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## GRID:

### Backers of energy-saving rule fret over policy's legal fate

Hannah Northey and Robin Bravender, E&E reporters

Greenwire: Thursday, October 15, 2015

Backers of a major energy conservation rule -- including one of its biggest champions -- are nervous about the regulation's fate in the wake of Supreme Court arguments on the issue.

The high court yesterday heard arguments about the legality of a Federal Energy Regulatory Commission "demand-response" rule requiring power users to be paid for committing to scale back electricity use at times of peak demand ([Greenwire](#), Oct. 14). Conservative justices appeared skeptical that the rule was within the bounds of the agency's jurisdiction, and they may uphold a lower-court decision to strike down the FERC regulation.

Supporters of the FERC program contend that the ramifications of throwing out the rule are high. Solicitor General Donald Verrilli, who's representing the agency in the court arguments, told the justices yesterday that the rule in question could bring about billions of dollars in consumer benefits by lowering electricity rates and would help protect the grid against blackouts and brownouts.

Former FERC Chairman Jon Wellinghoff, who championed the 2011 regulation when he was

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leading the agency, said oral arguments around Order 745 were not encouraging.

A high court decision to reject the FERC rule could make the continuation of demand response programs more difficult, even if people come up with creative solutions, said Wellinghoff, who now works at the law firm Stoel Rives LLP.

"The problem is that there are very few if any state [demand response] programs. States have traditionally done very poorly in the development of robust demand response programs," Wellinghoff said yesterday in an interview.

States may have demand response programs, but Wellinghoff and others say FERC's program -- which allowed electricity users to bid commitments to scale back energy use in wholesale markets -- is critical.

States have not been able to support demand response programs on the distribution level because they erode revenues for distribution companies, Wellinghoff said. "They resist it, and by resisting it they thwart customers from participating and don't, even if the states try to put in a robust program, the utilities that have to carry, distribution utilities have to carry that program out."

Natural Resources Defense Council attorney Allison Clements earlier this week called the D.C. Circuit Court of Appeals' decision to throw out the FERC rule "wrong-headed," and warned that it could "throw a wrench into the transition to a clean energy future." Clement during an interview yesterday echoed that message, but said she was heartened by Verrilli's defense.

Clement warned emissions reductions could be compromised and consumers could suffer if the court doesn't allow FERC's Order 745 to stand.

"We're going to lose both the direct carbon emissions and other dirty emission reductions that we're getting by displacing fossil fuel generation, in some cases," Clement said. "We're also going to lose this increasingly flexible clean and reliable grid that demand response resources [support]."

But Republican FERC Commissioner Tony Clark, a former state regulator from North Dakota who at one time led the National Association of Regulatory Utility Commissioners, disputed assertions that the court's ruling could end demand response.

Those arguments, he said, are a "red herring."

States have plenty of incentive to foster demand response because the practice reduces rates,

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and any rule in favor of the groups challenging FERC -- including grid operators and power providers represented by the Electric Power Supply Association (EPSA) -- isn't going to make demand response illegal, Clark said.

"I think demand response is going to exist regardless of where they decide to draw that line, and the reason is it'll either participate on the retail side through state-administered programs or it will participate through this somewhat complex contraption in the wholesale markets that FERC has designed," Clark said. "It'll participate either way, it just depends jurisdictionally where it comes in the door."

Demand response providers and aggregators talking about demise of demand response, he added, may simply like the compensation in the FERC-created markets.

"It's been lucrative," he said. "I understand their position and why they have that particular position, but in terms of the technology, regardless of how the [Supreme Court] rules, it's not going to eliminate demand response."

Clark said he's more concerned the Supreme Court could issue a broad decision adopting the philosophy that anything in the electricity sector that affects the wholesale market would fall under the agency's purview.

"That would be an extraordinarily broad ruling, and that could be used to really steamroll right through state retail rate regulation, because really everything right down to the light switch on the wall in some way affects the wholesale market," he said.

Challengers of the FERC rule, meanwhile, are hopeful that the high court affirms the lower court's decision to knock down the regulation.

"EPSA is pleased to have played a lead role in this important court case, joined by a diverse array of national and state entities representing a broad cross-section of the electricity sector," EPSA Senior Vice President Nancy Bagot said yesterday in a statement. "EPSA is hopeful that the Supreme Court will affirm the decision of the D.C. Circuit striking down FERC's Order 745."

## **Stakeholders 'hold their breath'**

A decision from the high court could come as early as next week.

Justice Samuel Alito recused himself from the case, presumably because he has a financial stake in one of the companies involved, although the court didn't specify the reason.

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Several of the conservative justices on the court indicated yesterday they thought FERC may have exceeded its authority. Justice Antonin Scalia suggested that FERC had acknowledged it was "mucking around in an area that's the states' area."

Justice Anthony Kennedy, who is often a swing vote on high-profile issues, also indicated that he saw some flaws with the FERC order. "Is it fair to say that FERC is luring retail customers into the wholesale market?" Kennedy asked. "If that were true, would that not be a serious problem for the government?" He also called FERC's argument "essentially circular."

Meanwhile, some of the liberal justices appeared to suggest that FERC may have the jurisdiction, or that the court should defer to the agency's expertise on the matter.

"We're not electricity regulators; they are. It's pretty tough and technical," said Justice Stephen Breyer. "That's why I've been trying to figure out just what it is about this thing that, in your view, makes it unreasonable," he told Paul Clement, the attorney representing FERC's challengers.

If the justices split 4-4 on the issue, they could affirm the lower court's decision as early as Monday after voting during their Friday conference. The court could also take months to decide.

"I think everybody's sort of going to hold their breath," said Carter Phillips, who represented EnerNOC Inc. in the arguments yesterday. EnerNOC helps large energy users participate in demand response programs.

Vanderbilt University law professor Jim Rossi, who co-authored an amicus brief calling on the court to back FERC's authority, said the Supreme Court would be hard-pressed to find the commission didn't have the authority to issue Order 745.

But Rossi said the justices could take a closer look at the quality of the reasoning behind the rule, which would put the ball in FERC's court.

"FERC would have to come up with a better explanation, it would probably go back to the drawing board and come up with a better explanation," he said. "In addition, it may be the case that FERC has to come up with a more narrowly tailored set of regulations with respect to demand response ... [making it] clear that FERC is only regulating the wholesale set of the market."

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