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

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,	)	
Petitioners,	)	
v.	)	No. 11-1486, *et al.*
FEDERAL ENERGY REGULATORY COMMISSION,	)	
Respondent.	)	

PETITIONERS' RESPONSE TO
RESPONDENTS' MOTIONS TO STAY ISSUANCE OF MANDATE

A party seeking to stay the issuance of this Court's mandate must demonstrate that a "certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d). That requires a strong showing that the Supreme Court will likely grant certiorari and reverse, and that the moving party will suffer irreparable injury absent a stay. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (standards for stay); *see also Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 134 S. Ct. 1621 (2014). The moving party also must demonstrate that a stay will not cause substantial harm to others and is in the public interest.

The motions for stay filed by the Federal Energy Regulatory Commission and its intervenors do not satisfy these requirements. The Commission has not decided at this time whether to pursue further review, and it makes no showing that the Supreme Court would likely grant certiorari. Nor does the Commission make any claim, much less any showing, that issuing the mandate will cause irreparable harm. In fact, because the Commission does not challenge the Court's holding striking down its improper compensation scheme, *see* FERC Mot. 2, the rule should be vacated without delay. The intervenors, for their part, merely rehash arguments that were rejected when this Court, without dissent, denied the petitions for rehearing. The motions to stay issuance of the mandate should be denied.

ARGUMENT

I. There Are No Substantial Questions That Warrant Supreme Court Review.

This case does not present any substantial questions that could warrant a stay, because there is no reasonable probability the Supreme Court will grant certiorari. *See* S. Ct. R. 10(a). This Court denied rehearing *en banc* and no judge dissented from that decision. There is no circuit split or other conflict in lower court authority. And the Commission does not even allege any conflict between the Court's decision and Supreme Court precedent. *See* S. Ct. R. 10(a) & (c).

The Commission also is not challenging the Court's conclusion that the final rule's compensation scheme is arbitrary and capricious, *see* FERC Mo. 2; *see also*

FERC Ltr. (July 11, 2014), and therefore the Commission does not dispute that utility tariffs will have to be changed to eliminate the unjust and unreasonable compensation requirements imposed by the rule. Nonetheless, the Commission suggests that the improper compensation requirements in its rule should remain in place and a stay should be granted because it would welcome "additional time" to consult with the Solicitor General. FERC Mot. 5. That hardly constitutes a legitimate basis for granting a stay; indeed, it would be the exceptional case where the government would not welcome more time for internal deliberation. In any event, nothing would prevent the Commission from consulting with the Solicitor General and filing a petition for certiorari after the mandate issues. Moreover, because the Court decided this case over four months ago, the Commission has already had ample time to consult with the Solicitor General (which it was required to do before seeking rehearing). That the Commission and the Solicitor General have still not decided whether to seek certiorari belies any suggestion that the case is so important that a stay is required.

The Commission contends that new developments support its stay request. *First*, it notes that two courts of appeals have upheld the Commission's authority to regulate wholesale rates and practices affecting those rates. *See id*. at 5–6 (citing *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014); *PPL EnergyPlus, LLC v. Solomon*, Nos. 13-4330, et al, 2014 WL 4454999 (3d Cir. Sept. 11, 2014).

But one of those decisions was issued before any rehearing petitions were filed in this case and was cited in the Commission's rehearing petition. *See* FERC Reh'g Pet. 11–12. Moreover, both cases *support* the Court's decision. They reiterate the principle that the Federal Power Act draws a bright line between state and federal authority and, like this Court's decision, they hold that "mere formal distinctions" cannot erase the jurisdictional line between wholesale and retail sales and rates. *See, e.g.*, *Nazarian*, 753 F.3d at 476. The decisions are not helpful to the Commission because this Court's decision does not call into question the Commission's undisputed authority to regulate *wholesale* rates or to "regulate practices affecting the wholesale [rates] . . . , provided the Commission is not directly regulating a matter subject to state control, such as the retail market." *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216, 222 (D.C. Cir. 2014). Instead, the problem with the Commission's rule is that the matter it regulates — "demand response"— "involves *retail* customers, their decision whether to purchase *at retail*, and the levels of *retail* electricity consumption." *Id.* at 223.

