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What's Next? Potential Impact of the Landmark Supreme Court Decision in FERC v. EPSA on Demand Response Across the Country

By now, much has been written about the January 25 decision by the United States Supreme Court (the Court) in *Federal Energy Regulatory Commission v. Electric Power Supply Association*, Docket No. 14-840, and *EnerNOC, Inc. v. Electric Power Supply Association*, Docket No. 14-841 (together, *EPSA II*). *EPSA II* reversed and remanded the D.C. Circuit Court of Appeals (D.C. Circuit) decision holding that the Federal Energy Regulatory Commission (FERC) did not have jurisdiction over demand response (*Electric Power Supply Ass'n v. FERC*, 753 F.2d 216 (D.C. Cir. 2014) [*EPSA I*]). That D.C. Circuit decision found that FERC had exceeded its jurisdiction in electricity matters in Order No. 745 (Docket No. RM10-17), which required wholesale market operators to pay retail customers the full locational marginal price (LMP) for reducing their energy consumption (referred to as G) rather than a lower rate that nets out the customer's savings from purchasing less energy (LMP-G). The Supreme Court held that FERC was within its authority under the Federal Power Act (FPA) to regulate market operators' compensation of customers for demand response (DR) in the organized wholesale markets and FERC's decision to compensate demand response providers at LMP rather than LMP-G was not arbitrary and capricious.

So now that the Supreme Court has spoken, what's next? This Advisory seeks to answer that question.

Remand to the D.C. Circuit

Pursuant to the Supreme Court's decision, the case will now be sent back to the D.C. Circuit for further proceedings. The formal judgment remanding the case is likely to be issued by the end of February.

On remand, the D.C. Circuit may have to address one remaining issue left undecided in the D.C. Circuit's initial decision. When the case was before the D.C. Circuit previously, the California ISO (CAISO) and California Public Utilities Commission (CPUC) (collectively, the California Petitioners) argued that in issuing Order No. 745, FERC failed to make the prerequisite finding under Section 206(a) of the FPA that the cost allocation methodology it had accepted in CAISO's tariff filing submitted in response to FERC's earlier demand response rulemaking (Order No. 719)[1] was now unjust and unreasonable. The California Petitioners explained that pursuant to FERC's Order No. 719, CAISO had submitted tariff revisions to FERC updating its cost allocation methodology to permit demand response resources to participate in the wholesale market. CAISO's Order No. 719 tariff provisions were developed through the region's stakeholder process and, after FERC approval of the same, CAISO spent millions of dollars implementing those changes. Nine months after CAISO's Order No. 719 tariff changes were approved, FERC issued Order No. 745.

The California Petitioners argued that FERC exceeded its authority in requiring CAISO's compliance with Order No. 745 because FERC did not find, either specifically or generically, that the cost allocation methodology it previously approved for CAISO's tariff had become unjust and unreasonable. FERC held in response that Order No. 745 was a generic rulemaking applicable to all ISOs/RTOs, and that specific findings concerning the justness and reasonableness of each independent system operator's demand response program were therefore unnecessary. Furthermore, FERC argued that Order No. 745 found existing cost allocation methods inadequate only to the extent that they failed to comply with the general guidelines in Order No. 745. FERC therefore expressly declined to make specific findings for each ISO/RTO, including CAISO.

On remand, the California Petitioners will have the option to withdraw this remaining issue, particularly in light of the limited scope of this issue contrasted with the breadth of the *EPSA II* decision. Absent a withdrawal, the D.C. Circuit will have the

opportunity to determine whether it will decide the matter based only on the briefs already before it or it will allow additional briefing and arguments, and if so, whether those new briefs and arguments will be permitted from the California Petitioners and FERC only or also from any party that has intervened. The D.C. Circuit's ultimate decision on this open issue could have impacts beyond California if it is broadly construed to apply to any region's market operator that amended its Order No. 719 tariff provisions to comply with Order No. 745.

The Impact of *EPSA II* on Order No. 745 Compliance in Each Region

Order No. 745 directed each independent system operator to submit a compliance filing with the tariff changes needed to implement the compensation approach in Order No. 745 on or before July 22, 2011. An extension until August 19, 2011, was requested and granted in New England, the Midwest and New York.

ISO New England, PJM and Midwest ISO

In all three of these regional wholesale markets, tariff revisions were filed by the independent system operator in compliance with Order No. 745, and those revisions were accepted and made effective in 2012. In each region, the Electric Power Supply Association (EPSA) filed a petition with the D.C. Circuit appealing FERC's orders accepting the regional Order No. 745 compliance filings. In New England, EPSA's petition was filed jointly with the New England Power Generators Association, Inc. (NEPGA). Those petitions have been held in abeyance pending the outcome of the original appeals of Order No. 745, as described below, and the approved tariff changes remain in effect in all three regions.

