CENSE REPORT / Jan Medley

Supreme Court rules "Demand Response" receive same rates for *conserving* electricity as companies earn for *generating* electricity

Abstract

A 2016 Supreme court decision written by Justice Elena Kagan[1] elegantly explains the economic value of "demand response," a strategy where large users of electricity are compensated for reducing power consumption during periods of peak electrical demand. The Court's arguments support the position that the authority of the Federal Energy Regulatory Commission (FERC) should be upheld to pay large users of electricity the same rate to reduce power consumption during periods of peak electrical demand as it would cost companies to generate enough electricity to meet demand.

The regulatory approach, known as "demand response," lowers costs for consumers and lessens the risk of system failures that can cause blackouts. As Justice Elena Kagan wrote for the majority in the 6-to-2 decision:

> *"That practice (demand response) arose because wholesale market operators can sometimes — say, on a muggy August day — offer electricity both more cheaply and more reliably by paying users to dial down their consumption than by paying power plants to ramp up their production."* [2]

The Court's decision rejected a claim by the Electric Power Supply Association (EPSA) that FERC's regulation of demand response interfered with retail rates and thus extended beyond FERC's authority to regulate only wholesale rates.

The Court also rejected EPSA's second argument that even if the commission had the authority to issue the regulation, it had acted arbitrarily in adopting it.

Clean energy advocates celebrate the decision, stating that it places demand response on a level playing field with power plants and will spur investment and innovation leading to a cleaner power grid.

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[1] Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n, 136 S.Ct. 760, 193 L.Ed.2d 661 (2016)

[2] https://www.supremecourt.gov/opinions/15pdf/14-840-%20new_o75q.pdf. p 2

1. What is Demand Response

Demand response pays large energy consumers (universities, manufacturers, large office buildings, etc.) to reduce energy during times of peak demand. For electric grid operators and utilities, who must provide its customers with cost-effective, consistent and reliable electricity, demand response is a much cheaper alternative than paying power providers premium prices to provide the system with more electricity. Because demand response is such a cost-efficient way to meet peak demand, the savings can be passed along to all energy consumers.[3]

Since 1935, as part the Federal Power Act, the Federal Energy Regulatory Commission has had the authority to regulate the demand response market.[4] FERC manages the compensation related to demand response for the wholesale electricity markets, in which electricity is competitively bought and sold.

In March 2011, FERC amended the Federal Power Act ruling that companies delivering demand response services should receive the same rates for *conserving* electricity as companies earn for *generating* electricity. [5]

2. State vs. Federal authority

In response, the Electric Power Supply Association (EPSA), representing electric power producers, took FERC to court and challenged the order, arguing that FERC is authorized to regulate wholesale, but not retail electricity transactions.[6]

In 2014, a D.C. Circuit court sided with the EPSA and found that states, not the federal government, have exclusive jurisdiction over the demand response market.[7]

In 2016, Justice Kagan rejected that argument, stating that the regulation affected retail sales only incidentally. She wrote:

> *"It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other. To the contrary, transactions that occur on the wholesale market have natural consequences at the retail level. And so too, of necessity, will FERC's regulation of those wholesale matters."* [8]

Justice Kagan rejected a second argument from the challengers: that even if the commission had the authority to issue the regulation, it had acted arbitrarily in adopting it.

> *"The commission, not this or any other court, regulates electricity rates" The disputed question here involves both technical understanding and policy judgment. The commission addressed that issue seriously and carefully, providing reasons in support of its position and responding to the principal alternative advanced. . .*

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3 https://www.energysmart.enernoc.com/why-does-supreme-court-care-about-demand-response
4 http://fortune.com/2016/01/25/supreme-court-demand-response-ruling/
5 https://www.ferc.gov/EventCalendar/Files/20110315105757-RM10-17-000.pdf
6 http://fortune.com/2016/01/25/supreme-court-demand-response-ruling/
7 Ibid
8 https://www.supremecourt.gov/opinions/15pdf/14-840-%20new_o75q.pdf p.18

"It is not our job to render that judgment, on which reasonable minds can differ. Our important but limited role is to ensure that the Commission engaged in reasoned decision making — that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice." [9]

3. Conclusion

To clean energy advocates, this case epitomizes the confrontation between those who cling to the "fossil fuel-centric 20th century centralized grid" and those who seek a more decentralized, resilient, nimble, and diverse 21st century grid that includes a wide range of demand-side resources, including rooftop solar, wind power, batteries, demand response, and energy efficiency.[10]

[9] https://www.supremecourt.gov/opinions/15pdf/14-840-%20new_o75q.pdf p.33
[10] https://www.energysmart.enernoc.com/why-does-supreme-court-care-about-demand-response