ORAL ARGUMENT HELD SEPTEMBER 23, 2013
DECISION ISSUED MAY 23, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1486
Consolidated with Nos. 11-1489, 12-1088, 12-1091, 12-1093

ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION
Respondent.

On Petition for Review from the
Federal Energy Regulatory Commission

MOTION TO STAY ISSUANCE OF MANDATE

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DATED: September 22, 2014

The Intervenors Supporting Respondent listed below move the Court to stay the issuance of its mandate in the above-referenced case for at least a ninety-day period, to accommodate the time during which they may file a petition for a writ of certiorari in the Supreme Court of the United States ("Supreme Court"). Counsel for the Petitioners have not authorized the representation that Petitioners will not oppose this motion.

I. BACKGROUND

On May 23, 2014, a divided panel of this Court vacated Order 745, holding that Order 745 exceeds the Federal Energy Regulatory Commission's ("FERC") jurisdiction, and holding that FERC's decision to compensate demand response resources at the market-clearing price is arbitrary and capricious. Op. at 14. Judge Edwards, in his dissent ("Dissent"), disagreed with the majority, instead determining that FERC had jurisdiction to issue Order 745 and that the demand response compensation level adopted in Order 745 was not arbitrary or capricious. Dissent at 27. On September 17, 2014, this Court denied timely petitions for rehearing *en banc*. A stay of the issuance of the mandate is requested for the period until the Supreme Court rules on a timely filed petition for writ of certiorari.

II. REASONS FOR STAYING THE ISSUANCE OF THE MANDATE

In the instant proceeding, the standards for staying the issuance of the mandate are met in that the petition for a writ of certiorari would (1) present

"substantial question[s]" and (2) there is "good cause" for staying the issuance of the mandate. Fed. R. App. P. 41(d)(2)(A); *see also* D.C. Cir. R. 41(a)(2) (requiring that movant for a stay of the issuance of a mandate provide "facts showing good cause for the relief sought").

To determine whether a petition for a writ of certiorari presents a "substantial question," this Court considers whether the petition "tenders [issues that] are substantial." *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir. 1978). Courts may also consider whether there is a reasonable probability that the Supreme Court will grant certiorari and whether there is a reasonable probability of reversal. *See United States Postal Service v. AFL-CIO*, 481 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers) (in considering staying issuance of a mandate the court considers "whether four Justices will vote to grant certiorari [and] some consideration as to predicting the final outcome of the case in [the Supreme] Court"); *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001). The likelihood of a grant of certiorari "must [be] consider[ed] … in the context of the case history [and] the Supreme Court's treatment of other cases presenting similar issues." *Books*, 239 F.3d at 828. The petition for a writ of certiorari in this proceeding meets this requirement because the majority's opinion raises substantial questions regarding Supreme Court decisions, decisions of other circuit courts, and decisions of this Court. *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def.*

Council, 467 U.S. 837, 842-43 (1984); *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479, 481-83 (D.C. Cir. 2009) ("*Conn. DPUC*"); *Entergy Services, Inc. v. FERC*, 400 F.3d 5, 8 (D.C. Cir. 2005); *BP W. Coast Products, LLC v. FERC*, 374 F.3d 1263, 1273 (D.C. Cir. 2004). Further, this proceeding presents a substantial question of national importance regarding whether FERC may exercise jurisdiction over the impacts of demand response on wholesale energy markets, under federal law.

For the second prong of "good cause," circuit courts focus on the balance of equities and whether the movant for the stay will suffer "irreparable injury" if the stay is denied. *Nanda v. Board of Trustees of the University of Illinois*, 312 F.3d 852, 853 (7th Cir. 2002); *see Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980); *Nara v. Frank*, 494 F.3d 1132, 1133 (3rd Cir. 2007); *Books*, 239 F.3d at 828. In application, the "irreparable injury" standard requires that the movant show *some* harm will accrue absent the stay or that some public interest supports the stay. *See, e.g., Books*, 329 F.3d at 829 (balance of equities favored staying the issuance of the mandate in case involving public display of religious material where "public interest is best served [by] affording the City a full opportunity to seek review in the Supreme Court of the United States before its officials devote attention to formulating and implementing a remedy"). This proceeding presents similar issues. If the issuance of the mandate is not stayed, FERC will need to begin

unwinding demand response participation in wholesale energy markets, which will increase electricity prices for customers. Once day-ahead and real-time energy markets are cleared without demand response resources, little can be done to reverse this price impact on customers. FERC has explained on many occasions the practical inability to re-clear energy markets after the fact.

