NOS. 14-840, 14-841

IN THE
Supreme Court of the United States

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

ENERNOC, INC. ET AL.,
PETITIONERS,
v.
ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF ENERGY LAW SCHOLARS IN SUPPORT OF THE PETITIONERS

RICHARD J. PIERCE, JR.
(Counsel of Record)
The George Washington
University Law School
2000 H Street N.W.
Washington, D.C. 20052
(202) 994-1549
rpierce@law.gwu.edu

EMILY HAMMOND
The George Washington
University Law School

JOEL B. EISEN
University of Richmond
School of Law

JIM ROSSI
Vanderbilt University
Law School

July 16, 2015
*Additional Amici listed in *Appendix List of Amici Curiae*

Counsel for Amici Curiae

QUESTION PRESENTED

Whether FERC reasonably concluded that it has authority under the Federal Power Act to regulate the rules used by operators of wholesale electricity markets to pay for reductions in electricity consumption and to recoup those payments through adjustments to wholesale rates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Agency Rules

Miscellaneous

INTEREST OF AMICI CURIAE

Amici curiae are law professors who have significant research and teaching experience in the field of energy law, with a particular focus on electric power markets. They are listed in the Appendix to this brief.[1] They are submitting this brief because they believe that the U.S. Court of Appeals for the District of Columbia Circuit made serious errors when it held that the Federal Energy Regulatory Commission (FERC) lacked authority to regulate operators' rules for demand response (DR) in the wholesale electricity markets. That holding is contrary to the text, history, and structure of the Federal Power Act (FPA), which mandates that FERC must remedy "practices . . . affecting" wholesale electricity rates to ensure such rates are just and reasonable. Moreover, it ignores FERC's reasonable interpretation of its statutory authority. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Amici direct their arguments to the jurisdictional issue only, and take no position on the second issue for which this Court has granted certiorari. *Cf.* Richard J. Pierce Jr., *A Primer on Demand Response and a Critique of FERC Order 745*, 102 GEO. WASH. U. J. ENERGY & ENVTL. L. 102, 103 (2011) (revealing complexity of second issue).

STATEMENT OF THE CASE

Section 201 of the FPA authorizes FERC to regulate wholesale sales of electricity in interstate

---

[1] No person other than the named amici or their counsel authored this brief or provided financial support for it. All parties have consented to the filing of this brief.

commerce. 16 U.S.C. § 824(b)(1). Further, §§ 205 and 206 of the Act direct FERC to regulate "practices . . . affecting" the rates for such sales if it finds these practices are "unjust, unreasonable, unduly discriminatory or preferential." *Id.* §§ 824d(a), 824e(a). In Order 745, FERC concluded that a uniform compensation scheme for DR resources bidding into the wholesale markets was necessary to ensure that wholesale rates would be just and reasonable. *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 FERC ¶ 61,187, at ¶ 2 (Mar. 15, 2011) [hereinafter Order 745].

In support of its determination, FERC canvassed the myriad, non-uniform approaches that the wholesale electricity markets used for pricing DR. *Id.* ¶ 14. The agency also considered commenters' general support for a unified policy, ¶¶ 43-44, and highlighted the purpose for its rulemaking: "propos[ing] a remedy for current compensation levels that inhibited meaningful demand-side participation." *Id.* ¶ 1. FERC explicitly exercised its FPA remedial authority in issuing Order 745. *Id.* ¶ 112.

Respondents petitioned the D.C. Circuit for review of Order 745, arguing: (1) FERC lacked statutory authority to issue the Order; and (2) even if it had such authority, the agency's exercise thereof was arbitrary and capricious. The D.C. Circuit vacated Order 745, ruling in Respondents' favor on both issues. *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014). First, the court determined that FERC's authority could not extend to setting compensation levels for wholesale DR, notwithstanding the court's agreement with FERC that "demand response compensation affects the wholesale market." *Id.* at 221. Second, the court concluded that the manner in which FERC set DR compensation was arbitrary and capricious.

SUMMARY OF THE ARGUMENT

The D.C. Circuit erred in determining that the FPA forecloses FERC jurisdiction to set compensation levels for DR resources, for two reasons.