Second, the Commission notes (as it did in its rehearing petition, *see* FERC Reh'g Pet. 12 n.4) that the Supreme Court recently granted certiorari in a case involving the Natural Gas Act. *See Oneok, Inc. v. Learjet, Inc.*, 134 S. Ct. 2899 (2014). But the petition for certiorari there identified a clear conflict in lower court authority and a conflict between the lower court's decision and Supreme Court

precedent. *See* Pet. for Writ of Certiorari, *Oneok, Inc. v. Learjet, Inc.*, 134 S. Ct. 2899 (2014), 2013 WL 4585335. The Commission has not, and cannot, make any similar showing here. Moreover, the question presented in that case has nothing to do with the Commission's authority to pay retail customers a FERC-approved rate to forgo purchasing energy at retail. Instead, it addresses whether the Natural Gas Act preempts state antitrust lawsuits seeking to regulate company practices that affect the wholesale gas market. The grant of certiorari in that case sheds no light on the issues here.

Because the Commission has not made any showing that the Supreme Court is likely to grant certiorari, there is no reason to consider the arguments of its intervenors, who merely restate arguments that have already been briefed and rejected — both on the merits and on rehearing. Their jurisdictional arguments rely on a distorted caricature of this Court's decision. Instead of engaging this Court's reasoning, intervenors' rehash rejected arguments that rest on the fiction that because "demand response" is a retail "non-purchase," it is purportedly not a retail sale subject to state regulation and is, therefore, not covered by the savings clause for "any other sale of electric energy" in Section 201(b)(1) of the Federal Power Act. *See* EPSA, *et al.*, Resp to Reh'g 3–10 (responding to these arguments). Intervenors also focus at length on the Court's holding that the Commission's compensation scheme is arbitrary and capricious. *See* Resp.-Interv. Mot. 13–15.

But, as noted above, the Commission has abandoned that issue. *See* FERC Mot. 2. There is no reason the Supreme Court would grant review to consider an issue the Commission is unwilling to defend.

II. The Commission Has Not Demonstrated Good Cause For Its Stay Request.

The "burden is on the party seeking a stay" — here the Commission — "to establish that it will suffer irreparable injury." *Sussman v. Jenkins*, 642 F.3d 532, 537 (7th Cir. 2011). The Commission has not met that burden. In fact, it does not claim any irreparable harm. Instead, it merely asserts that petitioners "have alleged no irreparable harm flowing" from a stay. FERC Mot. 7. But that attempt to foist *its* burden onto petitioners merely underscores that the Commission has not satisfied the requirements for a stay.

Instead of claiming irreparable harm, the Commission argues that statements made by other entities show that "demand response" has been relied on to maintain grid reliability and to promote conservation policies. FERC Mot. 8–10. The Commission fails to embrace these statements as its own, however, and they reflect the same arguments that were raised in support of rehearing. *See* EPSA, *et al.*, Resp to Reh'g 10–15 (responding to these arguments). The Commission cannot deny that it has ample authority to protect both the wholesale markets and reliability. Nor can it deny that nothing in this Court's decision prevents the States from implementing their own demand response programs. There is no reason

appropriate wholesale regulation, together with state programs designed and implemented at the retail level, would not resolve concerns about the impact of the Court's decision.

The Commission also states that the scope of the Court's order is unclear. *See* FERC Mot. 8. The Commission's final rule applies only to the energy markets. As a result, the broader precedential effects of the Court's decision — as it may relate to the capacity markets and other markets — will have to be resolved in future cases and in the first instance by the Commission. But that is no reason to delay issuing the mandate. The best way to eliminate uncertainty about the decision's reach is for the Commission to move forward expeditiously to address those issues, consistent with the statutory limits on its authority recognized in the Court's decision and the requirements of reasoned decision-making. The uncertainty resulting from granting a stay and not moving forward would harm the markets and the electric utility industry.

