NOS. 14-840, 14-841

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 Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

The Federal Power Act draws a "bright line" distinction between state and federal jurisdiction over the regulation of sales of electric power. The statute provides that *wholesale* sales—*i.e.*, sales of electric energy for resale—are subject to exclusive regulation by the Federal Energy Regulatory Commission, and that *retail* sales—*i.e.*, sales of electric energy for consumption—are subject to exclusive regulation by the States. 16 U.S.C. § 824(a), (b). While the markets are obviously interrelated in that retail sales affect wholesale sales, and vice versa, FERC has authority over the wholesale markets and the States have authority over the retail markets. This case involves an attempt by FERC to regulate "demand response," which it defines as "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy." 18 C.F.R. § 35.28(b)(4).

The question presented is:

Does FERC's final rule directing that certain retail customers receive payment at a FERC-approved rate for purchasing less energy at retail—*i.e.*, "demand response"—exceed its jurisdiction and impermissibly invade the States' exclusive jurisdiction over the regulation of retail sales?

RULE 29.6 STATEMENT

The following respondents join this brief:

The ***Electric Power Supply Association ("EPSA")*** is a national trade association that represents the competitive power industry and is incorporated under the laws of the District of Columbia. EPSA's members include 14 companies, along with numerous supporting members, and state and regional partners that represent the competitive power industry in their respective regions. EPSA's members have significant financial investments in electric generation and electricity marketing operations across the country. There is no parent corporation or any publicly held corporation that owns 10 percent or more of EPSA's stock.

The ***American Public Power Association ("APPA")*** is an association of governmental entities to which Rule 26.1 does not apply. APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers, and APPA members do business in every state except Hawaii. Many APPA members sponsor or participate in "demand response" programs in the course of providing retail electric utility services.

The ***National Rural Electric Cooperative Association ("NRECA")*** is a not-for-profit national service organization with no parent entity or publicly-traded stock. It is the national service organization for more than 900 not-for-profit rural electric cooperatives and public power districts

providing retail electric service to more than 42 million customers in 47 states. NRECA's members include consumer-owned local distribution systems and 66 generation and transmission cooperatives that supply wholesale power to their distribution cooperative owner-members.

Old Dominion Electric Cooperative ("ODEC") is a not-for-profit power supply electric cooperative with no parent entity and no publicly-traded stock. It is a regional, consumer-owned power supplier that was formed in 1948 to provide power to a consortium of electric distribution cooperatives. In 2014, ODEC's 11 members served over 560,000 retail electric consumers, representing approximately 1.4 million member-owners. The service territories served by ODEC's members cover large portions of Virginia, Maryland, and Delaware.

The ***Edison Electric Institute ("EEI")*** is the trade association of the U.S. shareholder-owned electric companies. EEI members serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry, and they represent approximately 70 percent of the U.S. electric power industry. EEI's diverse membership includes utilities operating in all regions of the U.S. EEI does not have any parent companies, and no publicly-held company has a 10 percent or greater ownership interest in EEI. EEI does not issue stock.

The ***PJM Power Providers Group ("P3")*** is a non-profit corporation that is an Internal Revenue Code § 501(c)(6) organization composed of suppliers of energy, capacity, and other services within the PJM Interconnection, L.L.C. ("PJM") power market.

P3 supports the development of properly designed and well-functioning markets in the PJM region, which includes 13 States and the District of Columbia. P3's members together own over 88,000 megawatts of power and over 51,000 miles of transmission lines, serve nearly 12.2 million customers and employ over 55,000 people.

PPL Electric Utilities Corporation, ***PPL EnergyPlus, LLC***, ***PPL Brunner Island, LLC***, ***PPL Holtwood, LLC***, ***PPL Martins Creek, LLC***, ***PPL Maine, LLC***, ***PPL Montour, LLC***, ***PPL Susquehanna, LLC***, and ***Lower Mount Bethel Energy, LLC*** are all direct or indirect subsidiaries of PPL Corporation. The shares of PPL Corporation are publicly traded. No other publicly held company has a 10% or greater ownership interest in any of the PPL entities joining this brief.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE PETITIONS 15

I. FERC's Attempt To Regulate "Demand Response" Is Foreclosed By The Federal Power Act. 16

A. The Statute Denies FERC Authority To Regulate Retail Rates And Sales 16

B. Petitioners' Arguments Cannot Overcome The Statute's Plain Text. 19

II. The Decision Below Is Not Exceptionally Important. 27

III. This Case Presents A Poor Vehicle To Review The Question Presented 34

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 4

Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) 27

FPC v. Conway Corp., 426 U.S. 271 (1999) 17

FPC v. S. Cal. Edison Co., 376 U.S. 205 (1964) 4, 16

Munn v. Illinois, 94 U.S. 113 (1877) 4

National Fed'n of Indep. Business v. Sebelius, 132 S. Ct. 2566 (2012) 22

New York v. FERC, 535 U.S. 1 (2002) 17

OneOk, Inc. v. Learjet, Inc., No. 13-271 (U.S.) 25

Panhandle E. Pipe Line Co. v. Public Serv. Comm'n of Ind., 332 U.S. 507 (1947) 4, 17, 19

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 24

Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927) 4, 16

Rapanos v. United States, 547 U.S. 715 (2006) 30

Administrative Decisions

Demand Response Compensation in Organized Wholesale Energy Markets, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,656 (2010) 10, 11

EnergyConnect, Inc., 130 FERC ¶ 61,031 (2010) 23

Kentucky Utils. Co., 15 FERC ¶ 61,002 (1981) 31

Wholesale Competition in Regions with Organized Elec. Mkts., Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008) 10

Statutes

16 U.S.C. § 824 ..... passim

16 U.S.C. § 824d 4, 5, 17

16 U.S.C. § 824e 5, 21

Electricity Modernization Act of 2005, Pub. L. No. 109-58 ..... 26, 27, 28

Rules

18 C.F.R. § 35.28 ..... 8, 9, 19

Other Authorities

Black's Law Dictionary (7th ed. 2000) 19, 23

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Comments of the Independent Market Monitor for PJM, Docket No. EL14-55-000 (Oct. 22, 2014) 32

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FERC Staff Report, *2010 National Action Plan on Demand Response* (June 17, 2010) 7

FERC Staff Report, *A National Assessment of Demand Response Potential* (June 2009) 7

FERC Staff Report, *Assessment of Demand Response and Advanced Metering (*Dec. 2014) 29

Letter of North Carolina Utilities Commission to FERC (Aug. 1, 2014) 30

Monitoring Analytics, LLC, *Price Responsive Demand* (July 22, 2014) 31

Monitoring Analytics, LLC, Report, *PJM State of the Market* (Mar. 12, 2015) 32

PJM Interconnection, L.L.C., *Revisions to the Reliability Pricing Market*, Docket No. ER15-852-000 (Jan. 14, 2014) 32, 33

The Electric Energy Market Competition Task Force, *Report to Congress on Competition in the Wholesale and Retail Markets for Electric Energy* (Apr. 5, 2007) 6

INTRODUCTION

This case arises out of FERC's dissatisfaction with the manner in which States are exercising their exclusive jurisdiction over the regulation of retail sales of electric energy. Although FERC in recent years has pursued regulatory policies that allow wholesale prices to adjust rapidly to changes in market conditions (often over intervals of an hour or less), many States to date have not adopted similar pricing models in their retail markets. Instead, they have generally continued to follow the traditional practice of keeping most retail rates fixed and relatively stable. As a result of this difference in regulatory approaches, demand for energy by retail customers may not respond rapidly to fluctuations in wholesale prices. For example, when wholesale prices spike at peak times, those changes may not be reflected in the retail price at peak times; as a result, consumption of energy and thus retail sales may fail to respond to spikes in wholesale prices.