A. This Case Presents Numerous Substantial Questions.

The Intervenors Supporting Respondents anticipate presenting the following questions in their petition for a writ of certiorari:

1) Whether, consistent with prior Supreme Court decisions and decisions of this Court, the Court should have reached step two of the test for agency deference defined in *Chevron*.

2) Whether demand response is, under the Federal Power Act ("FPA"), subject to state jurisdiction.

3) If demand response is subject to state jurisdiction, whether, consistent with prior decisions of this Court, the United States Court of Appeals for the Third Circuit ("Third Circuit"), and the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), FERC may regulate demand response to the extent demand response affects wholesale electricity markets.

4) Whether, consistent with prior decisions of the Supreme Court and this Court, the deference granted to FERC regarding the technical nature of its responsibilities allows FERC to set compensation for demand response at the wholesale market-clearing price.

"[A]lthough neither controlling nor fully measuring the Court's discretion," the following standards guide the Supreme Court's decision whether to grant a petition for a writ of certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. S. Ct. R. 10(a)-(c).

For the reasons discussed below, the Supreme Court is likely to grant certiorari on each of the four material questions listed above.

1. Because the Majority Opinion Raises Substantial Questions Regarding *Chevron* and this Court's Prior Decisions, the Supreme Court Is Likely To Grant Certiorari and Reverse.

Because the majority's decision raises substantial questions regarding the deference granted to agencies in *Chevron* and this Court's prior application of the *Chevron* doctrine, the Supreme Court is likely to grant certiorari and will likely reverse this Court's opinion. *See* 467 U.S. at 842-43. Pursuant to *Chevron*, "if the intent of Congress is clear, that is the end of the matter," but "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. Likewise, this Court has held that "FERC's interpretation of its own statutory

jurisdiction is entitled to *Chevron* deference." *Detroit Edison Co. v. FERC*, 334 F.3d 48, 53 (2003) (citation omitted). This Court has ruled that:

> [i]n reviewing an agency's interpretation of a statute it is charged with administering, this Court … must first determine "whether Congress has directly spoken to the precise question at issue." If so, our task is at an end for we "must give effect to the unambiguously expressed intent of Congress." But "if the statute is silent or ambiguous with respect to the issue," we defer to the agency if its construction of the statute is reasonable. *Wolverine Power Co. v. FERC*, 963 F.2d 446, 449-50 (D.C. Cir. 1992) (internal citations omitted); *see BP W. Coast Products*, 374 F.3d at 1273.

In the instant case, the majority misconstrued the *Chevron* doctrine in concluding that "[b]ecause the [FPA] *unambiguously* restricts FERC from regulating the retail market, we do not need to reach *Chevron* step two." Op. at 14 (emphasis added). The majority skipped the question of whether demand response is an activity that falls within the Savings Clause of Section 201 of the FPA. The Supreme Court will determine whether the majority's view of Section 201 of the FPA is supported by plain language or, instead, runs afoul of the *Chevron* doctrine and this Court's prior application of the *Chevron* doctrine.

Section 201 of the FPA allows FERC to regulate "the sale of electric energy at wholesale in interstate commerce" but does not allow FERC to regulate "any other sale of electric energy." 16 U.S.C. § 824(b)(1). Nowhere does the FPA define demand response as a "sale of electric energy." No other provision of the FPA would necessarily place demand response within the scope of the Section 201

Savings Clause.

To the contrary, Order 745 was very clear that demand response is *not* a sale of electric energy. *Demand Response Compensation in Organized Wholesale Markets*, Order 745, Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 64 (Mar. 15, 2011) ("Order 745") (citing *EnergyConnect, Inc.*, 130 FERC ¶ 61,031 at P 32 (2010)). Any conclusion that the clause "any other sale of electric energy" necessarily encompasses demand response is not supportable by the plain language of the FPA. Therefore, the FPA is not "unambiguous" as the majority determined; rather, the FPA has not "directly spoken to the precise question at issue." *See Chevron*, 467 U.S. at 842–43. This Court's application of the *Chevron* doctrine raises substantial questions because it is contrary to its own prior decisions when it failed to move to step two of the *Chevron* analysis. *See Chevron*, 467 U.S. at 842-43; *BP W. Coast Products*, 374 F.3d at 1273; *Conn. DPUC*, 569 F.3d at 481-483; *compare Detroit Edison*, F.3d at 54 (not reaching *Chevron* step two because FERC's action addressing facilities used to provide local distribution service was directly contrary to the plain language in Section 201).

