



Commissioner Tony Clark Statement June 11, 2014



The DC Circuit Court Decision on Order No. 745

"As an initial matter, I thank Chairman LaFleur for soliciting my thoughts and those of each of her fellow Commissioners prior to her decision to seek en banc review of the recent DC Circuit Court of Appeals Order No. 745 decision. Such comity and proactive outreach has been a hallmark of her leadership of the agency.

"The court's opinion addressed two overarching matters. The first related to whether the Commission had exceeded its statutory authority under the Federal Power Act (FPA) given the nature of demand response (DR) itself.

"The second was the more discrete question of whether the Commission erred in requiring that DR products be compensated in the energy markets at the same rate as an electric supply offer.

"Addressing the second matter first; it should come as no surprise that I do not support a review of that portion of the Court opinion that vacated the Commission's full locational marginal price (LMP) requirement for DR.

"Most important, that portion of the order does not meet the burden required of petitioners for en banc review. Specifically, this is not an issue of such exceptional importance that it merits review nor does it create a glaring inconsistency with DC Circuit or US Supreme Court precedent.

"Beyond the matter of the threshold for review, I also believe the court was wholly correct in its assessment of the pricing mechanism adopted by the Commission. As I have written in previous statements, the full-LMP rate for DR that was mandated by the Commission in Order No. 745 is unjust and unreasonable on its face. It fails to recognize the costs that are avoided by consumers when they choose not to consume power and thus creates distortions in the energy marketplace to the detriment of traditional supply resources relying on wholesale market prices. In Order No. 745, the Commission failed to adequately address this problem, even though Commissioner Moeller's dissent thoroughly identified the issue.

"With regard to the matter of Commission jurisdiction itself, I find that the jurisdictional question raises issues of greater importance than the level of compensation to which DR is entitled and the fuzzy nature of the line between state and federal jurisdiction under the FPA offers at least some fodder for discussion about how this opinion fits with prior court holdings.

"Yet, I cannot help but find the DC Circuit's majority opinion persuasive. The Commission's assertion of jurisdiction over "Wholesale Demand Response" was always rather bold, as explained by the court's majority. There simply has to be a jurisdictional "bridge too far" for FERC under the FPA. The line the court drew, distinguishing between wholesale supply sales and retail consumption/compensation, is not unreasonable, though it could have far-reaching impacts. While there is no doubt the Commission now finds itself in a predicament, it bears noting it is a predicament of its own making, not the court's. To the degree different industry stakeholders may now have a challenge on their hands related to the court's decision, the root cause is a flawed regulatory construct. We might not have found ourselves in this situation had the Commission taken a more modest approach to the compensation of DR in the wholesale markets. By allowing the pendulum to swing so far, the Commission predictably ushered into the marketplace a flood of DR resources, some of which may only be willing to provide service at

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subsidized rates. As structured, a single DR resource is now capable of receiving full supply payments from multiple wholesale market constructs, including the capacity and energy markets, all while avoiding a number of the burdens placed on traditional supply resources. It's no wonder the court adopted the term "lure;" that is exactly what has happened in recent years. This caused wholesale grid operators to struggle to devise appropriate methodologies for measuring, verifying, and otherwise coping with the ever-increasing amount of demand response coming from aggregated retail loads. Calling a "nega-watt" the equivalent of a "mega-watt" has always been clever rhetoric, but it defies common sense. One supplies energy, the other is a retail/demand-side decision to consume or not consume the energy. The Commission should now acknowledge the problems created by its own muddled redefinition of "demand" as "supply."

"The natural place for DR is on the retail side of the markets, where customers can observe electricity prices and make a choice about whether to consume energy or to curtail their demand for that energy. By necessity under the FPA, this will require FERC to actively engage the states, which have the retail jurisdiction FERC lacks. In my mind, enabling functioning price-responsive demand is the right answer to the conundrum in which we now find ourselves, and it is where the Commission should expend the bulk of its efforts. Price-responsive demand cuts to the heart of the matter. It provides all of the proper price-forming benefits the Commission seeks, but without concocting unwieldy, convoluted and bureaucratically complex schemes to pay consumers not to consume power. It pierces the veil that exists between the wholesale and retail sides of the electricity business; a veil made thick by the statutory construct that separates federal jurisdiction from that of the states. In a world of robust price-responsive demand, end-use consumers, aided by advanced demand side management devices enabled by a smarter grid, are able to fulfill their role on the demand side of the equation. The result, in short, would be a properly functioning marketplace."

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