This phenomenon has frustrated FERC, but because Congress reserved to the States exclusive jurisdiction over the regulation of retail sales, FERC cannot simply force States to shift to dynamic pricing. FERC tried to get around that limitation—and make retail markets more responsive to wholesale prices—by devising an alternative method of incentivizing retail customers to reduce their energy consumption in response to increases in wholesale prices. It decided to treat a promised reduction in consumption by retail customers—"demand response"—as a "resource" that can be sold on the nation's centralized wholesale energy markets. In other words, if certain retail customers

are willing to consume less energy at peak times, *i.e.*, reduce their retail purchases, the resulting "demand response" can be offered into the *wholesale* markets (and compensated) as the functional equivalent of new wholesale supply. FERC justified this federal regulation of reductions in retail sales on the circular theory that "demand response" was now traded in the wholesale markets.

The D.C. Circuit saw through all this and correctly rejected FERC's incursion on the States' exclusive jurisdiction over retail sales. As the court explained, "demand response" by definition "involves *retail* customers, their decision whether to purchase at *retail*, and the levels of *retail* electricity consumption." U.S.Pet.App.11a. Although those decisions may affect wholesale rates, they do so only in the same way that retail sales inevitably affect wholesale rates: by increasing or reducing demand in wholesale markets. Indeed, the interrelationship between retail and wholesale demand is the *raison d'être* for this whole gambit; it is precisely because the markets are interrelated that FERC sought to end-run certain States' unwillingness to follow the federal lead in adopting dynamic pricing. FERC's claim that it has authority to regulate reduced retail demand because it has invited "demand response providers" into the wholesale markets merely describes FERC's power grab without justifying it. FERC cannot expand its own jurisdiction at the expense of the States' exclusive jurisdiction by asserting a need to regulate a "direct effect" on wholesale rates that FERC has created by inviting retail customers into the wholesale markets.

The decision below does not conflict with decisions of this Court or any other. Nor does it have the kind of exceptional importance that petitioners suggest. States remain free to develop and regulate their own demand response programs, and FERC remains free to use the many tools at its disposal to encourage them to do so, and to ensure that wholesale markets operate efficiently. That FERC cannot force States to adopt dynamic pricing, either directly or through the expedient of treating reduced retail demand as a wholesale resource, is simply a reflection of our federalist system as reinforced by the Federal Power Act's express reservation of exclusive jurisdiction over retail sales to the States.

Finally, the aspects of the D.C. Circuit's decision on which petitioners have not sought review underscore a significant vehicle problem. The D.C. Circuit recognized that treating demand response as equivalent to actual wholesale supply for pricing purposes is arbitrary and capricious. That is true because, among other things, paying retail customers to reduce their consumption is nothing like generating actual energy. By failing to include that issue in their petitions, petitioners not only obscure a glaring weakness in their jurisdictional argument but also seek what amounts to an advisory opinion about an order that has been invalidated on multiple grounds, only one of which they ask this Court to review.

In sum, the decision below is correct, creates no circuit split, and invalidates the order at issue on grounds that petitioners do not ask this Court to correct. The petitions should be denied.

STATEMENT OF THE CASE

1. When Congress enacted the Federal Power Act in 1935, it reaffirmed the "bright line" distinction "between state and federal jurisdiction" over the electric power industry, *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964), ensuring that "retail" sales of electric energy would remain subject to exclusive state regulation. *See Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927). The Act expressly reserves to the States jurisdiction over retail sales of energy, and prohibits FERC from regulating matters that "are … subject to regulation by the States." 16 U.S.C. § 824(a). By not disturbing state authority over the retail markets, Congress preserved "one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (citing *Munn v. Illinois*, 94 U.S. 113 (1877)); *see also Panhandle E. Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 517-18 (1947) ("The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.").

In contrast, the Act grants FERC exclusive jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). FERC is responsible for over-seeing "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission." *Id.* § 824d(a). It is also responsible for ensuring that all

wholesale rates and charges, as well as "all rules and regulations affecting or pertaining to such rates [and] charges," are just and reasonable. *Id.*

To ensure that FERC is able to fulfill its regulatory obligations, the Act requires "every public utility" to file with FERC "schedules" showing "all rates and charges for any transmission or sale subject to the jurisdiction of [FERC], and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 16 U.S.C. § 824d(c). If FERC determines that a public utility's rates and charges, or any of its classifications, practices, or regulations affecting rates and charges, are unjust and unreasonable, it is required to change them. *Id.* § 824e(a).

2. Although Congress has divided retail and wholesale authority between the States and FERC, it is well understood that, as in virtually any market, retail and wholesale sales are interrelated. State regulation of retail rates and sales thus has a direct and substantial effect on the wholesale markets regulated by FERC, and vice versa.

In simple terms, the electric energy markets operate as follows: Retail customers (in industry parlance, "load") purchase energy to consume at state-regulated rates. The public utilities and other load-serving entities that supply retail customers with energy do so by generating it with their own generation units or purchasing it in the wholesale markets at FERC-regulated rates. Because electric energy generally cannot be stored, there is inevitably

a direct relationship between consumption and the volume of sales made to retail customers in the retail markets, on one hand, and the volume of energy purchased in the wholesale markets for resale, on the other. For example, retail customers tend to consume more electricity at certain times of day. That increase in consumption translates directly into "load" that load-serving entities must meet. If, as often is the case, load-serving entities are not in a position to meet that additional demand by generating more electricity themselves, then they must purchase more electricity in the wholesale markets. *See* The Electric Energy Market Competition Task Force, *Report to Congress on Competition in the Wholesale and Retail Markets for Electric Energy*, at 48 (Apr. 5, 2007), *available at* http://www.ferc.gov/legal/fed-sta/ene-pol-act/epact-final-rpt.pdf.