First, the D.C. Circuit impermissibly attempted to rewrite the FPA by failing to give effect to FERC's §§ 205 and 206 remedial authority. In so doing, the court below departed from this Court's longstanding precedent, which provides that FERC has jurisdiction to regulate practices affecting wholesale rates if those practices render the rates unjust and unreasonable, notwithstanding that those practices may also impact retail markets. *See, e.g., FPC v. Conway Corp.*, 426 U.S. 271, 276-80 (1976). The D.C. Circuit also ignored over a century of case law elaborating federal regulatory authority over "practices . . . affecting" jurisdictional rates. This body of law provides the relevant limiting principle: such practices must be directly related or integral to the proper functioning of the wholesale markets. FERC's reasonable determination that DR pricing bears this direct connection to the wholesale markets should be reinstated. *See infra* pp. 9-13.

Second, the D.C. Circuit devised a wholly new and unsupported interpretation of § 201(a) of the FPA that has no basis in the statutory text or this Court's jurisprudence. *See Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 527 (1945)). The D.C. Circuit decided that the precatory language of § 201(a) supported an exclusive zone of state regulatory authority over matters involving retail rates. If left in place, this novel development would limit FERC's jurisdiction over interstate power markets in unprecedented ways and re-open the "*Attleboro* gap" that Congress sought to fill when crafting the FPA. *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

ARGUMENT

I. FERC Reasonably Determined It Had Jurisdiction to Remedy Wholesale Market Dysfunctions With Respect to DR Pricing.

A. FERC Clearly Invoked Its Remedial Authority in Issuing Order 745.

Congress structured the FPA to close a regulatory gap by authorizing federal regulation over interstate sales of electricity—a regulatory option unavailable to the states under the dormant Commerce Clause. *See Attleboro*, 273 U.S. 83 (applying constitutional limits to state regulation of interstate energy transactions). In designing the FPA, Congress "authorized federal regulation in areas beyond the reach of state power, such as the gap identified in *Attleboro*, [and] it also extended federal coverage to some areas that previously had been state regulated." *New York v. FERC*, 535 U.S. 1, 6 (2002).

Section 201 of the Act establishes plenary FERC authority over the rates for wholesale power sales in interstate commerce. 16 U.S.C. § 824(b)(1); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) ("FERC clearly has exclusive jurisdiction over the rates to be charged . . . interstate wholesale customers."). Section 205 mandates that all jurisdictional rates be just and reasonable. 16 U.S.C. § 824d. This includes actual jurisdictional rates and "classifications, practices, and regulations affecting such rates and charges." *Id.* § 824d(c). Section 206 of the FPA further obligates FERC to fix "just and reasonable" rates whenever it finds that any "practices . . . affecting" jurisdictional rates make such rates unjust or unreasonable. *Id.* § 824e. Regulating compensation rates in wholesale markets, then, falls squarely within FERC's authority.

Importantly, in Order 745 FERC did not regulate DR as a "sale" under § 201. Instead, FERC relied on its remedial authority under §§ 205 and 206 as the basis for its Order 745 jurisdiction. Order 745 ¶ 112. Yet the D.C. Circuit failed to give effect to §§ 205 and 206, stripping it of nearly all its meaning.[2]

---

[2] An expansive reading of the opinion below suggests the court held that *any* FERC regulation of DR on the wholesale markets is foreclosed. This issue was decided by FERC in Order 719; the time for challenging that determination has long since

Instead, the court substituted its own judgment for that of FERC and reviewed the agency action based on a hypothetical, limitless menu of what FERC might have done, rather than on the substantial record that FERC actually developed. *Cf. SEC v. Chenery* (*Chenery I*), 318 U.S. 80, 93-94 (1943) (agency's "action must be measured by what [it] did, not by what it might have done").

B. FERC's Remedial Authority Extends to Jurisdictional Practices Affecting Wholesale Rates, Even if Those Practices Also Impact Retail Rates.

This Court has long held that §§ 205 and 206 confer on FERC jurisdiction to regulate "practices . . . affecting" wholesale rates, even when the agency's actions also impact retail customers. *See, e.g., FPC v. Conway Corp.*, 426 U.S. 271, 276-80 (1976) (rejecting FERC's determination that § 206 did not permit it to consider the impact on retail rates in setting just and reasonable wholesale rates); *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 363-64, 372 (1988) (recognizing FERC remedial jurisdiction over the terms of agreements to integrate power supply resources between utilities, even though FERC does not itself have jurisdiction over the affected generation assets).[3] Indeed, in upholding Order No.

---

passed. *See* Wholesale Competition in Regions with Organized Electric Markets, 73 Fed. Reg. ¶ 64,100 (Oct. 28, 2008) [hereinafter Order 719].