Current Status in New England (Docket No. ER11-4336). ISO New England's (ISO-NE) proposed tariff changes that were filed in compliance with Order No. 745 became effective on June 1, 2012, and are currently in effect. ISO-NE proposed to implement the tariff changes in two phases and therefore filed one set of "Transition Period Rules" and a second set of "Full Integration Rules." The Transition Period Rules were implemented beginning June 1, 2012, and will remain in place until the Full Integration Rules become effective, which is currently set for June 1, 2018. ISO-NE is continuing to develop the Full Integration Rules through subsequent compliance filings. A number of parties, including EPSA and NEPGA, requested rehearing of FERC's initial order approving ISO-NE's compliance filing. EPSA and NEPGA questioned whether FERC erred in accepting ISO-NE's compliance filing, as the revised tariff would treat behind-the-meter generation as a demand response resource eligible to receive full LMP compensation. FERC denied all requests for rehearing, and EPSA and NEPGA have appealed those orders to the D.C. Circuit, as described below.

Current Status in PJM (Docket Nos. ER11-4106 and EL14-55). PJM submitted its initial Order No. 745 compliance filing in June 2011 and made additional compliance filings in 2012, pursuant to FERC's initial order in December 2011. PJM's tariff revisions became effective on April 1 and July 1, 2012, and remain in effect. In this docket, FERC also rejected rehearing requests from EPSA and the PSEG Companies that argued FERC erred in accepting PJM's proposal to treat behind-the-meter generation as DR-eligible for full LMP compensation.

In a separate complaint to FERC on May 23, 2014, the same day the D.C. Circuit issued its decision in *EPSA I* vacating Order No. 745, FirstEnergy filed a complaint against PJM requesting that FERC require (1) the "removal of all portions of the PJM Tariff allowing or requiring PJM to include demand response as suppliers to PJM's capacity markets" and (2) the results of the PJM capacity auction due to be released that same day be considered void and legally invalid with respect to any demand response resources. This complaint was pending before FERC until the Court reached its decision in *EPSA II*. Following *EPSA II*, FirstEnergy filed a notice of withdrawal of its complaint.

Current Status in Midwest ISO (Docket Nos. ER11-4337 and ER12-1266). In the Midwest ISO (MISO), the Order No. 745 tariff revisions that were submitted to comply with Order No. 745 became effective on July 12, 2012. MISO's initial proposed tariff revisions, submitted in August 2011, differentiated between demand response resources facilitated by behind-the-meter generation and other demand response resources, and they would have excluded the former from compensation. FERC issued an order in December 2011 accepting that filing in part, directing MISO to make an additional compliance filing and rejecting MISO's proposal regarding behind-the-meter generation as beyond the scope of Order No. 745. In January 2012, EPSA and others requested rehearing of the finding in FERC's December 2011 order, asking FERC to uphold MISO's initial proposal differentiating between compensation for the two types of DR. In March 2012, in a separate docket, MISO submitted its compliance filing pursuant to FERC's December 2011 order. In July 2012, FERC issued an order rejecting the rehearing requests, accepting MISO's March 2012 filing and directing MISO to make an additional compliance filing. In August 2012,

MISO made its next compliance filing, which was accepted by FERC in May 2013, subject to another compliance filing, which MISO submitted in September 2013. MISO's September 2013 compliance filing remains pending before FERC.

Appeals to the D.C. Circuit [Case Nos. 12-1306 (ISO-NE), 12-1368 (PJM) and 12-1381 (MISO)] of Orders Accepting Individual RTO Order No. 745 Compliance Filings. EPSA (in New England, joined by NEPGA) filed petitions for review of FERC's orders accepting ISO-NE's, PJM's and MISO's Order No. 745 compliance filings, respectively, in the D.C. Circuit.

In all three cases, the petitioners challenged FERC's orders requiring each independent system operator to compensate demand response resources supported by behind-the-meter generation at full LMP, in addition to raising the jurisdictional challenge that was reversed in *EPSA II*.

These appeals are currently being held in abeyance by the D.C. Circuit. In each docket, the parties are under an obligation to file motions to govern future proceedings within 30 days of the issuance of the judgment in *EPSA II*. Once the Court issues its formal judgment, EPSA/NEPGA and FERC will be obligated to apprise the D.C. Circuit of their view of how the cases should proceed, if at all, in light of the *EPSA II* remand. The options are that the parties and FERC can agree that the appeals should be dismissed or the petitioners can decide to continue with their appeals in the wake of FERC's Order No. 745 having been upheld by the Supreme Court.

