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Electricity Regulation at the Supreme Court: What Might the Grant of *PPL* Mean for *EPSA*?

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Last week, the Supreme Court granted *certiorari* in *Hughes v. PPL EnergyPlus, LLC* ("*PPL*"), its second case of the term involving the Federal Energy Regulatory Commission's ("FERC") regulation of wholesale electricity markets. Two days earlier, the Court heard oral argument in the first case, *Federal Energy Regulatory Commission v. Electric Power Supply Association* ("*EPSA*"). Following argument in *EPSA*, the prevailing wisdom was that the Court was divided, and that a 4-4 tie affirming the lower court opinion was a real possibility (Justice Samuel Alito is recused in that case).[1] After the Court granted *PPL*, attention turned to what implications, if any, the decision to hear *PPL* had for *EPSA*,[2] especially given the relatively unusual circumstances surrounding the Court's decision to take the case: every court to have considered the issue in *PPL* had reached the same conclusion and the Solicitor General, the federal government's lawyer before the Supreme Court, had urged the Court not to take the case.

There are many possible relationships between the Court's decision to hear *PPL* and the outcome in *EPSA*. At one extreme is the hypothesis that *PPL* has no relation to *EPSA*, other than its subject matter. One iteration of that hypothesis is that the decision to take *PPL* has more to do with *Oneok, Inc. v. Learjet, Inc.*[3]—a case that the Court decided earlier this year and that has several similarities to *PPL*—than with *EPSA*. At the other extreme is the idea that the decision to grant *PPL* may indicate that the Court did in fact divide 4-4 in *EPSA* and now wants to consider the federal-state boundary on different facts and with a full court (no Justice was recused from the decision to grant *PPL*).[4] This essay considers an alternative hypothesis: that the decision to

[1] *See, e.g.*, Lyle Denniston, *Argument analysis: When An Empty Chair May Count the Most*, SCOTUSBLOG (Oct. 14, 2015), http://www.scotusblog.com/2015/10/argument-analysis-when-an-empty-chair-may-count-the-most/.

[2] Lyle Denniston, *Court Takes on New Energy Pricing Dispute*, SCOTUSBLOG (Oct. 19, 2015), http://www.scotusblog.com/2015/10/court-takes-on-new-energy-pricing-dispute/.

[3] 135 S. Ct. 1591 (2015).

[4] *See, e.g.*, Robert Walton, *Federal Court Takes Up New Federal-State Power Authority Case*, UTILITY DIVE (Oct. 21, 2015), http://www.utilitydive.com/news/supreme-court-takes-up-new-federal-state-power-authority-case/407690/ (suggesting that the Court's decision to hear *PPL* could indicate a 4-4 tie in *EPSA* and reflect a desire to consider the issues a second time); Lyle Denniston, *Court Takes on*

grant *PPL* might indicate that the Court has sided with FERC in *EPSA*, but is concerned about the potential reach of that decision.

To understand the relationship between these cases, it is helpful to review their basic facts. The first case, *EPSA*, involved the scope of FERC's jurisdiction to set payments for demand response programs in wholesale markets. Demand response programs entail payments to end-users—or aggregators of end-users—in exchange for reductions in electricity consumption at times of peak demand. The idea is that, under certain circumstances, it is more efficient (*i.e.*, cheaper) to reduce electricity consumption rather than increase generation. The principal issue in *EPSA* is whether FERC intruded on the States' exclusive jurisdiction over the retail electricity market by issuing a rule that set compensation for demand response resources in the wholesale electricity market. FERC contends that wholesale demand response falls under its jurisdiction pursuant to the Federal Power Act ("FPA"), which provides FERC with jurisdiction over, among other things, any rule or regulation that "affect[s]" wholesale rates.[5] Last year, the D.C. Circuit disagreed, concluding that FERC's rule regulated the retail price of electricity and therefore violated the FPA by infringing on the States' exclusive jurisdiction over retail electricity rates.[6]