Notwithstanding the direct relationship between retail and wholesale demand, there is not always a direct relationship between retail and wholesale prices at a particular time and place. *See* U.S.Pet. App.96a-98a. That disconnect results in part from Congress's decision to bifurcate regulation over the two markets, as well as from different regulatory choices made at the state and federal levels. In the wholesale markets, FERC has pursued policies that allow rates to fluctuate on an hourly basis (or even more frequently), taking into account the marginal cost of generating additional electricity to meet demand (for example, allowing rates to increase when demand increases on a hot summer day). In the retail markets, by contrast, States traditionally have kept most rates fixed and stable. As a result,

retail prices at a particular time and location often fail to track changes in wholesale prices. *See id.*

Some state regulators have sought to address that disconnect by implementing "dynamic pricing," promoting advanced metering technology, and establishing other regulatory programs that allow retail rates to more closely track wholesale price fluctuations. *See* FERC Staff Report, *A National Assessment of Demand Response Potential*, at 21-22 (June 2009) ("2009 FERC Report"), *available at* http://www.ferc.gov/legal/staff-reports/06-09-demand-response.pdf; *see also id.* at 79. Other state regulators, however, have chosen to keep retail rates fixed and stable, in part because retail customers "do not like price volatility" and in part because advanced metering technology that could provide retail customers with more accurate price signals is still developing. *Id.* at 189; *see also* Joint. States.Br.18 ("the typical end-use customer pays a flat rate for each kilowatt-hour of electricity used for an extended period"). Those choices reflect state policy judgments about how best to regulate retail sales.

3. FERC has not been shy about expressing its preference that States adopt dynamic pricing models that would allow retail rates to more closely track wholesale rates, and thereby encourage retail customers to reduce their energy consumption at times when energy is more expensive to generate and transmit. *See, e.g.*, 2009 FERC Report, at 65-66 (identifying "regulatory (retail)" "barriers to demand response"); FERC Staff Report, *2010 National Action Plan on Demand Response*, at 5 (June 17, 2010), *available at* http://www.ferc.gov/legal/staff-reports/

06-17-10-demand-response.pdf. Although FERC cannot simply force States to regulate retail rates in a manner more to its liking, it has become increasingly dissatisfied with the reluctance of state regulators to align their retail regulation with its wholesale regulation. *See, e.g.*, DC.Cir.JA.1135:5-8 (Chairman Wellinghoff) (expressing frustration over States' failure to adopt dynamic pricing policies). Accordingly, FERC decided to take matters into its own hands by asserting jurisdiction to regulate what it calls "demand response."

As defined by FERC, "demand response" is "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy." 18 C.F.R. § 35.28(b)(4). In plain English, the term describes the basic economic phenomenon that customers will consume less when prices go up. *See* James Bushnell, *et al.*, *When It Comes To Demand Response, Is FERC Its Own Worst Enemy?*, The Electricity Journal, at 11 (Oct. 2009) ("[o]ne rarely hears the term used outside of the electricity industry because the notion that consumers must pay and make decisions on a real-time price is a fact of life in all industries without explicit price regulation").

Since the States' exclusive jurisdiction over retail sales precludes FERC from attempting to reduce consumption during peak periods by requiring higher retail rates during those periods, FERC decided to do the next best thing: It invited retail consumers into wholesale markets and then

asserted jurisdiction to pay them for not consuming energy. The purpose and effect of that action is to create a mechanism for changing both the quantity of retail sales and the effective rate for those retail sales—*i.e.*, to regulate retail sales. Indeed, FERC acknowledges that this is a way to regulate retail sales, noting that States can adopt "retail-level demand response programs[] where, for example, local utilities pay consumers to curtail consumption." U.S.Pet.25. As a matter of basic economics, forgoing the opportunity to be paid not to consume energy increases the cost of consuming energy, just like a direct increase in retail prices, because the effective cost of consumption includes not only the consumer's out-of-pocket payment for energy consumed but also the lost opportunity cost of forgoing that payment.

For example, if a retail customer faces a constant retail rate of $10 per unit, but has the opportunity to be paid $5 per unit not to consume at peak times, then the retail customer's effective rate during peak times is $15 per unit—the $10 per unit it will actually pay, plus the $5 per unit lost "demand response" payment the customer chooses to forgo by going ahead with the retail purchase. This equivalence is confirmed by FERC's own definition of "demand response," which includes reductions in expected demand in response to either "an increase in the price of electric energy," which at retail is clearly within the exclusive province of the States, or "incentive payments designed to induce lower consumption of electric energy." 18 C.F.R. § 35.28(b)(4). FERC's effort to order wholesale-market operators to make such incentive payments—*i.e.,* to pay people not to consume energy

when demand is at its highest—is plainly an effort to achieve indirectly what it could not achieve directly: retail markets that are more responsive to FERC's wholesale rate regulation.

To that end, FERC directed the independent system operators and regional transmission organizations that operate large portions of the nation's transmission grid and administer centralized, bid-based wholesale markets to allow retail customers (directly or through their agents) to participate in their wholesale markets and to treat them "comparably to other resources." *Wholesale Competition in Regions with Organized Elec. Mkts.*, Order No. 719, FERC Stats. & Regs. ¶ 31,281, at P 15 (2008). More specifically, FERC directed wholesale-market operators to treat an offer by a retail customer not to consume energy as equivalent to an offer by a generator to generate electricity and sell it at wholesale. FERC required each wholesale-market operator to develop and file with FERC a methodology for compensating these so-called "demand response providers" (*i.e.*, retail customers or their agents) for their commitments to consume less energy. *Demand Response Compensation in Organized Wholesale Energy Markets*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,656, at P 8 (2010).

When its initial efforts to lure retail customers into the wholesale markets proved less fruitful than anticipated, FERC decided to intervene again. In 2010, it issued a notice of proposed rulemaking expressing its dissatisfaction that "demand response providers" were "collectively" playing only "a small role in wholesale markets," and asserting that

"inadequate compensation structures have hindered the development and use of demand response." *Id.* at P 9. FERC thus proposed to substantially increase the compensation being offered to most "demand response providers" by adopting a uniform requirement that all wholesale-market operators pay retail customers the same rate (known as the "locational marginal price" or "LMP") for not consuming energy that the wholesale-market operators pay wholesale generators for generating it. *Id.* at P 1.

Thousands of pages of comments were filed by a broad spectrum of interests opposing both FERC's attempt to assert jurisdiction over retail rate regulation by redefining reductions in retail consumption as a form of wholesale service and the compensation methodology it proposed. As they explained, by paying "demand response providers" the same rate as generators, FERC's scheme would result in retail customers being compensated twice-over for their non-consumption—first, in the form of the retail charge they avoid for the energy they agree not to purchase, and second, in the form of the payment they receive from the wholesale-market operator for agreeing not to purchase that energy. By failing to include any offset for the retail charge that is avoided by not consuming energy, FERC's approach would incentivize retail customers to reduce consumption far beyond the levels that the wholesale rate itself would dictate. So instead of furthering FERC's professed objective of creating a mechanism for retail customers to respond to price signals in the wholesale markets, its proposed mechanism would dramatically distort the markets,

artificially dampen demand, and discourage productive economic activity.

