

CLIENT ALERT

FERC Extends Supreme Court's *EPSA* Decision Beyond Demand Response to Energy Efficiency

December 12, 2017

AUTHORS

Norman C. Bay | Sohair A. Aguirre | Thomas R. Millar

On December 1, 2017, the Federal Energy Regulatory Commission ("FERC" or the "Commission") issued an order that, among other things, affirmed its jurisdiction under the Federal Power Act ("FPA") over the participation of certain energy efficiency resources ("EERs") in the wholesale electricity markets.¹ Citing the Supreme Court's ruling in *FERC v. Elec. Power Supply Ass'n*, FERC held that it had "exclusive jurisdiction" over the participation of EERs in organized wholesale markets "as a practice directly affecting wholesale markets, rates, and prices."² The decision is significant for two reasons. First, FERC has extended the reasoning of *EPSA* from demand response to EERs. Second, FERC held that states may not limit or condition the participation of EERs in wholesale electricity markets unless the Commission expressly gives states the authority to do so.

The Commission's order was in response to a Petition for a Declaratory Order filed by Advanced Energy Economy ("AEE"). After PJM Interconnection L.L.C ("PJM") instituted a stakeholder process to address the participation of third-party EERs in its capacity markets (in response to an order from the Kentucky Public Service Commission ("Kentucky Commission") banning participation by retail electric customers in any PJM wholesale market), AEE filed a petition seeking the following declarations from the Commission:

- The Commission has exclusive jurisdiction over the participation of third-party EERs in the wholesale electricity markets;

¹ *Order on Petition for Declaratory Order*, 161 FERC ¶ 61,245, at P 1 (2017) ("Declaratory Order").

² *Id.* at 60; *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 775 (2016) ("*EPSA*").

FERC Extends Supreme Court's EPSA Decision Beyond Demand Response to Energy Efficiency

- A relevant electric retail regulatory authority (“RERRA”), *e.g.*, a state utility commission, may not dictate the requirements for, or disallow, participation of third-party EERs in wholesale electricity markets absent a grant of such authority to the RERRA from the Commission;
- The Commission’s order directing independent system operators and regional transmission organizations (“ISO-RTOs”) to allow aggregators of retail customers to bid demand response directly into the ISO-RTO markets, Order No. 719, does not allow RERRAs to “opt-out” or otherwise restrict the sale of third-party EERs into wholesale electricity markets;
- An ISO-RTO stakeholder process is an improper forum to address a RERRA’s authority to “opt-out” with respect to the sale of EERs;
- Any ISO-RTO procedure to allow RERRAs to opt-out or restrict the participation of third-party EERs in wholesale electricity markets can only be applied prospectively (*i.e.*, not to past capacity auction results); and
- In any future Commission proceedings initiated by a RERRA seeking authority to opt-out or otherwise restrict the participation of third-party EERs in wholesale markets, the Commission will consider whether:
 - the RERRA is acting within its authority to restrict participation by the third-party EERs in wholesale electricity markets; and
 - providing the RERRA with such authority satisfies the Commission’s FPA obligation to ensure just and reasonable rates.

Not surprisingly, the Commission affirmed its exclusive jurisdiction to regulate the participation of EERs in the wholesale electricity markets.³ While rejecting AEE’s distinction that third-party EER providers, as opposed to utilities that bid their own EERs, do not have any nexus with retail electric service, the Commission held that such a nexus, nevertheless, would not divest the Commission of its jurisdiction to regulate EERs in wholesale electricity markets.⁴ Drawing an analogy to demand response, and relying on the Supreme Court decision in *EP SA*, the Commission stated that it “has jurisdiction over the participation of EERs in organized wholesale markets as a practice directly affecting wholesale markets, rates, and prices.”⁵

³ Declaratory Order, 161 FERC ¶ 61,245 at P 59.

⁴ *Id.*

⁵ *Id.* at P 60.

FERC Extends Supreme Court’s EPSA Decision Beyond Demand Response to Energy Efficiency

Moreover, the Commission held that because of its exclusive jurisdiction over the participation of EERs in wholesale markets, RERRAs “may not bar, restrict, or otherwise condition the participation of EERs in wholesale markets unless the Commission expressly gives RERRAs such authority.”⁶ Further justifying its exclusive jurisdiction, the Commission found that the *terms of eligibility* of an EER’s participation have a direct effect on wholesale markets.⁷ While the jurisdictional argument was decided in AEE’s favor, ultimately, the Commission found that a previous order authorized the Kentucky Commission to regulate “any PJM-offered *demand side or load interruption programs*.”⁸ Therefore, the Commission found that it had previously provided the Kentucky Commission with the requisite authority to regulate the participation of EERs.

In addition, while the Commission declined to opine on future requests related to an “opt-out” and EERs, the Commission provided additional guidance with respect to participation of EERs in wholesale markets. With respect to the arguments related to Order No. 719’s “opt-out” provisions allowing RERRAs to limit participants in the demand response programs, the Commission found that “it was not obligated to do so”⁹ and that the Order No. 719 “opt-out” provisions did not apply to EERs.¹⁰

The Commission also recognized RERRAs’ “strong interest in maintaining and promoting retail energy efficiency programs.”¹¹ However, the Commission held that it may nevertheless regulate EER participation even if such regulation had a substantial effect on retail markets.¹² The Commission ultimately concluded that “any incidental effects from EER participation [in wholesale markets] on the retail markets are not substantial.”¹³

Finally, in addressing other issues raised by AEE, the Commission held that:

- Any changes to PJM capacity market rules should be implemented prospectively and should not change the results of completed capacity auctions;¹⁴ and

⁶ *Id.* at P 61.

⁷ *Id.*

⁸ *Id.* at P 66 quoting *In re: Ky. Pub. Serv. Comm’n, Application of Kentucky Power Company D/B/A American Electric Power for Approval, to the Extent Necessary, to Transfer Functional Control of Transmission Facilities Located in Kentucky to PJM Interconnection, L.L.C. pursuant to KRS 278.218*, Case No. 2002-00475 (May 19, 2004).

⁹ *Id.* at P 62.

¹⁰ *Id.* at 65.

¹¹ *Id.* at P 63.

¹² *Id.*

¹³ *Id.*

¹⁴ Declaratory Order at P 70.

FERC Extends Supreme Court's EPSA Decision Beyond Demand Response to Energy Efficiency

- While an ISO-RTO stakeholder process is not the proper forum in which to determine RERRAs' "opt-out" authority, it can be the proper forum to develop rules to implement RERRAs' "opt-out" selection.

This was an important decision for EERs that participate in wholesale markets. The decision may be viewed as the logical extension of *EPSA*. FERC affirmed that it retains "exclusive jurisdiction" to regulate the participation of EERs in wholesale markets, and states may not regulate such resources unless the Commission expressly allows the states to do so. Moreover, FERC is not obligated to provide an opt-out provision to states. The reasoning of this decision, coupled with *EPSA*, provides legal support for other resources that can be aggregated at the retail level and offered into the wholesale markets.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

Norman C. Bay

202 303 1155

nbay@willkie.com

Sohair A. Aguirre

202 303 1140

saguirre@willkie.com

Thomas Millar

202 303 1144

tmillar@willkie.com

Copyright © 2017 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.