The second case, *PPL*, involves Maryland's efforts to encourage the construction of new electricity generation in an area of the state facing reliability concerns.[7] As an incentive to build new generation, Maryland offered to provide generators with a "contract for differences." This contract effectively guaranteed a price for any bid that was accepted in the wholesale market. It worked as follows. The generator was required to bid its output into the wholesale markets for electricity and for capacity.[8] If the market-clearing price was below this guaranteed price, the state would make up the difference through a surcharge on ratepayers (applied via the local utility); but if the market-clearing price was above this guaranteed level, the generator would rebate that difference to the utility. The Fourth Circuit Court of Appeals invalidated Maryland's program.[9] It first held that the contract for differences was field-preempted because, by guaranteeing that the generator received a particular price for any capacity that cleared the wholesale market, Maryland substituted that price for the price signal from the wholesale market,

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New Energy Pricing Dispute, SCOTUSBLOG (Oct. 19, 2015), http://www.scotusblog.com/2015/10/court-takes-on-new-energy-pricing-dispute/ (observing that a 4-4 tie in *EPSA*, "might have led the Court . . . to agree to take on [*PPL*] to try to sort out the meaning of the [Federal Power] Act").

[5] 16 U.S.C. §§ 824d(a), 824e(a).

[6] *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216, 223 (D.C. Cir. 2014).

[7] Technically the generator could also be located within the District of Columbia, which is part of the same reliability zone. *See PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 473 (4th Cir. 2014).

[8] The capacity market is essentially a forward market in which utilities purchase options for the delivery of electricity in the future. *See* PJM, *Capacity Market (RPM)* http://learn.pjm.com/three-priorities/buying-and-selling-energy/capacity-markets.aspx (last visited Oct. 26, 2015).

[9] *Nazarian*, 753 F.3d at 476.

thereby intruding on FERC's exclusive jurisdiction to set wholesale rates.[10] In addition, the Court held that the program was conflict-preempted because, by altering the effective price facing the generator, it represented a "direct and transparent impediment to the functioning" of the wholesale market.[11]

Aside from the subject matter, the legal issues in *EPSA* and *PPL* have little in common. Although both questions deal with the boundary between federal and state authority over the electricity sector, the statutory inquiries are quite different: *EPSA* involves the question of what the FPA means by "affect" wholesale rates, while *PPL* requires the Court to determine when federal law precludes state regulation. Resolving one will not necessarily shed light on the other.

But if we move up a level of generality—from the particular programs at issue to the way the Court will have to interpret the FPA to resolve each case—a potential relationship between the two cases emerges.

Consider the following. In order to reverse the D.C. Circuit decision in *EPSA*, the Supreme Court will have to conclude that FERC has jurisdiction to set demand response payments because those payments "affect" wholesale markets and therefore fall within FERC's "affecting" jurisdiction under the FPA.[12] But both the D.C. Circuit and multiple Justices expressed concern that FERC's jurisdiction over rules and regulations affecting wholesale rates does not have a clear "limiting principle."[13] After all, almost any industrial policy that affects demand for electricity could be said to "affect" wholesale rates. And while no one, least of all FERC, believes that the FPA sweeps that broadly, at the *ESPA* arguments, the Justices evinced deep concern over how to transform the FPA's expansive language into a judicially manageable standard that preserves a role for state authority.

That is where the decision to grant *PPL* might come in. The Fourth Circuit decision could, if interpreted broadly, greatly increase the impact of an opinion that rules in FERC's favor and overturns the D.C. Circuit decision in *EPSA*. Recall that the Fourth Circuit concluded that the FPA preempted the Maryland program both because it intruded on FERC's exclusive jurisdiction over wholesale rates and because its impact on the effective price facing the

[10] *Id.* (concluding that the contract for differences "functionally set[] the rate" received by the generators).

[11] *Id.* at 479 ("Maryland's initiative disrupts this scheme by substituting the state's preferred incentive structure for that approved by FERC.").

[12] 16 U.S.C. §§ 824d, 824e.

[13] *Elec. Power Supply Ass'n*, 753 F.3d at 221; October 14, 2015 Oral Arg. Tr. at 14 (Roberts, C.J.) ("But it's just as obvious, it seems to me, that you have to have some sort of limiting principle, otherwise FERC can do whatever it wants. So what is the limiting principle that you would suggest to us?"), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-840_p86a.pdf; *id.* at 15-16 (Scalia, J.) (expressing concern that FERC was regulating retail conduct based on that conduct's indirect effect on the wholesale market).

generator represented a "direct and transparent impediment to the functioning" of the wholesale market.[14] In reaching those conclusions, the Court was careful to limit its holding to the specific program before it, observing that "not every state regulation that incidentally affects federal markets is preempted."[15] Nevertheless, the conclusion that the FPA preempts a state policy that "interferes" with the price signals from a FERC-jurisdictional market could, if interpreted broadly, place in jeopardy many state efforts to promote preferred forms of generation. For example, a state production tax credit or feed-in tariff could, under a broad reading of that decision, "interfere with" or set the price signal from a wholesale market.