Finally, the Commission's intervenors, but significantly not the Commission itself, argue that requiring the Commission to comply with the Court's decision could increase wholesale electricity market clearing prices and that once the auctions have cleared "little can be done to reverse the harm." Resp.-Interv. Mot. 13–15. In fact, it is the existing demand response compensation mechanism that has distorted energy clearing prices and that will continue to do so if the

Commission's rule is allowed to remain in effect. *See* Statement of FERC Comm'r T. Clark (June 11, 2014) (explaining that the Commission's "muddled redefinition of 'demand' as 'supply'" has distorted the markets); *see also* JA 179–80.

Importantly, separate and apart from finding the Commission lacks jurisdiction, this Court found the rule's compensation scheme arbitrary and capricious in light of the Commission's failure to respond to serious objections. See *EPSA*, 753 F.3d at 224–25. Because the Commission has not challenged that determination, tariff provisions will need to be changed to prevent the overcompensation required by the Commission's rule. Granting a stay will prolong the application of a rule that will not survive even in the very unlikely event the Supreme Court were to grant review and overturn this Court's jurisdictional holding.

The intervenors' remaining claims of harm are exaggerated and unsupported by record evidence, and they have been refuted by experts. *See, e.g.*, Decl. of Roy J. Shanker, Ph.D., *available at* http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13606600. They are also contrary to the intervenors' own statements. EnerNoc, an intervenor and a leading demand-response provider, has acknowledged that state regulators "have traditionally been significant supporters" of demand response and, under their authority, "demand response solutions will continue to deliver major economic benefits to consumers of electricity."

EnerNOC, Inc., Press Release (May 27, 2014), *available at* http://investor.enernoc.com/releasedetail.cfm?ReleaseID=850532; *see also* Jeff St. John, *EnerNOC: Court Challenges Can't Stop Demand Response*, Greentech Media (Sept. 26, 2014) (EnerNOC's President commenting on the Order No. 745 litigation and stating: "I am confident that no matter how this shakes out, the value of [demand response] will be maintained"), *available at* http://www.greentechmedia.com/articles/read/enernoc-court-challenges-cant-stop-demand-response.

* * *

The Court's decision enforcing the Federal Power Act is correct, no judge dissented from the denial of rehearing, and there is no substantial reason for the Supreme Court to grant further review. The Commission also has not made any claim of irreparable harm and the Court should not grant a stay based on claims of market harms that the Commission itself has not made. Moreover, the Commission is not challenging the Court's conclusion that its rule's compensation scheme is arbitrary; as a result, the rule should be vacated and the existing demand response provisions removed from tariffs. Instead of continuing to delay, the Commission should correct its orders, put an end to its improper intrusion on state authority, and allow the States to develop appropriate programs for demand response at the retail level. The nation's electricity markets have been burdened for long enough by the Commission's improper rule.

CONCLUSION

The motions to stay issuance of the mandate should be denied.

Respectfully submitted.

/s/ Ashley C. Parrish
Ashley C. Parrish
David G. Tewksbury
KING & SPALDING LLP
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Telephone: (202) 626-2627

Counsel for Petitioner
Electric Power Supply Association

David B. Raskin
STEPTOE & JOHNSON LLP
1330 Connecticut Ave, N.W.
Washington, D.C. 20036
Telephone: (202) 429-6254

Counsel for Petitioner Edison Electric Institute

Harvey L. Reiter
STINSON LEONARD STREET LLP
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Telephone: (202) 728-3016

Counsel for Petitioners American Public Power Association, National Rural Electric Cooperative Association, and Old Dominion Electric Cooperative

DATED: September 30, 2014

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 30th day of September 2013, served a copy of the foregoing documents electronically through the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Ashley C. Parrish
Ashley C. Parrish