No reasonable basis exists to conclude that demand response falls within the Savings Clause, a critical underpinning of the majority's decision not to move to step two of the *Chevron* doctrine. However, even if there were a rational interpretation for such a conclusion, there is an alternate reasonable interpretation

of Section 201(d) that demand response does not fall within the Savings Clause and, instead, involves a wholesale rather than a retail sale of service. Curtailment or balancing services do not unambiguously fall within the Savings Clause. Contrary to the majority's decision, FERC's interpretation of its authority is entitled to *Chevron* deference, consistent with Supreme Court precedent and precedent of this Court.

2. Because The Decision Regarding Whether Demand Response Is Subject to State Jurisdiction Has Far-Reaching Implications, the Supreme Court Is Likely To Grant Certiorari and Reverse.

The majority opinion assumes that demand response is subject to state jurisdiction. However, the FPA is silent on demand response and limits the Savings Clause to "facilities used for the generation of electric energy or … facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. §§ 824(b)(1). Therefore, the Savings Clause grants states the authority to regulate generation facilities, local distribution facilities, and retail sales of electric energy. Demand response is not generation; it is not a retail sale of electric energy; and it is not a form of local distribution. Demand response does not fall into any category expressly preserved for the states by FPA Section 201. *See Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 695 (D.C. Cir. 2000), *aff'd, New York v. FERC*, 535 U.S. 1, 23 (2002) (on appeal from FERC Order 888). This important question regarding the proper

scope of the FPA, and the precise lines of jurisdiction in a restructured electric industry, has significant implications for customers nationwide. An issue of such national significance is appropriately addressed by the Supreme Court.

3. Because Circuit Courts Have Reached Conflicting Decisions Concerning FERC's Jurisdiction Over State-Regulated Activities That Affect Wholesale Markets, The Supreme Court Is Likely To Grant Certiorari and Reverse.

Even if demand response is subject to state jurisdiction under the FPA, the majority's conclusions still raise substantial questions regarding decisions in this Court, the Third Circuit, and the Fourth Circuit regarding FPA Sections 201(b)(1), 205, and 206. 16 U.S.C. §§ 824(b)(1), 824d, and 824e. Pursuant to Section 201(b)(1), FERC regulates "the sale of electric energy at wholesale in interstate commerce" but not "any other sale of electric energy." *Id*. § 824(b)(1). The Savings Clause of Section 201(b)(1) states that FERC:

> shall not have jurisdiction, *except as specifically provided in this subchapter and subchapter III of this chapter*, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce . . . *Id*. (emphasis added).

FPA Section 205 charges FERC with ensuring that wholesale rates and "all rules and regulations *affecting* … such rates or charges" are just, reasonable, and not unduly discriminatory. *Id*. § 824d(a) (emphasis added). Likewise, FPA Section 206 states that when FERC finds:

> that any rule, regulation, practice, or contract *affecting* such [FERC-

> jurisdictional] rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. *Id*. § 824e(a) (emphasis added).

While generation facilities, local distribution facilities, and retail sales are within the domain of state regulation, the FPA grants FERC jurisdiction when such facilities and service *affect* FERC-jurisdictional rates. This Court made that very finding in *Conn. DPUC* when considering whether FERC had jurisdiction to review the Installed Capacity Requirement ("ICR") for the New England region. 569 F.3d at 479. This Court determined that FERC had exclusive jurisdiction to review the ICR, even though states have jurisdiction over generation resources, because "capacity decisions … affect FERC-jurisdictional transmission rates for that system without directly implicating generation facilities." *Id*. at 484. That the ICR helped FERC to "find the right price" in the wholesale market was sufficient to support FERC jurisdiction. *Id*. at 485. The majority's conclusion that FERC does not have jurisdiction over the wholesale market-related impact of demand response raises substantial questions in light of the holding of *Conn. DPUC*.