Without meaningfully responding to these comments, in 2011 FERC issued its final rule, Order 745, requiring wholesale-market operators to pay certain retail customers the market price for wholesale energy in return for purchasing less energy at retail. FERC asserted jurisdiction on the theory that compensating retail customers to reduce their retail purchases is a "practice" that affects wholesale rates. U.S.Pet.App.189a-90a. Adopting the view that "demand response can balance supply and demand as can generation," U.S.Pet.App.96a, FERC concluded that reductions in retail consumption by retail customers should be treated as equivalent to the production of energy by generators. U.S.Pet.App.94a-95a.

4. A diverse group of wholesale market participants—including shareholder-owned electric utilities, community-owned electric utilities, competitive power suppliers, and not-for-profit electric cooperatives—appealed to the D.C. Circuit. Although those parties are rarely aligned when it comes to questions concerning the regulation of the nation's energy markets, they joined together to oppose FERC's improper orders on two grounds. First, they argued that FERC's final orders regulating demand response exceed FERC's jurisdiction. Second, they argued that FERC's orders are unlawful because they failed to respond to serious objections, were not the product of reasoned decisionmaking, and rely on an unduly discriminatory retail-compensation scheme that produces rates that are not just and reasonable.

On May 23, 2014, the D.C. Circuit vacated FERC's final rule, concluding that FERC's regulation of demand response violates the limits on the agency's jurisdictional authority because "[d]emand response ... involves "*retail* customers, their decision whether to purchase at *retail*, and the levels of *retail* electricity consumption." U.S.Pet.App.11a. As the court explained, "a reduction in consumption cannot be a 'wholesale sale,'" *id.*, and although FERC has authority to regulate practices affecting wholesale rates, that grant of authority cannot (as FERC had conceded) "trump[] the express limitation on its authority to regulate non-wholesale sales." U.S.Pet.App.9a.

The D.C. Circuit also concluded that, even assuming FERC had jurisdiction, its final rule "would still fail because it was arbitrary and capricious." U.S.Pet.App.15a. In particular, the court concluded that, in deciding to treat retail customers' reductions in consumption the same as actual generation, and requiring that they be paid "the full LMP plus be allowed to retain the savings associated with [their] avoided retail generation cost," FERC "failed to properly consider—and engage— ... reasonable (and persuasive arguments)" that its final rule will overcompensate "demand response resources." *Id.* The court thus took pains to emphasize that if FERC "thinks its jurisdictional struggles are its only concern with Order 745, it is mistaken." U.S.Pet.App.16a. "We would still vacate the Rule if we engaged the Petitioners' substantive arguments." U.S.Pet.App.16a-17a.

Judge Edwards dissented. Although he acknowledged that the States' authority to regulate

retail sales is exclusive, and that FERC's jurisdiction over wholesale sales "shall not apply to any other sale of electric energy," 16 U.S.C. § 824(b)(1), he found ambiguity in the meaning of the term "sale." In his view, the Federal Power Act is ambiguous as to whether a promise to forgo consumption of electricity that would have been purchased in a retail electricity market constitutes a "sale" of electricity subject to regulation by the States. Because he concluded that paying retail customers not to consume energy is arguably not a sale, but a non-sale, he would have deferred to FERC's interpretation. U.S.Pet.App.20a-21a, 34a. Judge Edwards also thought that FERC had said enough to justify its decision to compensate retail customers who forgo consumption of energy at the same rate as generators who generate it. U.S.Pet.App.47a.

FERC and others petitioned for rehearing *en banc*. After those petitions were denied, petitioners filed petitions for certiorari that seek review of the D.C. Circuit's jurisdictional ruling, but not of its alternative basis for invalidating Order 745.

REASONS FOR DENYING THE PETITIONS

The petitions provide no compelling basis for this Court to disturb the eminently correct decision below. Petitioners do not and cannot identify any meaningful division of authority between the D.C. Circuit's decision and any decision of any other court. Nor have they identified any principle of law articulated by the court below that deviates from this Court's precedent. Instead, they merely disagree with a D.C. Circuit decision that correctly identified FERC's rule for what it is: a clear intrusion on the States' exclusive authority over retail sales, in a backdoor effort to overcome the States' unwillingness to adopt a regime for retail rates that mirrors FERC's preferred regime for wholesale rates.

Notwithstanding petitioners' sky-is-falling assertions, the decision below does not have the kind of exceptional importance that warrants this Court's intervention. The decision does not preclude the development or continuation of demand response programs; it merely respects federalism and restores the jurisdictional status quo ante, under which regulation of the retail markets was properly left to the States.

Moreover, this case presents a poor vehicle for resolving the only question the petitions present, as neither petition asks this Court to review the D.C. Circuit's alternative holding that FERC's final rule must be vacated as arbitrary and capricious even if it did not exceed FERC's jurisdiction. Petitioners' decision was tactical, both because that aspect of the D.C. Circuit's decision is not even arguably cert-

worthy and because the basic problem of treating a reduction in retail demand and the actual generation of wholesale electricity as equivalent for compensation purposes just underscores that demand reduction is nothing like wholesale generation. But this tactical choice creates vehicle problems, as petitioners seek what amounts to an advisory opinion on the jurisdictional basis for an order that has been invalidated on independent grounds. In reality, FERC should take the advice it has already received from the D.C. Circuit: FERC's frustration with certain States' refusal to follow its lead in adopting dynamic pricing is not a sufficient basis to expand its jurisdiction or to treat a reduction of retail demand as equivalent to wholesale supply.

I. FERC's Attempt To Regulate "Demand Response" Is Foreclosed By The Federal Power Act.

FERC's attempt to regulate retail customers' consumption decisions is foreclosed by the plain language of the Federal Power Act. Congress prohibited FERC from regulating retail sales, and FERC cannot overcome that statutory bar through the expedient of labeling payments made to retail customers to forgo retail purchases a "practice" that "affects" wholesale rates.

A. The Statute Denies FERC Authority To Regulate Retail Rates And Sales.

The Federal Power Act reserves to the States exclusive jurisdiction over the regulation of sales of electric energy at retail. 16 U.S.C. § 824(b); *S. Cal. Edison*, 376 U.S. at 213-14; *see also Attleboro*, 273 U.S. at 89. Although the Act grants FERC exclusive

jurisdiction over the regulation of the "sale of electric energy at wholesale in interstate commerce," Congress made clear that FERC's jurisdiction "shall not apply to any other sale of electric energy," and specifically prohibited FERC from regulating "those matters ... subject to regulation by the States"—*i.e.*, retail rates. 16 U.S.C. § 824(a)-(b); *see Panhandle*, 332 U.S. at 516 (noting that this "explicit prohibition" was "deliberate"). Accordingly, although FERC is tasked with ensuring that rates for wholesale sales—as well as public utility "practices" affecting those rates—are just and reasonable, 16 U.S.C. § 824d, it cannot do so by regulating retail rates and sales.

