Nos. 14-840, -841

In the Supreme Court of the United States

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, *ET AL.*,
Respondents.

ENERNOC, INC., *ET AL.*,
Petitioners,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* THE NORTH CAROLINA PUBLIC UTILITIES COMMISSION, IDAHO PUBLIC UTILITIES COMMISSION, SOUTH CAROLINA OFFICE OF REGULATORY STAFF, SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, ALABAMA PUBLIC SERVICE COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, ARIZONA CORPORATION COMMISSION, GEORGIA PUBLIC SERVICE COMMISSION, AND THE KANSAS CORPORATION COMMISSION IN SUPPORT OF THE RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The *amici curiae* (hereinafter "*Amici* States") are state public utility commissions and regulatory agencies with a vital interest in preserving their historical jurisdiction over retail electricity transactions for the benefit of their citizens. The regulation of retail electricity transactions is a function of the state's police power. *See Munn v. Illinois*, 94 U.S. 113 (1877). Specifically, the essential nature of retail electricity makes the rates, services and operations of public utilities "affected with a public interest" and subject to the police powers of the state. *Id.* 94 U.S. at 125-126. Demand response is a retail electric activity, a decision by a retail consumer not to buy from its retail electric supplier, intrastate in nature and under a state's regulatory authority, and is thus beyond the purview of FERC's jurisdiction. FERC's exercise of jurisdiction over demand response participation in the wholesale market encroaches upon the states' historical regulatory authority. FERC claimed in its Petition for Certiorari that no state has opposed FERC's authority to regulate demand response participation in the wholesale markets. Through the filing of this *amici* brief, the participating states seek to rectify this misconception that states do not oppose FERC's intrusion into the states' historical regulatory authority. The Court should affirm the Court of Appeals for the District of Columbia Circuit's opinion

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than *amici* or their counsel, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

enforcing the bright line Congress established in the Federal Power Act of 1935 between federal and state jurisdiction over electricity transactions. The *Amici* States do not address the issue of whether FERC erred in adopting the Locational Marginal Price (LMP) formula for compensating demand response participants because no compensation at wholesale should be paid directly to retail customers providing demand response.

SUMMARY OF ARGUMENT

As this Court has held repeatedly, the jurisdictional line between the federal and state governments over the sale of electricity is a bright one. The line is between wholesale and retail transactions. Section 201(b)(1) of the Federal Power Act (FPA) states, "[t]he provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy **at wholesale** in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy …" 16 U.S.C. § 824 (a) and (b) (emphasis added). It is beyond dispute and FERC admits that states have jurisdiction over retail transactions. State jurisdiction extends to retail service, which includes retail sales plus programs addressing incentives promoting non-sales of retail service. Under its ratemaking authority, the state regulatory commission must determine the right balance between customer classes when determining retail rates for jurisdictional entities. FERC's current system providing incentives to a limited class of retail customers interferes with this balancing performed by state regulators, a determination that is solely a state decision.

Nevertheless, FERC claims that it has jurisdiction over "practices" involving retail consumers that bid demand response into the wholesale market because their bids, though not wholesale, "affect" wholesale rates.[2] This "affects wholesale rates" platform for asserting federal jurisdiction is too attenuated and stretches the verb "affect" well beyond any interpretation to date. The D.C. Circuit correctly found that the FPA § 201 limits the "practice affecting" jurisdiction of FERC by prohibiting federal regulation over matters historically under state authority. *Electric Power Supply Assoc. v. FERC*, 753 F.3d 216, 410 U.S. App. D.C. 103 (D.C. Cir. 2014). The D.C. Circuit properly rejected the notion that FERC can "lure" consumers of retail products and services into the wholesale market and thereby claim "affecting jurisdiction" because the retail consumers are thereby participating in the wholesale market. FERC cannot extend its long federal arm beyond proper wholesale participants, such as load serving entities (LSEs), to entrap non-wholesale participants, retail consumers, and thereby attach jurisdiction to practices involving demand response by retail customers.

FERC claimed in its Petition for Certiorari that no state has opposed FERC's authority to regulate demand response participation in the wholesale markets. FERC's Petition for a Writ of Certiorari at 34.[3] *Amici* States disagree and rectify the notion that states do not oppose FERC's overreach. Indeed, FERC,

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[2] 16 U.S.C. 824e(a).