[3] As this Court implicitly recognized in discussing similar language of section 1(b) of the NGA, FERC may regulate wholesale sales even when those sales also relate to retail sales.

888's industry-wide electric power restructuring initiative, this Court observed "[w]ere FERC to investigate this alleged discrimination [regarding unbundled retail transmission] and make findings concerning undue discrimination," § 206 "would require FERC to provide a remedy for that discrimination"—even though such a remedy could also extend into retail aspects of bundled transmission. *New York v. FERC*, 535 U.S. at 27 (2002).

Without question, the wholesale markets often affect retail markets. But incidental effects on retail markets cannot bar FERC from regulating wholesale markets. This Court has recognized this principle numerous times. *E.g.*, *Conway Corp.*, 426 U.S. at 278-79; *Miss. Power & Light*, 487 U.S. at 371-72. The determinant of FERC's authority is whether "practices . . . affecting" the wholesale markets cause wholesale rates to be unjust and unreasonable. Under the FPA, the fact of a relationship to retail markets simply does not affect FERC's jurisdiction. In concluding otherwise, the D.C. Circuit relied on a flawed reading of § 201. Nothing in the FPA supports the D.C. Circuit's reading of the statutory scheme to bar FERC from regulating DR because it affects retail markets.

See ONEOK, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1603 (2015); *see also id.* at 1605 (stating FERC may regulate "with an eye toward blunting the sales' anticompetitive effects in the retail market—even though retail prices are controlled by the States.") (Scalia, J., dissenting) (citing *FPC v. Conway Corp.*, 426 U. S. at 276–80).

Lower courts have recognized this as well. The D.C. Circuit has previously held that FERC has § 206 authority to approve rules related to power capacity, even though the rules affected state decisions about power generation facilities, which FERC cannot directly regulate. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (2009), *cert. denied*, 558 U.S. 1110 (2010). FERC's § 206 authority also extends to requiring power transmission planning and cost allocation methods where the agency demonstrated that transmission owners were discriminating in providing access to those systems, notwithstanding traditional state authority over transmission siting. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *see also* Joel B. Eisen, *Who Regulates the Smart Grid?: FERC's Authority over Demand Response Compensation in Wholesale Electricity Markets*, 4 SAN DIEGO J. CLIMATE & ENERGY L. 69, 95 (2012-2013) ("This authority to regulate in mixed jurisdictional settings alone supports upholding Order 745.").

The D.C. Circuit agreed with FERC that DR "compensation affects the wholesale market." 753 F.3d at 221. Indeed, the court emphasized that how DR is compensated will impact wholesale prices and bears on system reliability. *Id.* But it failed to give deference to FERC's determination that these and other reasons brought the facts within FERC's jurisdiction. *Cf. Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 865 (1984) (providing reasons for deferring to agency interpretations). Instead, the D.C. Circuit fixated on its reading of the FPA as containing no limiting principle, thereby ignoring FERC's own reasoning, the text and history of the FPA, and over a century of precedent supplying limiting principles.

C. FERC Reasonably Concluded It Had Jurisdiction Because DR Directly Affects the Proper Functioning of the Wholesale Markets.

The D.C. Circuit improperly attempted to supply a new limiting principle for FERC's jurisdiction. But the FPA itself—and a large body of case law interpreting it and similar statutory language—provide the relevant limiting principles while supporting FERC's jurisdiction over DR rules here. In short, "practices . . . affecting" jurisdiction attaches for practices that are directly related or integral to the proper functioning of the wholesale markets.

The operative statutory language, "practices …affecting," is meant to permit regulatory flexibility in addressing unjust, unreasonable and discriminatory operation of the wholesale market. The surrounding statutory text requires a connection to jurisdictional rates. 16 U.S.C. §§ 824d(a); 824e(a). Courts have never held that these terms are frozen into a static meaning; rather, courts have developed over a century of case law delineating jurisdictional lines and adapting to market realities.

Remedial authority like that in §§ 205 and 206 has been the subject of decades of judicial decisions that draw jurisdictional lines for rate-setting agencies in the context of many of the regulatory statutes that are analogous to the FPA. Initially, agencies applied the language to direct discrimination—for example, railroads' secret customer preferences. *New York, New Haven & Hartford R.R. v. ICC*, 200 U.S. 361, 391 (1906) (interpreting Interstate Commerce Act). Later, the focal point for defining "practices" was often whether an aspect of a utility's operation should have been disclosed in a rate-setting tariff. *Village of Winnetka v. FERC*, 678 F.2d 354, 357 (D.C. Cir. 1982). As this Court has recognized, when markets are partially deregulated, "practices" has come to encompass the rules of market operation more generally. *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 56-58 (2007) (interpreting Communications Act).

