL DEFENSE
FUND
1875 Connecticut Ave., NW
Suite 600
Washington, DC 20009
Tel. (202) 572-3280
Email: mpanfil@edf.org

Counsel for Amicus Curiae Environmental Defense Fund

Allison Clements
Director, The Sustainable FERC
Project
NATURAL RESOURCES
DEFENSE COUNCIL
40 W. 20th Street
New York, NY 10011
Tel. (212) 727-4473
Email: aclements@nrdc.org

John N. Moore
Senior Attorney, The Sustainable
FERC Project
NATURAL RESOURCES
DEFENSE COUNCIL
20 North Wacker Drive, Suite 1600
Chicago, IL 60606
Tel. (312) 651-7927
Email: jmoore@nrdc.org

Counsel for Amicus Curiae Natural Resources Defense Council

Kristin Munsch
Director of Policy & Senior Attorney
CITIZENS UTILITY BOARD
309 W. Washington, Suite 800
Chicago, IL 60606
Tel. (312) 263-4282
Fax: (312) 263-4329
Email: kmunsch@citizensutilityboard.org

Counsel for Amicus Curiae Citizens Utility Board

Pursuant to Federal Rule of Appellate Procedure 29 and D.C. Circuit Rule 29(b), *amici curiae* respectfully move this Court for invitation to file the attached Brief of *Amici Curiae* Environmental Defense Fund, Natural Resources Defense Council, and Citizens Utility Board in Support of Respondents' Petition for Rehearing *En Banc* ("Brief") in this case. These three *amici* previously filed a joint *amicus* brief in this proceeding in September 2012.

All parties have been consulted on the filing of the brief. Respondent Federal Energy Regulatory Commission ("FERC") and Respondent-Intervenors PJM Industrial Customer Coalition, Coalition of Midwest Transmission Customers, Viridity Energy Inc., and EnerNOC, Inc. do not oppose its filing. Petitioners Electric Power Supply Association, Edison Electric Institute, American Public Power Association, National Rural Electric Cooperative Association, and Old Dominion Electric Cooperative indicated that they believe the motion is improper and reserved the right to file a response.¹ Other parties did not respond indicating a position.

1. *Amici* include non-governmental organizations Environmental Defense Fund ("EDF") and Natural Resources Defense Council ("NRDC"),

¹ Petitioners asked that we represent the following to the court:

Petitioners take the position that this motion seeking to lodge a proposed *amicus* brief in support of rehearing is improper and violates Circuit Rule 35(f). Petitioners have not had an opportunity to review this motion before it was filed and reserve their right to file a response, if necessary.

representing their hundreds of thousands of members concerned with reducing air pollution and securing environmentally sustainable energy policies, and Citizens Utility Board (“CUB”), representing the interests of retail customers in securing reliable, affordable, and environmentally sustainable energy policies. *Amici* have long supported greater utilization of cost-effective clean energy resources, including the demand-side resources addressed by FERC Orders 745 and 745-A.

EDF works actively on behalf of its many members to open electricity markets to promote innovation and deployment of clean energy resources, including demand response. CUB advocates for just and reasonable rates on behalf of residential and small business electricity consumers in Illinois, and supports proper compensation for demand response. NRDC houses the Sustainable FERC Project, a coalition of public interest groups working towards integrating renewable and demand-side resources into the transmission grid. NRDC has also advocated before FERC, including submitting comments on the proposed rule that became Order 745, and has participated in Regional Transmission Organization proceedings involving implementation of Order 745.

Amici share the belief that this case disrupts the uniformity of this Court’s decisions, Fed. R. App. P. 35(b)(1)(A), and involves questions of exceptional importance that will have significant public health, environmental, and consumer implications. Fed. R. App. P. 35(a)(2). *Amici* further believe that the attached

Brief will assist the Court in reaching a decision on the petitions for rehearing *en banc*.

2. *Amici* have also sought to minimize any additional burden this motion imposes on the Court. First, pursuant to D.C. Circuit Rule 29(d), this group of *amici* have joined together to submit a single brief. Second, *amici* have limited the attached Brief to seven and one-half (7.5) pages. *See* Fed. R. App. P. 29(d). Third, although Federal Rules of Appellate Procedure 29(e) allows for filing of an *amicus* brief up to seven (7) days after respondent's brief, *amici* are filing this motion and the attached Brief one day after the petition for rehearing *en banc* was filed to avoid delaying the Court's consideration of the petition. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, J.).

3. Rehearing *en banc* is clearly warranted here to protect the uniformity of this Court's decisions and resolve questions of "exceptional importance." *See* Fed. R. App. P. 35(a). As *amici* explain in the attached Brief, the majority opinion conflicts with Supreme Court as well as this Court's precedent. In particular, the majority failed to defer to FERC's reasonable interpretation of its own jurisdiction as required under *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), and *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), in which the Court recognized that the boundary between state and federal jurisdiction under the Federal Power Act is ambiguous. Rather than deferring to

FERC's reasonable interpretation of its jurisdiction under these precedents, the majority found that the Commission is powerless to promulgate rules affecting the "retail market," and declared that demand response falls within this newfound proscription. The decision undermines the role of expert agency decision-making, and contradicts this Court's prior precedent.

4. The decision raises issues of exceptional importance and has significant legal and practical ramifications that extend beyond the particular markets at issue in Order 745. Indeed, the decision creates uncertainty surrounding the extent of the Commission's jurisdiction over demand response resources in all wholesale markets. As a result, the decision undermines the existing vibrant market for demand response resources, which provides significant consumer, health, and environmental benefits.

5. Given the importance of the issues at stake and the significant errors in the majority opinion, it is vital that this Court grant rehearing.

For the foregoing reasons, *amici* respectively request that the Court grant this motion and invite the filing of the attached Brief.

Respectfully submitted,

/s/ Tomás Carbonell

Tomás Carbonell

Environmental Defense Fund

1875 Connecticut Ave., NW

Suite 600

Washington, DC 20009

Tel. (202) 572-3610

Email: tcarbonell@edf.org

*Counsel for Environmental Defense
Fund*

Dated: July 8, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2014, I have served the foregoing **Motion for Invitation to File 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*** upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail.

/s/ Tomás Carbonell

Tomás Carbonell

Environmental Defense Fund

1875 Connecticut Ave., NW

Suite 600

Washington, DC 20009

Tel. (202) 572-3610

Email: tcarbonell@edf.org

*Counsel for Environmental Defense
Fund*

Dated: July 8, 2014