[3] *See also* Respondent California Public Utilities Commission's Brief at 15.

through its assertion of jurisdiction over retail participants' activities, has encroached upon the states' historical right to regulate the retail market, and the *Amici* States file this brief to clarify the position of many states on this issue.

The benefits of demand response will not be eliminated within wholesale markets if this Court upholds the D.C. Circuit decision. Under a proper FERC regulatory construct, which adheres to the federal/state jurisdictional bright line, demand response may beneficially participate in the wholesale market. This Court should preserve the states' right to regulate retail transactions and should properly reset the jurisdictional demarcation Congress created and restore state jurisdiction over retail transactions where it appropriately belongs.

ARGUMENT

I. The states have sole jurisdiction over retail electricity transactions, and only Congress can change the jurisdictional bright line created by the Federal Power Act of 1935.

The plain text of the FPA specifically preserves the states' jurisdiction over retail electric transactions. Section 824(b) provides that the provisions establishing FERC's jurisdiction over the sale of electric energy at wholesale shall not apply to any other sale of electric energy. 16 U.S.C. § 824(b). States engaged in the regulation of electricity transactions long before Congress established FERC's predecessor, the Federal Power Commission. In an effort to close the *Attleboro* gap, Congress carved out jurisdiction over energy transactions in interstate commerce for the federal

commission, leaving all the rest with the states. *Public Util. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927); *New York v. Federal Energy Regulatory Comm'n*, 535 U.S. 1, 5-6 (2002). Jurisdiction over demand response falls squarely within the residual intrastate oversight originally undertaken by states and continuously exercised thereafter. Section 824(a) of the FPA provides that FERC's authority "extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). The essential nature of retail electricity makes the rates, services and operations of public utilities "affected with a public interest" and subject to the police powers of the state. *See Munn*, 94 U.S. at 126.

Demand response provided by retail customers falls within a retail electricity arena subject to the police powers of the state. FERC acknowledges that it lacks jurisdiction to regulate retail sales, but argues that demand response is not a sale, but rather is a practice affecting wholesale rates. FERC's Brief at 4. However, FERC has recognized in the past "that the States retain significant control over local matters …" *New York v. FERC*, 535 U.S. at 24 (citing Order No. 888, at 31,782, n. 543). The Court observed in *New York* that FERC admitted in Order 888, a rule relating to electric transmission, that its authority would not "encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resources planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resources portfolios; and authority to impose non-bypassable distribution or retail stranded cost charges." *Id.*

(emphasis added). FERC also acknowledged in Order 888, that it did not assert jurisdiction to order retail transmission directly to an ultimate retail consumer because states had "authority over the service of delivering electric energy to end users . . . . State regulation of most power production and virtually all distribution and **consumption** of electric energy is clearly distinguishable [from the Commission's objective of Order 888 and, therefore, Order 888 is not] inconsistent with traditional state regulatory authority in this area." *Id.*, 535 U.S. at 37 note 9 (Thomas, J., *dissenting*). FERC has previously recognized that consumption of electric energy is within the state's traditional regulatory authority that the FPA specifically reserved to the states; thus, it is axiomatic that the consumption or non-consumption of retail electricity energy is also within the state's sole jurisdiction.

Aside from the fundamental jurisdictional issue, from a policy perspective, the state, not the federal government, is in the best position to make decisions on demand response necessary to accurately support the best interests of its citizens. Retail electricity rates are an important part of these state interests. Only the retail supplier should be able to offer retail consumers demand response programs as a service. Consequently, the bright line demarcation under the Commerce Clause, the Supremacy Clause, the FPA and a long line of this Court's decisions is in the correct location. Retail consumers have recourse to state regulators' decisions by directly participating in state proceedings, through representation by state consumer advocates, and through the process of electing or influencing the appointment of state regulators. Decisions over retail

rates and services such as implementation of dynamic prices are best left to retail regulators and retail buyers and sellers of electric services, not to FERC to which no direct recourse may be taken. Local considerations such as the desire for uniform retail prices irrespective of the time of day or for dynamic retail prices based on the retail supplier's costs differing throughout the day are best addressed at the state level. Moreover, FERC cannot regulate the specific aspects of retail transactions irrespective of its interest in doing so. While FERC may be displeased by state decisions on these issues from its perspective as regulator over the wholesale market, it does not follow that FERC's exercise of jurisdiction over these retail issues would serve the best and desired long-term interests of retail consumers. FERC should not interject itself into these state specific issues indirectly through its oversight of the wholesale market.