The same is true for the FPA. With the diminishing prominence of utility-specific tariffs, FERC's role has shifted from overseeing whether an individual firm's action is an unjust, unreasonable, or discriminatory practice, to whether features of the wholesale markets' operation contribute to this effect.[4] *See generally Morgan Stanley Capital Group,*

---

[4] Prior to restructuring, demand response was not independently valued or priced but, to the extent it was reflected in interstate markets, it was provided as a part of a bundled wholesale transaction, which FERC would have regulated as a sale under Section 201(b)(1) of the FPA. The D.C. Circuit opinion suggests that FERC lost its jurisdiction over demand response with restructuring. As Justice Thomas observed in his dissent in *New York v. FERC*, to suggest that the very act of market restructuring somehow changed the

Inc. v. Pub. Utility Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008) (noting how with restructuring FERC continues to police conditions such as market power, even though individual contracts no longer need to be filed with FERC); *New York v. FERC*, 535 U.S. 1 (upholding FERC's § 206 efforts to implement unbundling in wholesale power markets, based in part on agency's finding of discrimination in bulk power supply markets); Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998) (documenting such shifts in regulated industries generally).

In addition to the requirement that "practices" must "affect" wholesale markets, courts have limited the *kinds* of practices to those that affect the wholesale markets *directly* or are integral to the proper functioning of the wholesale markets. This Court has applied this limiting principle to multiple similar statutory schemes. Under the Natural Gas Act (NGA), which is read *in pari materia* with the FPA, *Ky. Util. Co. v. FERC*, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985), this Court has emphasized that jurisdiction requires a *direct* connection to such rates. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 301 (1988) ("a natural gas company's capital structure is *related directly* to the rates FERC allows it to charge") (emphasis added); *N. Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 92 (1963) (FPC has "authority to regulate the *intricate relationship* between the purchasers' cost

---

jurisdictional lines in the FPA is a distinction that "belie[s] the statutory text." 535 U.S. at 41-42 (Thomas, J., dissenting).

structure and eventual costs to wholesale customers who sell to consumers in other States") (emphasis added). And this Court has held that similar language in the ICA requires that a practice must be "connected with the fixing of rates to be charged and prescribing of service to be rendered," and therefore does not extend to a carrier's employment decisions. *Mo. Pac. R.R. v. Norwood*, 283 U.S. 249, 257, *modified*, 283 U.S. 809 (1931) (internal quotations omitted); *see also United States v. Pa. R.R. Co.*, 242 U.S. 208 (1916) (holding that a railroad could not be forced by federal regulators to purchase equipment to serve its customers).

The D.C. Circuit's prior opinions recognize the limits on FERC's authority under §§ 205 and 206. As explained by then-Judge Scalia concerning what must be disclosed in compliance filings under the FPA,

> [T]here is an infinitude of practices affecting rates and service. The statutory directive must reasonably be read to require the [tariff disclosure] of only those practices that affect rates and services *significantly*, . . . It is obviously left to the Commission, within broad bounds of discretion, to give concrete application to this amorphous directive.

City of Cleveland v. FERC, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (emphasis in original); *see also Pub. Serv. Comm'n of N.Y. v. FERC*, 813 F.2d 448 (D.C. Cir. 1987) (utilities need not file practices dealing only with matters of "practical insignificance" to serving customers). Although firm-specific tariffs like those in *City of Cleveland* have given way to market-based rates, the requirement of directness has remained a limiting principle. *Cf. Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004) (rejecting FERC authority to determine California ISO's method of selecting board of directors as too remote and not "directly" or "closely" related to rates); *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1506 (D.C. Cir. 1990) ("Contracts that 'affect' a rate indirectly, merely because affecting the costs that determine what pipeline sales rates are permissible under the NGA's 'just and reasonable' standard, are beyond [the NGA's] reach.").

Given that §§ 205 and 206 cabin FERC's jurisdiction, the D.C. Circuit's use of far-fetched hypotheticals—applied in an attempt to illustrate the allegedly boundless scope of FERC jurisdiction—is wide of the mark. In response to the D.C. Circuit's creative analogies, Amici contend that FERC cannot regulate steel, labor, broccoli, microwave ovens, or hot dogs because practices involving those subjects would not have a direct and significant effect on wholesale rates. But as the D.C. Circuit acknowledged, FERC compiled a lengthy record in which it supported its reasonable determination that DR practices directly affect wholesale rates, system reliability, and the supply and pricing of energy at wholesale. Practices involving steel, labor, broccoli, microwaves and hot dogs simply do not have this kind of direct and significant effect on interstate power markets. Whether or not one agrees with FERC's *means* for remedying unjust and unreasonable market conditions, its jurisdiction here fits squarely within its remedial authority.

