



## Next Generation Energy Law Newsletter

Published by Law Offices of Carolyn Elefant, PLLC

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## Thawing Out



As Washington D.C. emerges from the grip of the Polar Vortex, some matters — such as the pending appeal of FERC Order No. 745 (demand response) before the D.C.

Circuit - remain frozen, while others - such as FERC rulings on PURPA matters are blossoming. This month's Next Generation Energy newsletter features these two topics, along with a few quick shots of energy innovations to set your imagination on fire and chase away the winter chill.

Enjoy this month's newsletter, and the upcoming warm weather! If there's a topic you'd like covered in future editions or you'd just like to offer some feedback, please drop me a line at [carolyn@carolynelefant.com](mailto:carolyn@carolynelefant.com).

Until next time.

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## Where's the D.C. Circuit's Response on FERC's Order No. 745 Demand Response...and What Might Happen Next?



It's been nearly [six months](#) since the [DC Circuit](#) heard [oral arguments](#) on the petition for review of [FERC Order 745](#). This dispatch summarizes the issues on review and responds to frequently asked questions such as what the lengthy decision time means and what happens if the case is remanded.

### Recap of Order 745

In case you've forgotten, Order 745 is FERC's landmark rule on demand response, aimed at ensuring comparable treatment for demand response resources. To this end, Order No. 745 required RTOs and ISOs to pay the locational marginal price (LMP), or essentially, the full wholesale price, for demand response resources participating in wholesale markets. As a result (and to oversimplify somewhat), under Order No. 745, generators selling power and customers withholding power are compensated the same way.

Order 745 was not without controversy. Commissioner Moeller [dissented](#), arguing that LMP pricing would result in double payment to demand resources since customers withholding power never paid to produce or purchase it.

A group of economists even filed an [amicus brief](#) at the court, which largely supports Commissioner Moeller's approach.

In spite of the much publicized debate over the appropriate pricing mechanism for demand response, September's oral argument before the D.C. Circuit focused largely on FERC's authority to regulate pricing for demand response to begin with. Under the Federal Power Act, FERC has jurisdiction over rates and practice related to wholesale sales. On the one hand, when demand resources are aggregated and offered as a bundle into wholesale markets, they arguably impact the wholesale sales over that FERC has exclusive authority to regulate

under the Federal Power Act. Yet, on the other hand each individual aggregated transactions – all of the industrial and commercial and even residential customers who sign up to agree to curtail power in exchange for payment – are essentially retail deals, which states have long regulated, [contend](#) the Order No. 745 challengers. And now, nearly six months later, the court has yet to weigh in with a ruling.

### **What Does a Six Month Wait Mean?**

Six months isn't terribly long in "judicial time" (I've waited two years for rulings in some cases). Still, it's uncharacteristic for the D.C. Circuit. As last year's [case round-up](#) showed, all but two of the court's thirteen decisions in FERC cases issued within three months or less from the date of argument. Used to be that a waiting time of longer than two months meant a win for the appellants and a reversal or remand of the FERC order.

While that's no longer true (as last year's round-up showed, FERC won the two of the cases that took the longest to decide), it is fair to say that a six month wait suggests that the court may be having some difficulty in reaching a decision.

### **What Are the Court's Concerns?**

Some courts might hesitate to issue a ruling that questions an agency's jurisdictional grounds for a decision - but the D.C. Circuit has no qualms about doing so. For example, in [Southern California Edison v. FERC](#), a case that involves a similar exercise in hairsplitting the line between retail and wholesale transactions as in the Order 745 appeal, the D.C. Circuit easily found that FERC lacked jurisdiction to regulate the netting periods used the California ISO (CAISO) to assess station power charges.

FERC had justified its decision to set netting intervals by reasoning that if a generator's sale of power to the grid exceeded its use of station power, then no retail sale had taken place and FERC did not encroach on the state's retail jurisdiction. But the D.C. Circuit rejected FERC's approach, asserting that "we do not understand why FERC is empowered to conclude that a retail sale has not taken place unless it can conclude that the transaction is wholesale sale." On remand, FERC acknowledged that it lacked jurisdiction over netting intervals for station power, a decision affirmed by the D.C. Circuit in [Calpine v. FERC](#).