Future Impacts in ISO-NE, PJM and MISO. The Order No. 745 tariff revisions in ISO-NE, PJM and MISO are currently in effect in each market region. These provisions will be left undisturbed if any of the related appeals are withdrawn or dismissed. However, in the event that the petitioners decide to continue their narrowed appeals, there is always the possibility that the D.C. Circuit could find in their favor – however remote the possibility.

New York ISO

Current Status (Docket Nos. ER11-4338, EL13-74 and ER14-2006). The New York ISO's (NYISO) tariff revisions that were filed in compliance with Order No. 745 remain pending before FERC. NYISO submitted its initial compliance filing in August 2011, which was rejected in part by FERC in a May 2013 decision, and NYISO was directed to submit an additional compliance filing. In June 2013, demand response providers requested rehearing of FERC's finding in the May 2013 decision that Order No. 745 does not require RTOs/ISOs to compensate DR facilitated by behind-the-meter generation at full LMP. FERC issued a tolling order affording it additional time to consider the rehearing requests, and in August 2013, NYISO submitted its compliance filing. Both NYISO's compliance filing and the rehearing requests remain pending before FERC.

On the same day, demand response supporters requested rehearing of FERC's May 2013 compliance order and also filed a joint complaint in a new docket (EL13-74) seeking a FERC order requiring NYISO to file revisions to its tariff to allow DR facilitated by behind-the-meter generation to be compensated at full LMP. FERC issued an order on the complaint in November 2013 finding that (1) Order No. 745 neither requires nor precludes behind-the-meter generation from LMP compensation, and (2) in light of the record, NYISO's failure to revise its tariff to allow such participation constitutes undue discrimination. FERC directed NYISO to submit a compliance filing that would allow DR facilitated by behind-the-meter generation to participate in NYISO's DR program on a basis comparable with other DR resources. EPSA sought rehearing of the FERC order, which remains pending. In May 2014, NYISO submitted a filing in compliance with FERC's November 2013 order, which also remains pending.

Future Proceedings. The Court's decision in *EPSA II* did not address the issues that remain pending before FERC regarding NYISO's Order No. 745 compliance. Until FERC issues the rehearing order in this docket, the behind-the-meter issue in this proceeding remains unresolved. While not controlling in this particular proceeding, it is possible that FERC will wait until the D.C. Circuit resolves EPSA's pending appeals in the individual ISO-NE, PJM and MISO appellate proceedings, which it can do since it is not under a time constraint within which to act on a rehearing.

California ISO

Current Status (Docket No. ER11-4100). The California ISO's proposed tariff changes in response to Order No. 745 became effective on July 18, 2013. CAISO submitted its initial compliance filing in July 2011, and in December 2011, FERC issued an order rejecting that filing in part and directing CAISO to make a subsequent compliance filing. In January 2012, CAISO requested rehearing, raising the same issues regarding Order No. 719 that it subsequently raised in its joint brief with the CPUC to the D.C. Circuit in *EPSA I*. CAISO submitted a compliance filing, as directed by FERC's December 2011 order,

in March 2012. FERC denied CAISO's rehearing request on July 18, 2013, the same day it accepted CAISO's compliance filing.

On September 16, 2013, CAISO filed a petition for review in the D.C. Circuit of FERC's December 15, 2011 and July 18, 2013 orders accepting CAISO's Order No. 745 compliance filings. CAISO filed its petition to preserve for appeal the issues it raised in its brief to the D.C. Circuit in EPSA I, which are now before the D.C. Circuit on remand following EPSA II, as described above. On October 15, 2013, CAISO requested its appeal be held in abeyance by the D.C. Circuit pending the issuance of a judgment in EPSA I.

Future Impacts. The CAISO tariff revisions are currently in effect. The issue raised jointly by the California Petitioners in EPSA I will be resolved by the D.C. Circuit on remand from EPSA II, unless the parties choose to withdraw their outstanding appeal. By separately seeking review of FERC's individual orders accepting CAISO's compliance filings, CAISO preserved its right to argue these issues before the D.C. Circuit based on the outcome of the remand decision. If that outcome is in favor of the California Petitioners, then CAISO will have the opportunity to decide whether to continue to pursue (or not) its appeals of FERC's orders accepting its Order No. 745 compliance filings.

Southwest Power Pool: Current Status and Future Impacts (Docket No. ER11-4105)

The Southwest Power Pool's (SPP) proposed tariff changes in response to Order No. 745 became effective on December 20, 2013. No rehearing was sought of FERC's order accepting the compliance filing. Accordingly, SPP's Order No. 745 compliance efforts should be unaffected by any further D.C. Circuit action.

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[1] Among other things, Order No. 719 required regional transmission operators (RTOs) and independent system operators (ISOs) to amend their tariffs to allow retail electric customers to bid demand response resources into their organized markets unless otherwise precluded by the relevant state regulatory authority.

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