The Act thus draws a "clear and complete" line that cuts "sharply and cleanly between sales for resale [*i.e.*, wholesale sales] and direct sales for consumptive uses [*i.e.*, retail sales]." *Panhandle*, 332 U.S. at 517. Applying that distinction, courts have long recognized that FERC has no jurisdiction either to regulate retail sales or to set the retail price. *FPC v. Conway Corp.*, 426 U.S. 271, 277 (1999). Instead, FERC's jurisdiction "over the sale of power" (unlike its authority over electric transmission) is "specifically confined to the wholesale market." *New York v. FERC*, 535 U.S. 1, 16, 20 (2002). In short, as the government concedes, FERC "lacks jurisdiction to regulate retail sales (*i.e.*, sales to users of electricity), which have long been pervasively regulated by state utility commissions." U.S.Pet.4.

The decision below reflects a straightforward application of these settled principles. FERC's final rule is an undeniable intrusion on the States' exclusive jurisdiction over retail rates and sales.

Indeed, the rule was expressly intended to address perceived deficiencies in state retail regulation—namely, the reluctance of some state regulators to move as quickly as FERC would prefer to adopt dynamic retail rates that better track fluctuations in wholesale prices. *See* U.S.Pet.App.216a; DC.Cir. JA.1135:5-8 (Chairman Wellinghoff) ("I have no assurances as to when the States will put dynamic retail prices with the controversies that are going on, all the political problems with getting those in place."). The rule seeks to remedy this purported deficiency in state regulation by directing that certain retail customers be paid a FERC-approved rate for forgoing retail purchases of energy. *See* U.S.Pet.7 (conceding that regulating "demand response" involves "paying electricity consumers"—*i.e.*, retail customers—"for commitments to curtail their consumption during peak periods"). By ensuring that retail customers are paid to consume less energy during peak periods, FERC can ensure that the effective rate during peak hours is the actual retail rate plus the amount of additional compensation a consumer will forgo. In effect, then, the rule changes the rates that retail customers pay for the energy they consume. Indeed, that is its whole purpose. The rule thus does precisely what the Federal Power Act forbids—it regulates retail sales.

Any doubt on that score is resolved by FERC's own regulations, which define "demand response" as "a reduction in the *consumption* of electric energy by *customers* in response to an increase in the price of electric energy or to incentive payments designed to induce lower *consumption* of electric energy." 18

C.F.R. § 35.28(b)(4) (emphasis added). *Consumption* of electricity (as opposed to resale) is by definition a retail (not wholesale) phenomenon, and a sale for consumption is necessarily a retail sale. *See* 16 U.S.C. § 824(d) (defining "sale of electric energy at wholesale" to "mean[] a sale of electric energy to any person for resale"); Black's Law Dictionary 1341 (8th ed. 2004) (retail: "The sale of goods or commodities to ultimate consumers, as opposed to the sale for further distribution or processing .... Cf. Wholesale."); *id.* at 335 (consumer: "[a] person who buys goods or services ... with no intention of resale"); *Panhandle*, 332 U.S. at 517-18 (explaining that Congress reserved to the States authority to regulate sales for "consumptive uses"). Moreover, FERC's own definition recognizes that forgoing the "incentive payments" it seeks to regulate is the functional equivalent of "an increase in the price of electric energy" at retail—*i.e.*, something that indisputably falls within the States exclusive jurisdiction. There is no way to understand FERC's attempt to create regulatory incentives for retail "customers" to purchase and "consume" less energy as anything other than an attempt to regulate retail sales.

B. Petitioners' Arguments Cannot Overcome The Statute's Plain Text.

Petitioners do not dispute that States have exclusive authority to regulate retail sales, or that FERC's regulation of "demand response" seeks to provide regulatory incentives for retail customers to reduce retail sales by forgoing consumption. Nor can they deny that the purpose of FERC's final rule is to address perceived market inefficiencies resulting

from state retail regulatory decisions. They nonetheless assert that FERC should be allowed to do what Congress has prohibited. None of their arguments has merit.

1. Petitioners first contend that FERC has not violated the Federal Power Act because the mechanism it chose for regulating retail rates and sales—directing wholesale-market operators to pay retail customers for commitments to reduce retail consumption—resides "[a]t the wholesale level." U.S.Pet.8. According to petitioners, because FERC has ordered wholesale-market operators to allow retail customers (or their agents) into their organized markets and to treat commitments to forgo consumption as an input in their wholesale rate-setting mechanisms, FERC may "regulate the compensation paid by wholesale-market operators for demand-response commitments." U.S.Pet.20; *see also* EnerNoc.Pet.24. But no principle of law or logic allows FERC to manufacture its own jurisdiction and override the States' exclusive jurisdiction by introducing retail transactions into a wholesale market.

The D.C. Circuit correctly rejected this sleight-of-hand argument. As it explained, FERC cannot grant itself the power to regulate retail transactions by "luring" retail customers into markets otherwise reserved for wholesale sales and then insisting that their presence on those markets leaves it with no choice but to regulate. U.S.Pet.App.11a (the "lure" here is a "change of the retail rate"). Regardless of the sign on the door labeling the markets as "wholesale," the transactions FERC seeks to regulate are still fundamentally retail transactions.

If FERC could expand its own jurisdiction so easily, then nothing would stop it from regulating any retail transaction that it thought the States were regulating poorly. Indeed, by petitioners' logic, FERC could strip States of all jurisdiction to regulate retail sales merely by inviting all retail customers to purchase power directly from the wholesale markets. U.S.Pet.App.9a (under the final rule's logic, "FERC could engage in direct regulation of the retail market whenever the retail market affects the wholesale market, which would render the retail market prohibition useless"). While petitioners disclaim such untenable results, *see* U.S.Pet.24, they do not and cannot explain why the logic of their arguments would not compel the conclusion that FERC may regulate anything that it chooses to transplant into markets that it regulates under its wholesale sales jurisdiction.

2. Petitioners' related contention that "demand response" is a "practice" that directly "affects" wholesale rates fails for much the same reason. U.S.Pet.12, 21, 24 (citing 16 U.S.C. § 824e(a)). Most retail energy sales affect wholesale sales, and vice versa. Nonetheless, Congress gave the power to regulate wholesale sales to the federal government and left the power to regulate retail sales with the States. That system of dual exclusive regulatory authority creates the potential for one sovereign to be frustrated when the other sovereign pursues different regulatory objectives, but Congress decidedly did not give FERC a trump card to regulate retail sales. The unremarkable fact that retail customers' commitments to forgo the consumption of energy have an effect on wholesale

prices thus hardly assists FERC. That effect is just a product of the basic interrelationship between retail and wholesale, and is no more (or less) "direct" than the effect that any retail transaction has on the wholesale markets.