A. The *Amici* States do not cede their traditional and historical right to regulate retail electricity transactions, including the rates of retail customers providing demand response.

FERC argued in its Petition for Certiorari that no state, except Louisiana, has taken issue with FERC's authority to regulate demand response participation in the wholesale markets. FERC's Petition at 34.[4] To the contrary, the *Amici* States oppose FERC's intrusion into the regulation of retail transactions. The *Amici* States seek to rectify the misconception established by FERC's inaccurate representation. The *Amici* States

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[4] See *supra* note 3.

cannot and do not surrender their historical right to regulate the retail electricity market.

Further, the participation by *Amici* States before this Court on whose behalf this brief is filed is an attestation that more states support the D.C. Circuit's opinion than support FERC's overreach. Among the states urging affirmance of the circuit court are those with retail electric suppliers both within and without Regional Transmission Organizations and Independent System Operators (RTOs/ISOs). While, nine state public utility commissions or regulatory agencies sign this *Amici* Brief supporting Respondents Electric Power Supply Association (EPSA), *et al.*, only three states have filed in support of FERC. Additionally, at least one of the three states supporting FERC's position, Maryland, has created a state demand response program that uses payments from the wholesale market to fund its incentive program to retail customers. Unfortunately, having ceded its jurisdiction over demand response to FERC, Maryland will have a revenue shortfall to pay the retail participants if the D.C. Circuit decision is upheld, that is until new rules can be adopted. Under those circumstances, it is understandable that states like Maryland do not oppose the federal intrusion upon their rights as state regulators. However, three states do not speak for the remaining forty-seven, and a majority of the states participating in this docket oppose FERC regulating demand response in the current manner, because FERC is, in effect, regulating the retail price of electricity, a matter within the sole jurisdiction of the states.

B. FERC's "affecting jurisdiction" fails to overcome the states' sole right to regulate retail transactions, and FERC's regulation improperly intrudes on states' regulatory authority.

The Joint States supporting FERC argue that "FERC respected the states' historic jurisdiction over retail procurement and rates by providing that any state may require the demand response resources within its boundaries to opt out." Joint States' Brief at 15. In other words, FERC, in Order 745, required wholesale market operators to accept demand response bids directly from an aggregator of retail customers unless prohibited by a state. The Joint States argue that because FERC has left "the ultimate authority over the eligibility of such [demand response] resources within [each states'] territories," FERC has not impermissibly intruded into the states' regulatory authority. Joint States' Brief at 16. However, a state's ability to "opt out" to either obtain or maintain jurisdiction the Constitution already assures it is inappropriate and unnecessary. Congress, not state opt outs, gives FERC its jurisdiction and the states their jurisdiction. Only Congress may change the jurisdictional bright-line between the states and the federal government.

Joint States argue FERC's Rule is within FERC's jurisdiction because it "addresses only payments made by **wholesale** power purchasers for demand response resources used by **wholesale**-market operators to set the **wholesale** price." Joint States' Brief at 18. Notably, the word "wholesale" does not modify the words "demand response resources" because the

demand response resources are state retail resources and an integral part of retail transactions. The entire crux of this case is that FERC's Rule reaches past wholesale entities and addresses payments made directly to retail consumers. The retail consumers constitute the "demand response resources." Payments made to retail customers at issue in this case change the retail rate for those customers, and FERC, not the states, is making the decisions regarding these retail rates. FERC's jurisdiction does not extend so far as this into retail activity even under its "affecting" jurisdiction however broadly construed in the past.

C. Demand response may properly be bid into the wholesale market by wholesale entities, as opposed to retail consumers, without circumventing the jurisdictional bright line created in the Federal Power Act of 1935.

