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Utilities: Forceful Reply in DR Case a Positive for Generators

Highlights

- EPSA's Oct. 30 reply brief to FERC and others' petition to stay the D.C. Circuit's vacatur of Order 745 (treating Demand Response, DR, as equal to generation) presents strong arguments, increasing the odds the Court's mandate will proceed, regardless of Supreme Court petitions. The fact that FERC, with the Justice Department, has still not decided whether they will petition for Supreme Court review is damaging to FERC's assertion that the case is important enough to merit a stay while the Supreme Court decides whether to hear the case.
- We think a ruling from the Court on the motion to stay the decision will follow within the next few days, or perhaps as soon as next week. In the event the Court denies FERC's motion to stay the Court's vacatur, Order 745 will be vacated and demand response will no longer be guaranteed full locational marginal pricing in electricity markets.
- Allowing the Court's vacatur to proceed will likely quicken the resolution of and improve the odds of success for First Energy's related complaint seeking to remove DR from the capacity markets. Whether FirstEnergy can have the results of PJM's May capacity auction thrown out remains to be seen, but we think it may be in a good position to drive prospective changes.

Discussion

Following the denial of FERC's petition for rehearing *en banc* in September, FERC, demand response providers, and customer groups filed a motion with the D.C. Circuit Court of appeals to "stay issuance of the mandate" in the case, pending resolution of the case at the Supreme Court. Staying the mandate would prevent the Court's May vacatur of Order 745, which guarantees demand response full locational marginal pricing in wholesale power markets, from going into effect. On October 30, the Electric Power Supply Association filed a brief in reply to FERC and DR providers' petitions to the D.C. Circuit to stay the vacatur. Vacatur of Order 745 could be positive for generators who compete with demand response in electricity and capacity markets.

EPSA argues that FERC and intervenors do not show that the Supreme Court is likely to grant certiorari and reverse the D.C. Circuit May decision invalidating the Order, nor that vacatur of the rule would cause "irreparable harm" to the public or respondents in the case. An important point: FERC, with the Department of Justice, has not yet filed, nor even decided whether they will file, a petition for a writ of *certiorari* at the Supreme Court. We agree with EPSA's assertion that this "belies any suggestion that the case is so important that a stay is required", and we also reiterate that Commissioners Moeller and Clark have not walked back statements that suggest they welcome working with states

Ticker(s):
EXC, ETR, FE, NEE, NRG, CPN,
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LON:CNA

on demand-response regulation. With submission of EPSA's response now filed on the case's docket, we think a ruling from the Court on the motion to stay the decision will follow within the next few days, or perhaps as soon as next week. The strong EPSA reply increases the odds that the issuance of the Court's mandate vacating Order 745 will proceed, regardless of submission of Supreme Court petitions for *cert.* by FERC or intervenors.

Capacity Market Complaint Could Move Faster

On September 22, FirstEnergy submitted an amended version of its complaint seeking to apply the May *EPSA* decision to PJM's capacity market. FE would like to re-run the 2017/2018 Base Residual Auction without demand response, and remove demand response from prospective auctions. Dynegy recently moved to intervene in the complaint proceedings, presumably seeking to join FirstEnergy in its efforts to remove the product from the auctions. Allowing the Court's vacatur to proceed will likely quicken the resolution of, and improve the odds of success for, First Energy's complaint.

Whether FirstEnergy can have the results of PJM's May capacity auction thrown out remains to be seen. In a recent decision concerning potential market manipulation in ISO-NE's Forward Capacity Auction (FCA) for the 2017-2018 commitment period, FERC Chairman LaFleur and Commissioner Philip Moeller voted against re-running the auction. To our knowledge, FERC has never re-run a capacity auction before - doing so may present too big a burden to past auction participants. Nonetheless, we think FirstEnergy may be in a good position to drive prospective changes for next May's auction, if the mandate invalidating Order 745 is issued. With no FERC jurisdiction over demand response products and the Court's language in the decision criticizing comparable compensation schemes for DR with generation, it would be difficult for FERC to justify the product's continued presence in the auction. We caution that FERC could still delay resolution of the FE proceedings until after a Supreme Court ruling on the *EPSA* case, even if the vacatur of Order 745 issues.

PJM, the respondent in the FirstEnergy complaint proceeding, has until October 28 to file an answer to the complaint at FERC. FirstEnergy has not applied for "fast-track" complaint processing procedures, so following October 28, an order ruling on FirstEnergy's concerns could follow approximately two or three months afterwards, at the end of December or the beginning of January, according to FERC's own assessment of typical complaint timing, [here](#). If the stay of the Court's mandate is granted and a petition for *cert.* filed, the disposition of the complaint would probably not occur until resolution of the petition at the Supreme Court.

Additional Resources

[*Electric Power Supply Association, et al. v. FERC*, D.C. Cir. 2014, No. 11-1486, May 23, 2014](#)

[EPSA Reply to Motion to Stay Issuance of Court's Mandate, September 30, 2014](#)

[FERC Motion to Stay Issuance of Court's Mandate, September 22, 2014](#)

[Intervenors' Motion to Stay Issuance of Court's Mandate, September 22, 2014](#)

[First Energy Amended Complaint Re: *EPSA* and Capacity Markets, EL14-55-000, September 22, 2014](#)

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