FERC claims otherwise only by pointing to the more "direct" effect that it has *given* these retail transactions by *ordering* wholesale-market operators to incorporate them into their wholesale markets and pricing mechanisms. *See* U.S.Pet.20-21 (characterizing "demand response" as "a key determinant of the wholesale rate"). But that is just another version of FERC's argument that it may manufacture jurisdiction by inviting "demand response" into wholesale markets and then dictating that it have a "direct" effect on wholesale rates that it otherwise would lack. FERC's power to regulate practices affecting wholesale rates does not include the power to create the circumstances that purportedly necessitate its exercise. *Cf. National Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (plurality opinion) (power to "regulate" something does not include "the power to create it").

Instead, as the D.C. Circuit correctly recognized, the relevant question for jurisdictional purposes is whether "demand response" in and of itself—*i.e.*, independent of FERC's efforts to incorporate it into wholesale markets and rates—falls within FERC's jurisdiction. As even FERC seems to recognize, it does not. The kind of "demand response" FERC seeks to regulate by definition "involves *retail* customers, their decision whether to purchase at *retail*, and the levels of *retail* electricity consumption," U.S.Pet.App.11a—*i.e.*, the very

matters that FERC concedes "have long been pervasively regulated by" the States. U.S.Pet.4. Forcing wholesale-market operators to pay retail customers to consume less electricity at retail so that those customers' effective retail rates change does not somehow create a wholesale transaction.

Indeed, FERC itself has concluded that "demand response providers" are not "public utilities" subject to its jurisdiction, *see EnergyConnect, Inc.*, 130 FERC ¶ 61,031, at P 30 (2010), and it concedes that "demand response" transactions are subject to state regulation as long as they occur outside the organized wholesale markets. U.S.Pet.25. That is because they are inherently retail, not wholesale, transactions. FERC cannot change that basic fact by confining its assertion of jurisdiction to "demand response" transactions that it has directed to occur on markets otherwise reserved for wholesale transactions.

That FERC's "demand response" scheme does not technically involve payment for a "sale of electric energy" does not alter the jurisdictional analysis in the slightest. *See* U.S.Pet.App.34a-35a (Edwards, J., dissenting); EnerNoc.Pet.23. Under the Federal Power Act, the question is not whether a payment for non-consumption is a sale (or non-sale) of energy, but whether paying retail customers to consume less energy entails "regulation" of a matter "subject to regulation by the States." 16 U.S.C. § 824(a). And that question is not close. Prescribing payments to a customer for purchasing less of a product is clearly a regulation of the sale of that product. A "sale" involves "the transfer of property ... for a price." Black's Law Dictionary 1364. Prescribing what a

customer will be paid for purchasing less of a product regulates both the quantity of property transferred and the price of the product. A regulator who wants the effective price of a product to be $15 can achieve that end not only by setting the price at $15, but also by letting another regulator set it a $20 and then paying $5 to anyone who makes the purchase, or letting another regulator set it at $10 and then paying a $5 rebate to anyone who forgoes the purchase.

The economic reality in each of these scenarios is the same, and that reality is that the regulator is regulating the sale of that product. No amount of jargon can obscure the fact that paying a bounty to forgo consumption at retail effectively changes both the quantity of and the rate for a given retail sale, and that by requiring wholesale-market operators to pay such bounties, FERC is regulating retail sales. That is so whether FERC offers "demand response" payments to retail customers directly or to third parties who "aggregate" willing retail customers; either way, the rates and sales FERC is regulating are retail rates and sales. That FERC has achieved this forbidden result by prescribing payments to, rather than by, retail customers (or their agents) does not make its incursion on the States' exclusive retail jurisdiction any less unlawful.

3. With no answer to these fundamental problems with their argument, petitioners insist that FERC's authority to regulate practices "affecting" wholesales rates is "without qualification or exception." EnerNoc.Pet.22 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 783-84 (1968)). But the decision they cite stands only for the proposition

that FERC has broad authority to determine when a practice "affecting" wholesale rates *is unjust and unreasonable*. It says nothing about what kinds of practices fall within FERC's "affecting" authority—let alone whether FERC can convert retail sales into practices "affecting" wholesale rates by making them a component of wholesale rate-setting. Nor are petitioners aided by the various preemption cases they cite for the undisputed proposition that States cannot regulate wholesale markets. *See* U.S.Pet.26-28; EnerNoc.Pet.25-28. The question here is not whether the States may interfere with wholesale markets. It is whether FERC can confer upon itself authority to regulate retail sales by transplanting retail transactions into wholesale markets and then labeling them a "practice" that "affects" wholesale rates. As the D.C. Circuit correctly recognized, if the reservation of State authority over retail sales is to have any meaning, the answer must be no.

In sum, this case presents no occasion to consider the scope of FERC's "affecting" authority because whatever the extent of that authority may be, it cannot extend so far as to authorize FERC to regulate retail rates and sales.* Petitioners' contrary contentions would eviscerate the "bright line" distinction that Congress created.

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* There is likewise no basis for accepting EnerNoc's suggestion, not advanced by the government, that the Court hold these petitions pending its decision in *OneOk, Inc. v. Learjet, Inc.*, No. 13-271, addressing the preemptive scope of the Natural Gas Act.

4. Finally, petitioners suggest that FERC's authority to regulate "demand response" is supported by the Energy Policy Act of 2005. As the D.C. Circuit correctly recognized, however, the relevant provisions of that Act only underscore that FERC has exceeded its authority.

Section 1252 of the Energy Policy Act does not grant FERC any authority to regulate demand response. Nor does it even hint at the notion that FERC already possesses that authority. To the contrary, section 1252 recognizes that demand response is a matter of state concern, "encourag[ing] States to coordinate, on a regional basis, State energy policies to provide reliable and affordable demand response services to the public" and directing the federal Secretary of Energy to provide "technical assistance to [the] States ... to assist them" with these efforts. Electricity Modernization Act of 2005, Pub. L. No. 109-58, § 1252(e)(1), (2); *see also id*. § 1252(a), (b), (g), (h), (i) (making revisions to ratemaking standards to be considered by state regulatory authorities in retail ratemaking). Far from granting FERC authority to regulate demand response, section 1252 assigns FERC an advisory role of (i) "educating consumers on the … benefits of advanced metering and communications technologies," (ii) "working with States, utilities, [and] other energy providers ... [and] experts to identify and address barriers to the adoption of demand response programs," and (iii) preparing a report "that assesses demand response resources, including those available from all consumer classes." *Id*. § 1252(d)-(e).