Unlike claims made by FERC, EnerNOC and the Joint States, affirming the DC Circuit opinion will not end demand response within the wholesale market. The *Amici* States do not suggest that demand response benefits should be precluded entirely from wholesale markets. Demand response properly bid into the wholesale capacity market, as a demand-side bid as opposed to a supply-side bid, can and will provide efficiency and reliability in those markets.[5] However,

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[5] The *Amici* States recognize that this case involves demand response in the wholesale energy markets, as opposed to the wholesale capacity markets. The *Amici* States oppose demand response in the wholesale energy markets as it currently exists, because it allows an independent system operator to make direct payments to retail consumers.

as the DC Circuit held, FERC's current supply-side bidding construct under review is the improper intrusion into a state's regulatory authority. Under the current bidding construct, a retail customer, or an aggregator of retail customers (known as a "Curtailment Service Provider") may directly bid that retail customer's promise to reduce electricity consumption (*i.e.*, demand response) into the wholesale market as a supply-side resource. In return, the retail consumer receives a direct payment from the wholesale market, like a "steel in the ground" generator of electricity, when it reduces its retail consumption of electricity. Demand response properly developed in the wholesale market is not improper. Rather, it is the current construct that is improper. The D.C. Circuit correctly analyzed that FERC has "lured" retail consumers, which do not participate in the wholesale market but are under the jurisdiction of the states, directly into the wholesale energy market and by doing so has ultimately altered the retail rate in the process.[6] In altering the retail rate through its regulation, FERC has overstepped its jurisdiction provided by the FPA and has encroached upon the jurisdiction granted and reserved solely to the states by the FPA.

Demand response may be properly bid into the wholesale capacity market as a demand-side bid, by a wholesale participant, such as an LSE, as opposed to a bid on the supply-side of the market. Under a demand-

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[6] As stated by Respondents, when a retail customer receives a direct payment for a decision not to consume retail electricity, that retail customer's rate has changed, the new rate is the payment made for consumed electricity minus the payment received for non-consumption.

side program, a wholesale participant, such as an LSE, may make a curtailment commitment and receive as an incentive to participate, not a direct payment of money, but an avoidance of costs and obligations. For example, an LSE with a 10 MW load and 4 MW of demand response could bid into the capacity market 4 MW of demand response from its customers at a stated price. When the market operator calls upon the LSE to institute demand response because the locational marginal price reaches its clearing price, the LSE will reduce demand from the wholesale system to 6 MW. At all other times the LSE may serve a load up to 10 MW. The incentive is that if the bid is accepted, the LSE's capacity obligation, the amount of generation that a market operator must procure to satisfy the LSE's capacity, will be reduced from 10 MW to 6 MW, creating savings for the LSE that may be flowed back to the retail consumers actually reducing demand. The effect is a credit or savings that may be measured and verified versus a direct payment as used on the supply-side under the current demand response rules. Under this construct, states maintain jurisdiction over retail transactions, and the wholesale market still obtains demand response benefits from LSE demand-side bids.

The Independent Market Monitor for PJM is correct that the D.C. Circuit's decision allows for PJM "to correct faulty rules that have interfered with efficient performance of the PJM capacity market design, known as the Reliability Pricing [Model] (RPM)."[7]

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[7] See Comments of the Independent Market Monitor for PJM at 5 (October 22, 2014), filed in response to Complaint, *FirstEnergy Serv. Co. v. PJM Interconnection, LLC*, FERC Docket No EL14-55-000 (filed May 2014).

Currently, demand-side resources are treated as a supply reserve within PJM. However, PJM has not applied its rules and requirements equally to generators and demand-side resources.[8] The *Amici* States support demand-side resources on the demand-side of the wholesale market, and in certain wholesale markets, such as PJM, these rules already exist.[9]

FERC and its allies argue that "retail-level demand response programs are not adequate substitutes for demand-response participation in wholesale markets." FERC's Brief at 32; Joint States' Brief at 17. Even if accurate, this argument ignores the jurisdictional impediment at the heart of this case. Moreover, this argument is erroneous for two reasons. First, all of the *Amici* States have demand response programs, and these programs are working well.[10] Even if they were not, the states, through direct regulation over retail buyers and sellers, have the jurisdiction and greater

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[8] See Comments of the Independent Market Monitor for PJM at 2-4 (October 22, 2014), filed in response to Complaint, *FirstEnergy Serv. Co. v. PJM Interconnection, LLC*, FERC Docket No EL14-55-000 (filed May 2014).

[9] See The PJM Reliability Assurance Agreement Schedule 6.1 (Price Responsive Demand).