And that is where *EPSA* comes back in. It seems reasonable that Justices who support a broad understanding of FERC's affecting jurisdiction (or, alternatively, who would defer to FERC's interpretation of that authority), might have reservations about the federalism implications of that outcome. The Fourth Circuit opinion in *PPL* might only heighten those concerns about *EPSA*'s impact on state authority—not because FERC regulations themselves would necessarily impede state policies, but because those regulations might be interpreted to preempt significant areas of state authority. That concern seems especially likely for Justices Anthony Kennedy or Clarence Thomas, both of whom have been skeptical of broad federal preemption doctrines.[16] Neither Justice indicated a clear view on FERC's jurisdiction at oral argument, meaning that they could be the fifth vote needed to overturn the D.C. Circuit's decision—assuming the four more liberal Justices side with FERC.[17] In other words, if the Court is going to endorse the broad view of FERC's affecting jurisdiction notwithstanding qualms about the logical extension of that authority, it would make sense that the Court would also want to take a case that could limit the preemptive effect of that authority. *PPL* provides that opportunity.

That hypothesis is more plausible in light of the relatively unusual circumstances surrounding the Court's decision to take *PPL*. As noted, there was no split among the federal circuit courts on this question—the Third Circuit, the only other federal court of appeals to address this issue—reached essentially the same conclusion.[18] A circuit split is one of the

[14] *Nazarian*, 753 F.3d at 476 (concluding that the contract for differences "functionally set[] the rate" received by the generators); *id.* at 479 ("Maryland's initiative disrupts this scheme by substituting the state's preferred incentive structure for that approved by FERC.").

[15] *Id.*

[16] *See, e.g.*, *Oneok*, 135 S. Ct. 1591; *id.* at 1603 (Thomas, J., concurring in part and concurring in the judgment); *Wyeth v. Levine*, 555 U.S. 555 (2009); *id.* at 582 (Thomas, J., concurring in the judgment).

[17] Although speculation has focused on Justice Kennedy as a possible fifth vote to overturn the D.C. Circuit's decision, it is at least worth nothing that Justice Thomas and not Justice Kennedy joined the Court's opinion holding that an agency gets *Chevron* deference when defining its jurisdiction. *See City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). Those votes may suggest a greater or lessor inclination to defer to FERC on this question.

[18] *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 246 (3d Cir. 2014).

principal criteria by which the Court decides whether to grant a question like that presented in *PPL*.[19] In addition, at the Court's invitation, the Solicitor General filed a brief that urged the Court not to take the case. Although these briefs are certainly not dispositive, it is unusual for the Court not to follow the Solicitor General's recommendation to deny a case.[20] And finally, energy regulation also is not of the many areas of federal law on which the Court grants cases on a regular basis.

All that suggests that there must have been something about *PPL* that made it appear especially important to the Justices.[21] A desire to deal with the consequences of a broad reading of FERC's affecting jurisdiction in *EPSA*, which was argued just two days before the Justices voted to grant *PPL*, would explain that decision. At the very least, the decision to take a case like *PPL* is what we might expect if the Court were to side with FERC and overturn the D.C. Circuit decision in *EPSA*, but with concerns about that outcome's impact on state energy policies.

[19] Supreme Court R. 10(a), *available at* https://www.law.cornell.edu/rules/supct/rule_10.

[20] *See, e.g.*, David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 276 (2009), available at http://www.georgemasonlawreview.org/wp-content/uploads/2014/06/16-2_Wachtell.pdf (noting that between 1998 and 2004, the Court agreed with the Solicitor General's recommendation to deny *certiorari* roughly 80% of the time).

[21] That a federal court of appeals "has decided an important question of federal law that has not been, but should be, settled by [the] Court" is another criterion for granting *certiorari*. *See* Supreme Court R. 10(a), *available at* https://www.law.cornell.edu/rules/supct/rule_10.