Still, overturning a FERC practice that applied in narrow circumstances within one ISO is a far cry from vacating a FERC rule that impacts every transmission organization, not to mention the entire demand response industry. Moreover, the court also must also ensure that the its ruling is consistent with the retail/wholesale line in the

that the parties have asked the court to review in the Order 1000 appeal which is scheduled for [March 20](#). I suspect that these interconnecting considerations account for the delayed ruling.

### **What Happens if There's A Remand?**

There are a couple of issues to consider if the Order 745 case is remanded - either for FERC to reconsider the jurisdictional grounds or, to modify the methodology for demand response pricing if that's the basis for the remand. If that happens, that's where the fun begins. Chairman Wellinghoff, chief architect of FERC's demand response policy has left the Commission. Commissioner Moeller who authored the dissent now has "partner in crime" with Commissioner Clark who often joins Commissioner Moeller's dissents or authors his own. Meanwhile, FERC is still operating with four commissioners until the Senate confirms the President's recent nominee, Norman Bay. The Commission's composition is different now from back in 2011 when Order No. 745 issued - and that could change the scope of the order.

### **What About Refunds?**

The California energy crisis spawned years of litigation over refunds, after FERC determined as the result of a Section 206 investigation, that dozens of utilities, generators and munis had manipulated the market and overcharged for power. However, the posture of the Order 745 appeal differs significantly from the California energy crisis cases.

For starters, the petitioners challenging Order 745 did not request refunds as a remedy either before the Commission or the court. Since federal appellate courts are courts of limited jurisdiction, they do not have jurisdiction over issues that were not raised on rehearing or presented to the court so it is unlikely that the court would require refunds. Likewise, unless a party challenged an ISO demand response compliance filing as unjust or unreasonable or non-jurisdictional, a refund effective date would not have been established for calculating the refunds.

Finally, FERC itself admitted in Order 745 that it lacks jurisdiction over the demand response providers who would have been overpaid or unjustly paid if demand response compensation was set unlawfully or higher than it should have been. Just as the Ninth Circuit [held](#) that FERC lacked authority to order municipalities and non-public utilities to refund overpayments resulting from market manipulation, likewise, FERC would not have the

mean that parties won't attempt to seek refunds, nonetheless).

### **What Other Cases Are Affected?**

The court's decision on the Order No. 745 appeal could potentially impact a pending FERC compliance action.

Currently, FERC is [pursuing an enforcement action](#) against Maine-based Lincoln Paper Company for engaging in market manipulation of NEISO's demand response program. On February 14, 2014, Lincoln filed a [motion to dismiss](#), arguing in part that FERC lacks jurisdiction over demand response transactions which are "retail non-sales" — effectively the opposite of wholesale sales that FERC is empowered to regulate. A D.C. Circuit ruling finding that FERC lacks jurisdiction over demand response would certainly aid Lincoln's position.

In the three years that Order No. 745 has been in effect, demand response has become an entrenched and robust player in the ISO and RTO markets. The court must also be cognizant of the difficulty of putting the genie back in the bottle but at the same time, affirming Order No. 745 without attempting to sort through the tough jurisdictional questions will have implications for the energy industry for years to come.

*We'll cover the court's ruling in Order No. 745, so stay tuned. In the meantime, if you have additional questions about this case, please contact Carolyn Elefant at [carolyn@carolynelefant.com](mailto:carolyn@carolynelefant.com).*

## **A PURPA Pick-Up**


In recent years, there's been a resurgence of interest in PURPA, as renewables look to leverage the 30-year old statute to secure long-term contracts vital to attract private investment. At the same time, concerns about potentially higher consumer rates have lead utilities and state commissions to push back, resulting in an increased number of FERC rulings on PURPA over the past year and a half. The table below summarizes those cases.