[10] See, e.g. N.C. Gen. Stat. § 62-133.8 and 133.9 (2007); S.C. Code Ann. § 58-37-20 (Supp. 2013); Alabama, Real Time Pricing Standby Generator Capacity; Louisiana, Controllable Load; Idaho, The Energy Exchange Irrigation Load Control Program and FlexPeak Management; South Dakota, Electric Rate Savings Saver's Switch, Released Energy Access Program and Real Time Pricing; Arizona, Peak Solutions and PowerPartner; Georgia, Real Time Pricing and Demand Plus Energy Credit Rider; Kansas, Demand Response Incentive Rider.

ability to improve them than FERC through its indirect jurisdiction over these transactions as the wholesale regulator. Section 1252(e)(1) of the Energy Policy Act of 2005 (EPAct 2005) states that "[i]t is the policy of the United States to encourage States to coordinate, on a regional basis, State energy policies to provide reliable and affordable demand response services to the public." The EPAct 2005 authorizes the federal government to "provide technical assistance to the States" to assist the states with creating such programs.[11] However, the federal government, instead of facilitating the states' development of demand response programs, has usurped the states' authority by creating competing programs. Second, within the wholesale market, existing demand-side resources that are located on the demand-side of the market have not had a chance to flourish due to FERC's current improper construct allowing demand-side resources to bid into the market on the supply-side as well. An example of a wholesale demand-side program is "Price Responsive Demand" within the PJM market.[12] The rules are already established to implement this program; however, due to FERC's improper construct of allowing demand response to participate on the supply-side, participation in Price Responsive Demand is not currently robust.[13] If demand response becomes a

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[11] EPAct 2005, Pub. L. No. 109-58 § 1252 (e)(2).

[12] See The PJM Reliability Assurance Agreement Schedule 6.1 (Price Responsive Demand).

[13] Commissioner Tony Clark, Statement on Order Rejecting PJM Tariff Revisions, ER15-852-000 (March 31, 2015), available at http://www.ferc.gov/media/statements-speeches/clark/2015/03-31-15-clark-PJM.asp.

demand-side resource, where it properly belongs, as opposed to a supply-side resource, demand response products will succeed. Further, the wholesale market participants themselves began creating a new construct for demand response participation in anticipation of the possibility that the D.C. Circuit's opinion would be affirmed.[14] Thus, FERC and its allies have inaccurately asserted that no adequate replacement for the current system exists.

The Joint States further posit that "the Joint States . . . have spent billions of dollars to develop and deploy technologies necessary to enable a smart electric power grid," allowing retail customers to modify their electric consumption based upon market signals." Joint States' Brief at 37-38. This statement is misplaced for two reasons. First, this statement confirms the existence of lost opportunity costs that EPSA identifies in its brief, thus underscoring that FERC's regulation of direct participation by retail consumers is a direct regulation of retail rates. EPSA Brief at 10. The statement indicates that retail customers are modifying their usage and ultimately reducing the rate they pay for retail service based upon FERC's regulatory construct of direct payments to retail consumers. FERC should

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[14] *PJM Interconnection, L.L.C.*, Revisions to the Reliability Pricing Market ("RPM") and Related Rules in the PJM Open Access Transmission tariff ("Tariff") and reliability Assurance Agreement Among Load Serving Entities ("RAA"), Docket No. ER15-852-000 (January 14, 2015); ISO-New England, *Contingency Plan Addressing the Potential Loss of FERC Jurisdiction Over Demand Response*, Henry Yoshimura, ISO New England Inc. (April 17, 2015).

not be directly involved in the development of retail prices and services.

The second argument that the Joint States seem to be making is a policy argument that if the Court were to not uphold FERC's Order 745, investments by some states and retail consumers would become stranded. However, these investments will not be stranded. The investments made to participate in demand response on the supply-side of wholesale markets may be used under the existing demand response resources that are on the demand-side of the wholesale market, e.g., the existing Price Responsive Demand product in the PJM market. These investments may also be used to further any new state initiatives a state may want to create by complying with the D.C. Circuit's opinion. An order preserving the states' right to regulate retail transactions will not destroy demand response. Rather, it will properly reset the jurisdictional balance Congress created between FERC and the states and allow proper implementation of demand response in retail and wholesale jurisdictions. Therefore, the *Amici* States urge the Court to affirm the D.C. Circuit's opinion.

CONCLUSION

The Court should affirm the District of Columbia Circuit court's decision to vacate FERC's overreach into the states' sole jurisdictional realm. Although the policy behind advancing demand response is a worthy policy goal, Congress did not confer that power upon FERC, and only Congress may redraw the jurisdictional boundary to take retail ratemaking authority away from the states. The Court should

uphold the D.C. Circuit's decision reigning in FERC's jurisdiction to its proper statutory grant.

Respectfully submitted,

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