Petitioners note that section 1252 "states in unequivocal terms that 'unnecessary barriers to demand response participation in energy, capacity and ancillary service markets *shall be eliminated*.'" U.S.Pet.35 (emphasis added). But the quoted language is merely a statement of policy, not a grant of any new preemptive authority. *See, e.g.*, *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010) (policy statement is not a delegation of authority). Moreover, this provision, when read in context, makes clear that Congress's chosen means for eliminating barriers is by encouraging the development of "smart metering" technology that *the States* can use (if they so choose) to allow retail customers to better "manage energy use and cost" by gaining access to a "time-based rate schedule under which the rate charged by the electric utility varies during different time periods and reflects the variance, if any, in the utility's costs of generating and purchasing electricity at the wholesale level." § 1252(a). Most of the 2005 Act's provisions addressing smart metering would have been wasted effort if FERC already had the authority to achieve the same end by ordering wholesale-market operators to pay retail customers to adjust their consumption to better reflect fluctuations in wholesale rates.

II. The Decision Below Is Not Exceptionally Important.

Petitioners concede, as they must, that there is no split in lower court authority on the question presented. *See* U.S.Pet.35. Their plea for this Court's intervention is instead premised on the notion that the decision below threatens to disrupt

the nation's energy markets. Tellingly, however, petitioners have very little to say about any potential harms that might result from the D.C. Circuit's decision vacating Order 745. Instead, the petitions focus almost exclusively on the supposed benefits that may not come to fruition, arguing that allowing FERC's order to stand may "produce lower electricity prices," U.S.Pet.31, enhance "the reliability of the grid," U.S.Pet.32, and mitigate market power, U.S.Pet.33. These claims are not backed up by any actual evidence, and in any event provide no basis for abandoning the "bright line" distinction that has governed the nation's energy markets for nearly a century. The division of regulatory authority between the federal government and the States might not produce the most efficient regulation (at least in the estimation of federal regulators), but "Our Federalism" has many virtues that extend well beyond efficiency.

1. *First*, the D.C. Circuit's decision in no way endangers "demand response" programs in the retail markets. It merely holds that such programs must be designed and administered, like any other programs that regulate retail rates and sales, by the States, even if FERC retains a role in "encourag[ing] and facilitat[ing] them." U.S.Pet.App.12a (citing Pub. L. No. 109-58, § 1252(f)). As EnerNoc has noted, 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.

Moreover, unlike FERC, which has addressed "demand response" as a backdoor effort to achieve more dynamic retail pricing, state regulators can address "demand response" as part of a coordinated effort to regulate the retail markets. Regulators in many States have made significant strides in this area, as evidenced by increased penetration of smart metering technologies and various legislative and regulatory developments documented in a recent FERC report. *See* FERC Staff Report, *Assessment of Demand Response and Advanced Metering*, at 1-8, 21-27 (Dec. 2014), *available at* http://www.ferc.gov/legal/staff-reports/2014/demand-response.pdf.

In fact, the D.C. Circuit's decision may benefit State demand response initiatives. In the administrative proceedings, numerous commentators, including state regulatory commissions, described the demand response and dynamic pricing programs that States, state-regulated utilities, and non-jurisdictional utilities have developed to address the disconnect between wholesale and retail prices. *See, e.g.*, D.C.Cir. JA.1232, 1236; U.S.Pet.App.59a. Those commentators warned that FERC's improper compensation scheme for demand-response commitments could stymie those efforts by luring retail customers away from state-regulated demand response programs and into FERC's scheme.

For example, the Illinois Commerce Commission noted that, by over-compensating retail customers for reducing their demand, FERC would "reduce the incentive for the implementation of retail rates which reflect wholesale prices," and that "as the value of the subsidy increases, the state

commission's likelihood of implementing time-differentiated retail rates decreases." DC.Cir. JA.292. Representatives from state regulatory commissions likewise explained that FERC's rule would impede efforts to install "smart meters," as "[a]n efficient retail price signal made possible by smart metering technology would be replaced with an inefficient price signal in the wholesale market." D.C.Cir.JA.448. On rehearing, those representatives objected that "state commissions would be faced with the task of revising retail rate structures in order to correct a price distortion created by a wholesale market pricing mechanism." D.C.Cir.JA.1235. Similar concerns were echoed by a large number of parties. *See, e.g.*, D.C.Cir.JA.388-90, 490, 567, 838-40; Ltr. of N. Carolina Utils. Comm'n to FERC (Aug. 1, 2014) (voicing North Carolina's concern that "demand response is a retail matter left to the exclusive jurisdiction of the States"), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13606624.

2. *Second*, although petitioners note that FERC has regulated "demand response" for about a decade, they ignore that a large portion of that decade was spent in litigation, and that the full force of FERC's jurisdictional overreach was not felt until 2010 when it proposed its new scheme for overcompensating retail customers. In any event, petitioners' "curious appeal to entrenched executive error" is unavailing. *Rapanos v. United States*, 547 U.S. 715, 752 (2006). The decision below merely restores the same jurisdictional line that has governed the nation's energy markets since 1935.

Moreover, the D.C. Circuit's decision does not preclude FERC or the organized wholesale markets from recognizing and accommodating demand response in other ways. In fact, FERC has ample tools to encourage and accommodate demand response without improperly asserting jurisdiction to regulate retail rates and sales. For instance, the traditional public utilities and competitive power suppliers that purchase power in the wholesale markets and then re-sell it to their retail customers can contract with retail customers and offer them incentives to reduce their demand consistent with state regulation, which will, in turn, allow those load-serving entities to reduce their purchases in the wholesale market. *See* CAISO.Br.15 (admitting that "[t]he electricity system as a whole might still be able to make use of demand response through state-regulated programs"). For decades, FERC has exercised authority to regulate the wholesale rates charged to these entities to reflect their agreements to curtail their wholesale purchases. *See, e.g.*, *Kentucky Utils. Co.*, 15 FERC ¶ 61,002 (1981) (wholesale rate reduced to reflect wholesale customer's agreement to curtail purchases during hours of supplier's choosing).

The decision below therefore will not have the crippling effect petitioners suggests, as it in no way calls into question FERC's authority to use these and other means within its jurisdiction to encourage and accommodate demand response. *See, e.g.*, Monitoring Analytics, LLC, *Price Responsive Demand* (July 22, 2014) (discussing wholesale demand program unaffected by the panel's decision), *available at* http://www.monitoringanalytics.com/rep

orts/Reports/2014/IMM_Price_Responsive_Demand_ER11-4628-000_20140722.pdf. Instead, as the Independent Market Monitor for the largest of the centralized markets, PJM Interconnection, L.L.C. ("PJM"), has stated, the decision below will have the salutary effect of creating "an opportunity to reform the rules for demand response to make them consistent with the functioning of an efficient and competitive market." Monitoring Analytics, LLC, Report, *PJM State of the Market*, at 221 (Mar. 12, 2015), *available at* http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2014/2014-som-pjm-volume2.pdf; *see also id.* at 137 (noting that FERC's regulation of "demand response" resources contributed to supply adequacy issues); *Comments of the Independent Market Monitor for PJM*, Docket No. EL14-55-000 (Oct. 22, 2014), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13664772.