Like FERC's jurisdiction over ICR in *Conn. DPUC*, Order 745 is limited to FERC's regulation of the impact of demand response on wholesale electricity markets. Order 745 does not determine whether retail customers are permitted to provide demand response. Order 745 applies only if demand response resource

participation would not "violate state laws or regulations." Order 745 at P 114. Order 745 calibrates compensation to reflect only the impact of demand response on wholesale energy markets by providing compensation equal to the wholesale market-clearing price. Notably, Order 745 does not reach issues such as the impact of demand response on distribution-level costs or charges, state decisions over new generation, or other topics that reside within the confines of the Savings Clause.

Further, *Conn. DPUC* follows other decisions of this Court finding that practices *affecting* wholesale rates are FERC-jurisdictional, even when the underlying facility or service may be state-jurisdictional. For example, in *Entergy Services, Inc.*, this Court found that FERC acted within its authority when it ordered Entergy to refund retail rates collected pursuant to tariffs approved by state utility commissions. 400 F.3d at 8. FERC was determined to have acted within its authority because FERC acted only with respect to the impact of retail rates on wholesale rates. *See id*. Similarly, Order 745 is limited to the impact of demand response resources on wholesale rates and operation of the bulk power system, the reliability of which FERC was charged by Congress with preserving. *See* 16 U.S.C. § 824o.

Other circuit courts have also followed *Conn. DPUC*. In *New Jersey Bd. of Pub. Utils. v. FERC*, the Third Circuit concluded that FERC has jurisdiction to accept tariff provisions that address the effect of state-regulated generation on

wholesale market prices. 744 F.3d 74, 96 (3rd Cir. 2014). The Third Circuit found that FERC has jurisdiction to regulate the wholesale market pricing effect of new generation facilities, notwithstanding the Savings Clause language that vests states with jurisdiction over generation facilities, because the states' introduction of "thousands of megawatts of new capacity … would have had an effect on the prices of wholesale electric capacity." *Id*.

The Fourth Circuit has reached the same conclusion. In *PPL EnergyPlus, LLC v. Nazarian*, the Fourth Circuit found that FERC's jurisdiction over the wholesale pricing of new generation facilities is exclusive because of the affect that such pricing has on wholesale rates. The Savings Clause was not a sufficient foothold for states to retain jurisdiction.

Order 745 addresses the impact of demand response on wholesale pricing, an impact that exceeds the impact of the thousands of megawatts of new generation capacity that was at issue in *New Jersey BPU* and the wholesale pricing of new generation facilities in *PPL EnergyPlus*. Both this Court and other courts have been clear that state regulation of facilities or services does not preclude FERC from exercising jurisdiction over the wholesale market or interstate transmission effects of those facilities or services, which is precisely what FERC accomplished by issuing Order 745.

4. Because the Majority's Finding That Compensating Demand Response at the Full-Market Price Was Arbitrary and Capricious Raises Substantial Questions with Regard to Supreme Court Precedent and This Court's Precedent, the Supreme Court Is Likely to Grant Certiorari and Reverse.

The majority's determination that setting demand response compensation at the full market-clearing price was arbitrary and capricious under 5 U.S.C. § 706(2)(a) raises substantial questions with regard to Supreme Court precedent and prior decisions of this Court. Specifically, in *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, the Supreme Court concluded that in reviewing claims under 5 U.S.C. § 706(2)(a), courts must consider whether an agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." 463 U.S. 29, 43 (1983) (internal quotes omitted). Further, this Court has consistently determined that FERC should be afforded significant deference due to the technical nature of its responsibilities. *See*, *e.g.*, *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010); *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). The panel determined that FERC's compensation decision was arbitrary and capricious because FERC did not directly respond to Commissioner Moeller's dissent regarding compensation. Op. at 14-16. However, FERC *did* explain why compensating demand response at the market-clearing price (not market-clearing price less some offset) was just, reasonable, and not

unduly discriminatory. Order 745 at PP 45-67. FERC explained that the market-clearing price was necessary to encourage necessary levels of demand response in wholesale markets and to overcome market barriers. *See id*.