II. The D.C. Circuit Also Erred In Interpreting the FPA to Give States Exclusive Authority Over Demand Response

In addition to ignoring the case law that supports FERC jurisdiction over DR, the D.C. Circuit used a flawed interpretation of FERC's authority, based on what it deemed "direct regulation of the retail market—a matter exclusively within state control." 753 F.3d at 224. In taking this unprecedented step, the D.C. Circuit announced a novel interpretation of § 201(a). That section states that FERC's reach "extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). If allowed to stand, the D.C. Circuit's effort to rewrite the FPA to contain an exclusive jurisdictional sphere for any activity a state regulates will threaten established FERC market initiatives far beyond DR.

This jurisdictional limit has no basis in the text or structure of the FPA. From its earliest decisions interpreting the FPA, this Court has consistently recognized the language of section 201(a) is a "mere 'policy declaration'" to help courts in addressing conflicts between federal and state authority under the statute—language that "'cannot nullify a clear and specific grant of jurisdiction . . . .'" *New York v. FERC*, 535 U.S. at 22 (*quoting FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964); *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 527 (1945)).

To Amici's knowledge, no previous decision of this Court or of the D.C. Circuit has held that the general language in § 201(a) carves out a field for "exclusive" state regulation. *Cf. Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 61, 74-77 (1943) (rejecting § 201(a) as a limit on express authority elsewhere in FPA); *Duke Power Co. v. FPC*, 401 F.2d 930, 938 (D.C. Cir. 1968) (§ 201(a) "is not a limitation on the Commission's exercise of a clear and specific grant of jurisdiction").

Treating § 201(a) as a policy declaration (consistent with this Court's past decisions) does not render this language a nullity. Instead, this language provides guidance for considering the interests of states in those situations where actual jurisdictional conflicts arise—typically, in preemption disputes. *Cf. New York v. FERC*, 535 U.S. at 19 (reasoning that the jurisdictional challenge to Order No. 888 does not invoke any kind of presumption against preemption "because the question presented does not concern the validity of a conflicting state law of regulation."). By reading § 201(a) as a jurisdictional savings clause that preserves "exclusive" state authority, the D.C. Circuit does violence to the FPA's structure. Had Congress wanted to give states *all* jurisdiction over activities that directly affect the retail market, it knew how to say so. *Cf.* 16 U.S.C. § 824(b) (expressly providing that FERC lacks jurisdiction over electricity generation facilities, among other things). The statute simply does not do this in § 201(a).

Moreover, the D.C. Circuit has failed to identify any actual jurisdictional conflicts between the federal government and the states, or any conflicts between state and federal regulatory programs. Because it has prematurely hypothesized a conflict with states where no actual dispute exists, the D.C. Circuit's erroneous interpretation of FERC's jurisdiction is more dangerous than it first appears. For example, it could call into question the validity of this Court's past decisions regarding the circumstances in which it is appropriate for state regulators to pass through federally-approved wholesale rates. *Nantahala*, 476 U.S. at 972 (noting that filed rate doctrine principles preclude state regulators from ignoring FERC's determinations affecting the cost of wholesale power when they set retail rates). Those decisions preserve a state regulatory role in assessing the prudency of specific purchases. *Id.* at 972 (suggesting that "a particular *quantity* of power from a particular source could be deemed excessive [by state regulators] if lower cost power is available elsewhere, even if the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*.") (emphasis in original). FERC's adoption of DR valuation rules in the wholesale market does not interfere with this state ratemaking role. If a state were to claim that FERC's compensation rules conflict with actual state retail ratemaking, the proper way to address this would be through a case-by-case preemption challenge under the filed rate doctrine. *See* Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1642-46 (2003).

Apparently recognizing that Order 745 creates no real conflict with state regulation, the D.C.