To the extent that any trends can be gleaned, the recent FERC PURPA cases show that FERC has been vigorous in rebuffing utilities' efforts to expand their ability to curtail QFs beyond the limited circumstances — emergencies and light load periods - where unilateral curtailment is permitted. In addition, if rulings like *Gadwell Wind* and *Clearwater Paper* — which claim that state commission rules on avoided costs and treatment of RECs violate PURPA — are any indication, the Commission may be

challenge a state's policy choices.

Finally and of note, in *City of Burlington* the Commission, by a 4-1 vote, terminated a buyer's mandatory purchase obligation with a facility under 20 MW for the first time since EAct 2005 was enacted.

Take a look at the chart below - and if you have any additional questions about PURPA, feel free to contact the firm directly at [carolyn@carolynelefant.com](mailto:carolyn@carolynelefant.com).

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**TABLE 1. FERC PURPA ENFORCEMENT AND DECLARATORY JUDGMENT ACTIONS 2012-2014 (through 3/2014)\***

Docket No.	Case Name	Citation	Issue	Result
EL14-4-000	CalWind Resources, Inc. v. California Independent System Operator Corporation	146 FERC ¶61,121 (2/21/2014)	Whether CAISO's interconnection tariff, requiring an additional interconnection study for a QF that increases capacity from 22 MW of 37.5 MW violates Order 2003?	FERC rules that CAISO tariff complies. Tariff states that no interconnection study is required for a facility that is substantially unchanged from initial interconnection agreement - but addition of 15 MW would constitute a substantial change.
EL12-12	Alko Renewable v. Mass Electric	146 FERC ¶61,107 (2/20/2014)	Whether utility must base avoided cost payments to solar QFs on same contract rate approved for Cape Wind Offshore Wind Project?	FERC defers resolution since QF's complaint is pending before the state commission.
EL13-54	Gadwall Wind v. Minn. PUC	145 ¶61,228 (12/19/2013)	Whether Minnesota's regulation requiring utilities to pay renewable QFs the lower of either (a) the utility's least cost renewable facility or (b) a competitive supplier's bid of a least cost renewable facility violates PURPA.	FERC declines enforcement, without further discussion.

\* Note: Chart does not include enforcement actions filed in federal court re: PURPA. This updated version *does* include rulings re: termination of mandatory purchase obligation post 10/2013.


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[Click for complete chart](#)

## An Update on Energy Counsel on Demand - Coming Soon!

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month, is nearing its launch. Though there's enormous need for affordably priced energy regulatory service, our initial offerings will focus on providing experienced energy regulatory counsel for in-house secondments, overflow and temporary needs and serving the unique needs of energy start-ups, most likely through subscription services and advice hotlines. We'll announce our formal launch via this newsletter, so stay tuned.

## Energy Bytes



### Coining New Incentives for Solar

A new form of [crypto currency](#) will soon be available for solar currents: [Solar Coin](#). As described at [SHFT](#), solar coins can be "mined" by solving crypto-puzzles or purchased on Twitter. But they can also be earned by developers - or even homeowners in net metering programs - who generate solar power and receive renewable energy certificates in return. Each REC can be redeemed for a solar coin that can be used to pay merchants — or maybe even law firms — who accept solar coins as tender.



### New Players Bring Energy to the Energy Sector

Even as recently as a decade ago, who would have thought that a cutting-edge tech publication like [Wired](#) would be covering the energy biz. But as this recent [article](#) makes clear, the energy industry isn't grandpa's utility any longer with cool kids like Google (which recently purchased Nest, known for networked thermostats that can facilitate demand response) and Tesla (the electric car company now investigating battery storage solutions) getting into the game. Exciting times!



### A View of Opower, Inside and Out

If you've ever wondered about #altenergy company, [Opower's](#) business model, you can learn more than you ever wanted to know with the release of its [S-1 form](#). For regulatory geeks, there's some interesting discussion of Opower's perceived regulatory risks in markets partly dependent upon government policies.

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