For the reasons discussed in the Intervenors Supporting Respondent's Brief and in the Dissent, compensating demand response at the market clearing price is just and reasonable and consistent with Supreme Court precedent and this Court's precedent. Notably, FERC thoroughly explained why compensating demand response at market-clearing prices did not overcompensate demand response resources. FERC rationally concluded that setting compensation at the market-clearing price was necessary to incentivize adequate participation in the wholesale markets in light of existing market barriers. Order 745 at P 61 (stating that Petitioners "fail to acknowledge the market imperfections caused by the existing barriers to demand response"). FERC "conclude[d] that paying LMP can address":

> the inadequate compensation mechanisms in place today in wholesale energy markets [that] fail to induce sufficient investment in demand response infrastructure and expertise that could lead to adequate levels of demand response procurement. Order 745 at P 57 (quoting a commenter).

FERC thoroughly "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," consistent with the Supreme Court's precedent in *Motor Vehicle Mfrs. Ass'n* and should have been afforded significant deference due to the

technical nature of its determination. 463 U.S. at 43; *see*, *e.g.*, *Am. Gas Ass'n*, 593 F.3d at 19; *Morgan Stanley Capital Grp. Inc.*, 554 U.S. at 532.

B. The Equities Favor Staying the Issuance of the Mandate.

There is good cause to stay the issuance of the mandate in this case, because irreparable harm will occur to the Intervenors Supporting Respondents if the mandate is issued and because the public interest favors a stay. First, issuance of the mandate vacating Order 745 will upset established market designs for Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs") throughout the country. Upsetting established programs and market designs will have significant impacts on the price that customers throughout the country will pay for electricity. If the mandate issues, FERC will be forced to begin unwinding Order 745-based demand response provisions from RTOs' and ISOs' tariffs. Not only will this result in significant expenditure of agency resources and the resources of the RTOs and ISOs, but it will result in increased day-ahead and real-time energy market clearing prices as actual demand resource participation and the threat of competitive entry of such resources are both removed from the energy markets. Once these auctions are cleared without demand response resources and customers are forced to pay higher prices for electricity as a result, little can be done to reverse the harm, especially in light of FERC's stated barriers to re-clearing such markets after the fact.

FERC has consistently confirmed that "the Commission has generally disfavored re-determining market outcomes after the fact, holding that 'retroactivity is not authorized when a new rule is substituted for an old rule that was reasonably clear so that the settled expectations of those who had relied on the old rule are protected.'" *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318 at P 242 (internal citations omitted). Further, FERC has stated that in situations where an ISO/RTO has committed an error implementing its existing tariff, "'to go back at [that] point and change those prices, when no notice was given by [the ISO/RTO] that such a disruption might occur, would do far more harm to wholesale electricity markets than is justifiable or appropriate in light of the circumstances.'" *Id.* at P 243 (internal citations omitted). "In cases involving changes in market design, the Commission generally exercises its discretion and does not order refunds when doing so would require re-running a market." *Ameren Services Company, et al. v. Midwest Independent Transmission System Operator, Inc.*, 127 FERC ¶ 61,121 at P 157 (2009). FERC "hesitate[s] to retroactively undo the decisions of market participants." *Id*. Therefore, in the event that the mandate issues and the Supreme Court grants certiorari and reverses this Court's decision, the Intervenors Supporting Respondents and other customers will suffer irreparable harm as any markets that clear in the interim will not be re-cleared to reflect the lower clearing prices that would have occurred if demand response resources were able to

participate in the markets.

Further, were the mandate to issue, FERC would not be precluded from requiring refunds from market participants that cleared demand response pursuant to Order 745-based tariff provisions. Any such refunds would need to be reallocated to the LSEs that originally contributed to the payments. This process will likely be complicated and time-consuming, and it has no particular sense of urgency. Any remand process could wait until after the Supreme Court's disposition of the petition for a writ of certiorari. More harm would be done by starting any refund process prior to the completion of the appeals process than would be done by delaying any potential refund process, which supports staying the issuance of the mandate.

Second, the public interest favors staying the issuance of the mandate. While the majority's opinion affects only Order 745-based demand response participation in energy markets, the opinion has spawned an immediate spin-off complaint that challenges FERC's ability to regulate the impact that demand response has on other FERC-jurisdictional markets, such as PJM's capacity market. These types of complaints, if they are granted in response to issuance of a mandate, could have far-reaching adverse effects on electricity customers and on the operation of the electric transmission system. The public interest is best served by allowing the appeals process to be completed before unwinding, or considering the

unwind of, any of the markets.

