

CLIENT ALERT

D.C. Circuit Denies Rehearing of Its Decision Limiting FERC Authority Over Demand Response

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Recently, the D.C. Circuit denied rehearing en banc of its decision in *Electric Power Supply Association v. FERC (EPSA)*. *EPSA* overturned the Federal Energy Regulatory Commission's (FERC) Order No. 745 in which FERC established compensation levels for demand response resources that participate in day-ahead and real-time wholesale energy markets operated by FERC-regulated regional transmission organizations. Specifically, the court held that because Order No. 745 encroached upon the states' exclusive jurisdiction to regulate retail energy markets, FERC had no jurisdiction to regulate demand response resources participating in wholesale energy markets. FERC and a coalition of supporting intervenors have since filed motions to stay the court's issuance of a mandate, pending the federal government's possible filing of a petition for a writ of certiorari in the U.S. Supreme Court, due by December 16.

Recent decisions in the Third and Fourth Circuits have also addressed the dividing line between state and federal authority in connection with state-administered procurements for new, gas-fired power plants. See *PPL EnergyPlus, LLC v. Solomon* and *PPL EnergyPlus, LLC v. Nazarian*. In these cases, the courts considered state initiatives to support power plant construction through so-called "contracts for differences," under which the plant's developer would receive the difference between the price it offered (and competitively bid) to build and operate the new plant and the revenues it would receive from its sales of capacity and/or energy from that plant into PJM Interconnection, L.L.C.'s (PJM) annual forward capacity market. In both cases, the courts held that the state initiatives were preempted by federal law because the state-approved payment mechanism either "set" or "affected" rates in wholesale markets that fall under FERC's exclusive jurisdiction. Petitions for writs of certiorari in the Supreme Court are due by November 27 (for the Fourth Circuit case) and December 10 (for the Third Circuit case). *(Please note that Crowell & Moring represents CPV Power Development, Inc. and CPV Maryland, LLC in these matters.)*

Each of these recent cases illuminates the current market challenges caused by uncertain jurisdictional lines. Regardless of where one might come out on the merits, at a minimum, they each send unclear signals to regulators and market participants alike, and they might well even be incompatible with currently evolving markets. They inject uncertainty as to the portfolio of resources that can be relied upon to meet both current and future supply and demand needs; they frustrate state and regional efforts to meet those needs; and they almost certainly will lead to arguments that they be extended to other resources that participate in the so-called organized energy markets, such as renewable power and distributed generation and storage.

Hopefully, the Supreme Court will take up one or more of these cases, and give guidance to the state and federal governments as they continue to develop the 21st century tools required to plan and regulate the nation's generation portfolio and the grid that serves it. Surely greater cooperation and coordination between the states and the various federal agencies tasked with this effort would be desirable; and potentially new regulations and/or legislation will be needed. But in the meantime, all market participants in the energy sector need to be aware of how these rulings could impact their businesses in the immediate and uncertain future.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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