

FAQ on DC Circuit Order 745 Decision and FirstEnergy PJM Complaint

Introduction

When new technologies are introduced into the market, it is a common pattern to see an evolution in the attitudes of incumbent players. At first, most 800 lb gorillas simply ignore the new innovation. Then, there is an inflection point when the new technology reaches critical mass and it's clear that it's not going away – users have realized the value and refuse to turn back the clock on progress. At that point, rules get re-written and incumbents have to make a choice: adapt to the new world order or cling to the past. And importantly, the new technology providers need to figure out how to work with the incumbent players or risk not reaching scale. We've seen this dynamic play out time and time again – from the advent of digital downloads reshaping the music industry to voice over IP redefining the telecom landscape. And we've seen it in the energy industry with demand response. DR is no longer a “novelty” – it's a mainstream technology that's proven itself over and over again, delivering nearly \$12 billion of savings in PJM last year alone and helping to prevent brownouts and blackouts on numerous occasions. Demand response isn't going away, and that reality has begun to set in with generators that are facing numerous additional challenges to their business model.

So, we find ourselves at an inflection point: some generators, like FirstEnergy, which has doubled down on its investment in coal-fired generation, are digging in for a fight because the very foundation of their business model is threatened by the existence of demand response; other forward-thinking utilities, however, see the value in innovation and are adapting their business models to accommodate a new world order – instead of fighting demand response and energy intelligence software, they're embracing it – investing more in it as a way to promote customer satisfaction, increase customer retention and improve their brand loyalty. Likewise, on EnerNOC's end, we're investing more in our utility offerings to make our software and services more attractive to the utilities that see the opportunity to use this technology to their advantage. Today, EnerNOC works with 46 different utilities, and we're focused on growing

that business by offering software solutions that help our utility customers deliver the programs and services that their customers are demanding.

What has happened to date?

On May 23, 2014, the DC Circuit Court of Appeals ruled in favor of the Electric Power Supply Association in the case of *EPSA vs. FERC*, finding that FERC had overstepped its authority with Order 745, which established the basis for compensating demand response (DR) in wholesale **energy** markets. The majority opinion in the 2-1 court decision held that the Order had encroached upon the retail electricity markets that are the exclusive jurisdiction of states under the Federal Power Act. A request for rehearing en banc by FERC and many other stakeholders was denied by the DC Circuit Court on September 17, 2014. The only remaining legal option to overturn the decision is a Petition for Certiorari (an appeal) to the United States Supreme Court.

Although the EPSA case was limited to energy markets, FirstEnergy, a mid-western utility with significant generation interests in PJM, has filed a complaint at FERC seeking to expand the findings of the EPSA decision to PJM's capacity market. EPSA has since requested that FERC remove demand response from all FERC jurisdictional capacity markets, including ISO-NE and NYISO. Participation by distributed energy resources in wholesale markets, including distributed solar, energy efficiency, and energy storage, would be jeopardized should FirstEnergy and EPSA be successful. In fact, the very foundation of capacity markets would be brought into question; without these demand side resources, prices in our nation's wholesale capacity markets would no longer “just and reasonable.”

A broad and diverse group of stakeholders have joined together to overturn the DC Circuit Court decision and defeat the FirstEnergy complaint, including many state public utility commissions, state consumer advocates, environmental groups, the tech community, and energy consumers and businesses.

These groups have banded together to fight to preserve the tremendous benefits of demand response, including:

1. **Economic:** Demand response saves businesses and households billions of dollars per year. The PJM Independent Market Monitor has estimated that demand response and energy efficiency saved consumers nearly \$12B this past year (equivalent to roughly \$500 for every household in PJM). **The American economy simply cannot afford to accept the financial burden that would be imposed by removing demand response from wholesale markets.**
2. **Environmental:** Demand response is a proven alternative to fossil-fuel generation. We support the efforts of the environmental coalitions who have advocated so strongly to maintain the environmental benefits of demand response.
3. **Reliability:** Demand response is necessary for maintaining grid reliability. If FirstEnergy succeeds, more than 10,000 MW of reliable demand response resources are at risk. Without demand response, thousands of Americans would have been left in the dark and without heat last winter when generation resources failed to show up at the height of the “Polar Vortex.”
4. **Innovation:** The energy industry is changing. While Europe and Asia outpace the US in virtually every aspect of the clean energy revolution, demand response is one area where the US has been the undeniable leader. Any attempt to limit demand response’s role in wholesale markets sets a bad global example and places unnecessary restrictions on future technologies that could help shape a new energy future.

What happens next?

There are two parallel paths that will unfold over the next several months. With regard to the DC Court decision in the original EPSA case, by mid-December, the Solicitor General of the United States is likely to decide whether or not to file a “writ of certiorari” (a request to appeal) with the Supreme Court of the United States. With regard to the FirstEnergy complaint, FERC is currently reviewing comments from both sides. FERC

is under no obligation to decide the matter by a specific date; however, given the urgency around this decision and implications for all parties, it is anticipated that it will respond as quickly as possible. In the meantime, for EnerNOC, it’s business as usual. We continue to focus our efforts on driving energy intelligence software sales, creating new demand response opportunities around the world, and executing against our grid operator commitments, which have not changed.

Who will decide whether there is a Supreme Court appeal? Have any decisions been made whether to seek appeal by those entities?

The ultimate decision rests with the Solicitor General. Other parties to the case may petition for certiorari, but the chances of the appeal being granted are highest with a Petition from the Solicitor General of the United States on behalf of FERC.

Given that the DC Circuit decision could result in authority being taken from the federal government, have states applauded the decision?

No: the opposite is true. States recognize the immense value of demand response participation in wholesale markets, including saving customers billions of dollars a year, enhancing reliability and resiliency, and reducing carbon emissions. And as Judge Edwards noted in the dissenting opinion of the EPSA case, under Order 719, states already have the option of deciding whether or not demand response customers can participate in wholesale markets. The EPSA decision robs states of that option by prohibiting participation in wholesale markets. The three states (CA, MD, and PA) that were parties in the EPSA vs. FERC decision all joined FERC in seeking rehearing of the DC Circuit decision, and several other states supported the request, including all six New England states and New York.

I have more questions. Who can I talk to?

For additional information, please speak to EnerNOC’s Director of Communications, Sarah McAuley. Sarah can be reached via email at smcauley@enernoc.com or by phone at 617-532-8195.

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