System operators rely on demand response resources to maintain reliability, particularly during emergencies. For example, during the Polar Vortex that occurred this January and the excessive heat of the summer of 2013, PJM activated over 2,500 MW of demand response and over 6,600 MW of emergency demand response, respectively in order to avoid unplanned outages. *See* PJM, "Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events" at 19 (May 8, 2014);[1] PJM, "Technical Analysis of Operational Events and Market Impacts During the September 2013 Heat Wave" at 51 (Dec. 23, 2013).[2] Therefore, were the mandate to issue prior to the Supreme Court's decision on the Intervenors Supporting Respondent's petition for a writ of certiorari, events such as the Polar Vortex and heat wave of the summer of 2013 could have adverse impacts on grid reliability because there would not be sufficient resources to meet system demand. Such results would have a devastating impact on the public at large, not just the Intervenors Supporting Respondent.

Further, issuance of the mandate could have negative impacts on reliability beyond emergency events. For example, in PJM, demand response has received

[1] Available at: http://www.pjm.com/~/media/documents/reports/20140509-analysis-of-operational-events-and-market-impacts-during-the-jan-2014-cold-weather-events.ashx.

[2] Available at: http://www.pjm.com/~/media/documents/reports/20131223-technical-analysis-of-operational-events-and-market-impacts-during-the-september-2013-heat-wave.ashx.

compensation for providing regulation service since 2006. *PJM Interconnection, LLC*, 114 FERC ¶ 61,201 at PP 3, 16 n.9 (2006). In this role, demand response helps to correct for very short-term changes in electricity supply and demand that could affect the stability of the power system and the ability to maintain the correct system frequency. Demand response also provides spinning reserve service in PJM, which protects grid reliability when the grid has an unexpected need for more power on short notice. Demand response has been providing this service in PJM since 2006 as well. *PJM Interconnection, L.L.C.*, 116 FERC ¶ 61,230 at PP 4, 19 (2006). PJM has also allowed demand response to provide day-ahead scheduled reserve service, which is arranged a day in advance and deployed within half an hour upon request by PJM. Demand response was permitted to provide this service beginning in 2008. *PJM Interconnection, L.L.C.*, 123 ¶ 61,232 at PP 3, 22-24 (2008).

Finally, and most importantly, demand response is a major contributor to PJM's capacity needs. While the Intervenors Supporting Respondent understand that the majority's opinion vacating Order 745 affects only the wholesale energy markets, certain parties may argue that the opinion requires eliminating demand response resources from the mix of resources that help meet capacity needs. Specifically, PJM and other RTOs/ISOs have longstanding rules that identify the installed capacity levels necessary to meet their region's expected peak loads.

These rules require participating utilities and others serving load to demonstrate that they have constructed or contracted for sufficient capacity to serve their customers. Over the past decade, PJM and other RTOs/ISOs have allowed voluntary demand response resources to compete directly with generation to satisfy capacity needs. The commitment by demand response resources to reduce their consumption upon request during system peaks has the same affect on reliability as a future commitment to build a new generator that must produce electricity upon request. If the mandate were to issue, and if it is determined that demand response was no longer able to serve as a capacity resource, significant amounts of generation would need to be built to ensure reliability requirements are met. It is possible, and perhaps likely, that this generation would not be able to be built in time to replace the large number of megawatts of demand response that would no longer be available through the different RTOs/ISOs. Therefore, because of these potential reliability concerns, the public interest favors staying the issuance of the mandate. As mentioned above, were the mandate to issue, one would reasonably expect a proliferation of complaints against other demand response opportunities.

III. CONCLUSION

For the foregoing reasons, the Intervenors Supporting Respondent respectfully request that the Court stay the issuance of its mandate pending the Intervenors Supporting Respondent's petition for a writ of certiorari.

Respectfully submitted,

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DATED: September 22, 2014

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 35(b)(2), I hereby certify that the Intervenors Supporting Respondent's Motion to Stay Issuance of the Court's Mandate Pending the Filing and Disposition of a Petition for a Writ of Certiorari contains 20 pages, not including the certificate of compliance and the certificate of service.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 22nd day of September, 2014, served this Motion to Stay Issuance of the Court's Mandate Pending the Filing and Disposition of a Petition for a Writ of Certiorari upon the counsel listed in the Service Preference Report via e-mail through the Court's CM/ECF system or via U.S. Mail.

Respectfully submitted,
McNEES WALLACE & NURICK LLC

By: /s/ Robert A. Weishaar, Jr.

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