In fact, PJM, which made the same sorts of apocalyptic predictions as petitioners when it sought rehearing of the D.C. Circuit's jurisdictional holding, has proposed a package of revisions to the rules for its centralized capacity auctions under which demand response would be reflected by "modifying the demand curve [in] such auctions ... to conform to qualifying commitments by wholesale entities to reduce their wholesale loads in the capacity market." PJM Interconnection, L.L.C., *Revisions to the Reliability Pricing Market*, at 2, Docket No. ER15-852-000 (Jan. 14, 2014), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13737155; *see also* CAISO.Br.15 (noting PJM filing and describing other options that may be available "[i]f

payment to consumers is the jurisdiction-removing fact"). According to PJM, this "wholesale 'demand-side commitment' approach" will ensure that those auctions "provide an economically efficient capacity resource mix to meet the region's peak demand reliably" even if the D.C. Circuit's decision stands and is interpreted as applying to capacity markets. *Id.* at 7.

While some respondents and other parties have serious concerns about PJM's proposal, which currently is pending before FERC, that filing illustrates that the D.C. Circuit's decision is far from the final word on demand response in wholesale energy markets. And of course, whether that decision applies to the capacity markets—which plaintiffs' *amici* characterize as "[t]he most vital wholesale market[s]" for demand response, Joint.States.Br.30—remains to be litigated, in the first instance, before FERC. *Compare* 14.Utils.Br.19 & n.2 (arguing that "demand response" will have to be removed from the capacity markets) *with* DE.Pub.Adv.Br.22 (arguing that challenges to "demand response" in "legally and economically distinct capacity markets ... will fail on their merits").

The bottom line is that most of petitioners' concerns are unproven, speculative, and premature. There is simply no reason to doubt that permissible wholesale regulation, together with state programs designed at the retail level, would resolve whatever concerns petitioners may have about the impact of the D.C. Circuit's decision.

3. *Third*, although petitioners allude to FERC's statutory obligations to ensure that wholesale rates remain just and reasonable and that the grid remains reliable, they conspicuously fail to allege that FERC lacks the tools—in conjunction with appropriate state regulation—to fulfill those obligations. FERC has been doing so since long before its demand response regulation came onto the scene, and it surely will continue to do so in the future, no matter how demand response is regulated or by whom.

The government's assertions about the "market power" of generators are even more unavailing. In the administrative proceedings, FERC disavowed any suggestion that its rule is needed to mitigate market power. Responding to concerns that its rule, when superimposed on extensive market power mitigation measures already in place, would result in excessive mitigation and thereby distort the markets, FERC stated that its "reference to market power" merely illustrated "the general principle that the greater competition in the market helps to limit potential opportunities for the exercise of market power." U.S.Pet.App.227a-28a. The government cannot now turn around and insist that its rule is essential to FERC's ability to mitigate market power in wholesale markets.

III. This Case Presents A Poor Vehicle To Review The Question Presented.

Both the government and the private petitioners conspicuously decline to ask this Court to review the D.C. Circuit's alternative holding that FERC's rule must be vacated because FERC failed to respond

meaningfully to compelling objections to its fundamentally unsound overcompensation scheme. U.S.Pet.App.15a-17a. Their decision is certainly understandable as a tactical matter. Whether FERC's compensation rationale is arbitrary and capricious is hardly a question that satisfies this Court's criteria for plenary review. But, more critically, the flaws in that compensation scheme underscore the broader flaw in FERC's effort to treat a retail phenomenon like demand response as if it were akin to wholesale supply.

At the outset, petitioners' tactical choice creates a significant vehicle problem. No matter how this Court resolves the jurisdictional question on which petitioners seek certiorari, petitioners are conceding that the order still must be vacated. In other words, they are effectively asking this Court for an advisory opinion on a question that will neither save the order under review nor change the D.C. Circuit's bottom line. To make matters worse, FERC convinced the D.C. Circuit to stay its mandate while FERC sought this Court's review, yet then proceeded to seek review of only one of the D.C. Circuit's two equally dispositive holdings. As a result, FERC has managed to prolong the life of its order—including its defective compensation formula—even though petitioners do not seek to defend the latter.

That significant vehicle problem is troubling enough in and of itself, but petitioners' attempts to divert attention away from FERC's flawed compensation scheme also underscore the central flaw in their jurisdictional argument. That scheme was arbitrary and capricious for a host of reasons, including because it reflects no offset of any kind for

the significant savings in retail charges that retail customers achieve when they consume less energy. But the basic problem with FERC's effort to equate compensation levels for "demand response" with those for actual wholesale supply is that the two are fundamentally different: one involves efforts to incentivize retail customers to consume less energy while the other involves compensating providers for providing actual energy for resale. Under the Federal Power Act, the two things are as different as night and day; indeed, they are as different as retail and wholesale. That petitioners would prefer this Court to ignore FERC's proposed compensation scheme is therefore understandable, because the problems with FERC's effort to equate "demand response" with actual wholesale supply for compensation purposes underscores that "demand response" and wholesale supply are not equivalent and that the former lies outside FERC's regulatory jurisdiction.

The government offhandedly suggests that the Court could respond to the anomalous situation it has created by granting review of the D.C. Circuit's alternative holding, even though neither it nor any other party has sought review of that holding (or even bothered to formulate a proposed second question presented). *See* U.S.Pet.35. But the far better way to eliminate the disruption that FERC's compensation scheme is perpetuating is to deny review altogether. That would finally force FERC to eliminate the massive distortions that its unlawful rule is still continuing to create.

To the extent petitioners suggest that this is the only opportunity this Court will ever have to

consider the question presented, they are mistaken. As the government recognizes, this case will hardly be the last word on FERC's efforts to regulate demand response. Although the government suggests that the D.C. Circuit's decision "throws into serious question whether FERC may review any of the rules established by wholesale-market operators to govern demand-response participation—or perhaps even whether it has authority to permit the participation of demand-response providers in wholesale-electricity markets at all," U.S.Pet.31, it tellingly declines to represent that FERC intends to stop permitting such participation or reviewing such rules. And, as the government notes, litigation about the extent to which FERC may do so is already underway. *See id.* Accordingly, this Court will have time enough to consider FERC's jurisdictional arguments when a more appropriate vehicle arises.

In the meantime, there is no reason FERC cannot continue to accomplish its other regulatory objectives through means that respect the jurisdictional boundaries Congress set. Indeed, that is exactly what Congress anticipated when it enacted the Energy Policy Act of 2005, granting FERC an advisory role for helping to facilitate smart metering to allow for appropriate state-level demand-response programs. FERC may be frustrated with the pace at which the States have moved toward aligning their retail regulation with FERC's wholesale regulation. But that does not empower FERC to take into its own hands matters within the exclusive jurisdiction of the States—let alone to distort the markets by dramatically overcompensating retail customers for not consuming energy. Because the decision below

does nothing more than reaffirm that eminently correct conclusion, there is no reason for this Court to disturb it.

CONCLUSION

The Court should deny the petitions.

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