



jurisdictional, organized wholesale energy markets. *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014). Subsequently, the Court denied FERC's petition for rehearing *en banc* on September 17, 2014, and granted FERC's motion to stay issuance of the mandate on October 20, 2014. The Court's October 20, 2014 order stays the mandate through December 16, 2014, the deadline (at that time) for the filing of a petition for a writ of certiorari with the Supreme Court. The order further provides that if, within the period of the stay, "a petition for writ of certiorari has been filed, the Clerk is directed to withhold issuance of the mandate pending the Supreme Court's final disposition." *See also* Fed. R. App. P. 41(d)(2)(B); D.C. Cir. Rule 41(a)(2).

By application filed with the Supreme Court on December 5, 2014, the Solicitor General sought an extension of the December 16, 2014 deadline for the filing of a petition for certiorari, through January 15, 2015. *See* Application of the Solicitor General for an Extension of Time Within Which to File a Petition for a Writ of Certiorari, *FERC v. Electric Power Supply Ass'n*, S. Ct. No. 14A596 (filed Dec. 5, 2014) (attached hereto). As stated in the Application, the Solicitor General has determined that the federal government will file a petition for a writ of certiorari, seeking Supreme Court review of this Court's May 23, 2014 decision, and that an additional 30 days is needed to prepare and print the petition. *See id.* at 4. A group of intervenors before this Court, including providers of demand

response, three state public utility commissions (from California, Maryland, and Pennsylvania), and other market participants, has likewise sought a 30-day extension of the certiorari deadline from the Supreme Court, and indicated its intention to file such a petition. *See* Application of EnerNOC, Inc., *et al.* for an Extension of Time to File a Petition for a Writ of Certiorari, *EnerNOC, Inc., et al. v. Electric Power Supply Ass’n*, S. Ct. No. 14A599 (filed Dec. 5, 2014). Today, the Chief Justice granted the Solicitor General’s Application, thereby “extend[ing] the time to and including January 15, 2015” to file a petition for a writ of certiorari.

Federal Rule 41(d)(2) and Circuit Rule 41(a)(2) provide that a stay of the mandate is warranted where a case presents a substantial legal question and the stay is supported by good cause. An extension of a stay, under Federal Rule 41(d)(2)(B), may be granted for good cause. These standards are satisfied here, where the Court has already granted one 90-day stay, presumably upon a finding of a substantial legal question and good cause. As the Solicitor General explains in support of an extension of the deadline to petition for certiorari, “[t]he FERC orders that the court of appeals set aside in this case address an integral feature of the Nation’s wholesale electric-power markets under FERC’s jurisdiction -- the rules for participation by demand-response resources -- that is of substantial importance to the proper functioning of those markets and to assuring just and reasonable rates for wholesale power in those markets.” Application at 4. A

further extension pending the federal government's filing of its petition for a writ of certiorari, and final disposition of the case in the Supreme Court, is appropriate.

Counsel for FERC has contacted counsel for petitioners, who states that, at this time, petitioners are continuing to formulate their position on this motion.

### **CONCLUSION**

The Commission respectfully requests that the Court extend the stay of issuance of the mandate in this case, pending the federal government's filing of a petition for writ of certiorari in the Supreme Court, and the Supreme Court's final disposition of the case.

Respectfully submitted,

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December 8, 2014

IN THE SUPREME COURT OF THE UNITED STATES

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No.

FEDERAL ENERGY REGULATORY COMMISSION

v.

ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.

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APPLICATION FOR AN EXTENSION OF TIME  
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Pursuant to Rules 13 and 33.2 of the Rules of this Court, the Solicitor General, on behalf of the Federal Energy Regulatory Commission, respectfully requests an extension of time, to and including January 15, 2015, within which to file a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case. The court of appeals denied petitions for rehearing on September 17, 2014. The time within which to file a petition for a writ of certiorari is therefore currently set to expire on December 16, 2014. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). Copies of the opinion of the court of appeals, which is reported at 753 F.3d 216, and the orders denying rehearing are attached.

1. On March 15, 2011, the Federal Energy Regulatory Commission (FERC) issued Order No. 745, which establishes the compensation level for "demand response" resources that participate in wholesale energy markets run by regional transmission organizations (RTOs) and independent system operators (ISOs). See 134 FERC ¶ 61,187. The term "demand response" refers to a reduction in expected consumption of electricity in response to either a higher price for electricity or an incentive payment for lower consumption. See id. ¶ 2 n.2; see also 18 C.F.R. 35.28(b)(4). Demand-response resources participate in wholesale energy markets by offering commitments to reduce electricity consumption at specified times or in specified circumstances in return for payments from RTOs or ISOs. RTOs and ISOs use demand-response resources to more efficiently operate the electricity grid and to reduce the cost of wholesale power. Order No. 745 provides that an RTO or an ISO must compensate demand-response resources for a given reduction in electricity consumption using the same formula -- "locational marginal pricing" -- that it uses to compensate generation resources for additional power.

FERC issued two additional orders denying rehearing. See Order No. 745-A, 137 FERC ¶ 61,215 (Dec. 15, 2011); Order No. 745-B, 138 FERC ¶ 61,148 (Feb. 29, 2012).

2. Various parties petitioned for judicial review of FERC's orders in the United States Court of Appeals for the District of Columbia Circuit. In a divided decision, a panel of that court vacated the orders. See Electric Power Supply Ass'n v. FERC, 754 F.3d 216 (2014). The panel majority held that FERC lacks authority under the Federal Power Act (FPA), 16 U.S.C. 824 et seq., to regulate the compensation that wholesale energy markets pay for demand-response resources. In the view of the majority, Order No. 745 "entails direct regulation of the retail market -- a matter exclusively within state control." Id. at 224. The majority further held that even if FERC possessed the statutory authority to issue Order No. 745, the order was arbitrary and capricious because FERC had failed to give sufficient consideration to a dissenting Commissioner's argument that the compensation formula established in the order overcompensates demand-response resources. See id. at 225.

Senior Judge Edwards dissented from both holdings. He concluded that "[b]ecause the [FPA] is ambiguous regarding FERC's authority to require ISOs and RTOs to pay demand response resources, we are obliged to defer under Chevron [U.S.A. Inc. v. Natural Resources Defense Council, Inc.], 467 U.S. 837 (1984),] to the Commission's permissible construction of 'a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction).'" 753 F.3d at 227

(quoting City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013)). He also concluded that FERC's determination of the appropriate compensation level for demand-response resources "was reasonable and adequately explained." Id. at 227-228.

FERC and other parties filed petitions for rehearing en banc. On September 17, 2014, the court of appeals denied the petitions.

3. The FERC orders that the court of appeals set aside in this case address an integral feature of the Nation's wholesale electric-power markets under FERC's jurisdiction -- the rules for participation by demand-response resources -- that is of substantial importance to the proper functioning of those markets and to assuring just and reasonable rates for wholesale power in those markets. The Solicitor General has authorized the filing of a petition for a writ of certiorari seeking review of the court of appeals' decision. This extension of time is needed to prepare and print the petition.

Respectfully submitted.

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DECEMBER 2014



**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 8th day of December 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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