Circuit stretches to invent one. It reasons that FERC's DR payments will "lure" retail customers into wholesale markets. 753 F.3d at 223. Yet FERC's jurisdiction over power markets is not based on the choices of private firms. Wholesale power market prices routinely impact retail customers' cost and benefit calculations, and thereby affect private firms' operational and investment decisions. This may impact the behaviors of market participants, whose choices may trigger federal jurisdiction, but these private decisions do not change the types of *activities* over which FERC has jurisdiction under the FPA. For example, a large industrial customer might take advantage of high prices to forgo consuming power it self-generates, choosing instead to sell the power into wholesale markets. Such a change in the firm's behavior might subject a transaction to FERC jurisdiction even though the firm's previous generation decisions were not regulated by FERC. But the private, voluntary transactions of private market participants have nothing to do with whether § 201(a) preserves exclusive jurisdiction for states over demand response, and do not support the D.C. Circuit's conclusion to the contrary.

Thus, the D.C. Circuit erred when it interpreted § 201(a) of the FPA to have a meaning that Congress did not express. Section 201(a)'s policy declaration does not define any exclusive field for state regulation of anything that affects retail customers.

III. The D.C. Circuit's Decision Is Contrary to Congress's Plain Design for Energy Regulation.

The D.C. Circuit's erroneous reading of FERC's remedial authority, premised on its faulty construction of § 201(a), would create a glaring gap in jurisdiction to regulate wholesale markets. As FERC found in Order 745, if DR is not consistently and properly valued in interstate markets, a variety of dysfunctions are likely to arise in wholesale markets. The practices of market participants with respect to DR and the impacts of those practices on the rates for power sales cannot be regulated by the states because they are interstate in nature. If the valuation of DR by participants in interstate markets is not subject to some federal regulatory oversight, there would be precisely the kind of regulatory gap that Congress sought to correct when it adopted the FPA in 1935. Sections 205 and 206 must be understood in light of this purpose: the FPA closes the *Attleboro* gap by ensuring that FERC may regulate when states cannot. *New York v. FERC*, 535 U.S. at 6.

The D.C. Circuit's reading of the FPA is inconsistent with this Court's recognition that "[t]he FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been *previously subject* to state regulation." *New York*, 535 U.S. at 21. The FPA did not retain the jurisdictional boundaries that existed in 1935, or suggest that only states would have authority over new market activities such as DR. *See id.* (upholding FERC jurisdiction over unbundled sales of transmission notwithstanding that "in 1935, there was neither state nor federal regulation of what did not exist"). The D.C. Circuit's erroneous interpretations of FERC's jurisdiction would be likely to lead to other regulatory gaps in restructured electric power markets. Under that court's reasoning, FERC's ability to regulate other activities in wholesale power markets, such as frequency regulation and battery storage, would also be called into question, even though those practices have direct and significant effects on wholesale rates.

CONCLUSION

For the reasons stated above, Amici urge this Court to reject the D.C. Circuit's erroneous holding that FERC lacks jurisdiction over the market valuation of demand response in competitive interstate wholesale power markets.

Respectfully submitted,

RICHARD J. PIERCE, JR.
(Counsel of Record)
The George Washington
University Law School
2000 H Street N.W.
Washington, D.C. 20052
(202) 994-1549
rpierce@law.gwu.edu

EMILY HAMMOND
The George Washington
University Law School

JOEL B. EISEN
University of Richmond
School of Law

JIM ROSSI
Vanderbilt University
Law School

July 16, 2015
*Additional Amici listed in *Appendix List of Amici Curiae*

Counsel for Amici Curiae

APPENDIX LIST OF AMICI CURIAE

Todd Aagaard
Villanova University School of Law

Sara Bronin
University of Connecticut School of Law

William Boyd
University of Colorado Law School

Ann Carlson
UCLA School of Law

David Dana
Northwestern University School of Law

Seth Davis
University of California, Irvine School of Law

Timothy Duane
University of California, Santa Cruz
University of San Diego School of Law

Michael Dworkin
Vermont Law School

Joshua Fershee
West Virginia University College of Law

Sam Kalen
University of Wyoming College of Law

Alexandra Klass
University of Minnesota Law School

Felix Mormann
University of Miami School of Law

Hari Osofsky
University of Minnesota Law School

Uma Outka
University of Kansas School of Law

Alan Palmiter
Wake Forest University School of Law

Melissa Powers
Lewis & Clark Law School

Miriam Seifter
University of Wisconsin Law School

David Spence
University of Texas McCombs School of Business

Amy Stein
University of Florida Levin College of Law

Joseph Tomain
University of Cincinnati College of Law

Hannah Wiseman
Florida State University College of Law

Steven Weissman
University of California, Berkeley School of Law