

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Demand Response Compensation In            )  
Organized Wholesale Energy Markets        )**

**Docket No. RM10-17-001**

**JOINT REQUEST FOR REHEARING OF  
THE ELECTRIC POWER SUPPLY ASSOCIATION,  
THE AMERICAN PUBLIC POWER ASSOCIATION,  
THE ELECTRIC POWER GENERATION ASSOCIATION AND  
THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

Pursuant to Section 313(a) of the Federal Power Act (“FPA”)<sup>1</sup> and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),<sup>2</sup> the Electric Power Supply Association (“EPSA”),<sup>3</sup> the American Public Power Association (“APPA”),<sup>4</sup> the Electric Power Generation Association (“EPGA”)<sup>5</sup> and the National Rural

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<sup>1</sup> 16 U.S.C. § 8251(a) (2006).

<sup>2</sup> 18 C.F.R. § 385.713 (2010).

<sup>3</sup> EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

<sup>4</sup> APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers, and do business in every State except Hawaii. Public power systems own almost 10 percent of the nation’s electric generating capacity, and about eight percent of the nation’s higher voltage lines (138 kV or greater).

<sup>5</sup> EPGA is a regional trade association of electric generating companies that supply wholesale electric power in Pennsylvania and surrounding States. Collectively, EPGA member companies own and operate more than 145,000 megawatts of electric generating capacity, approximately half of which is located in the mid-Atlantic region. The comments contained in this filing represent the position of EPGA as an organization, but not necessarily the views of any particular member with respect to any issue.

Electric Cooperative Association (“NRECA”)<sup>6</sup> (“Joint Petitioners”) respectfully request rehearing of the final rule on demand response (“DR”) compensation in organized wholesale energy markets issued on March 15, 2011 in the above-captioned proceeding.<sup>7</sup>

The members of this admittedly unusual coalition — which includes entities, such as EPSA and APPA, that do not often find themselves on the same side in Commission proceedings — are united by their grave concerns that the Commission has disregarded essential and fundamental statutory limits on the proper exercise of its jurisdiction. Accordingly, although certain of Joint Petitioners will be filing their own separate requests for rehearing raising other concerns and objections to the Commission’s Final Rule, Joint Petitioners are making this joint submission to focus on the Final Rule’s clear jurisdictional defects. Joint Petitioners are not opposed to, and, indeed, fully support, participation by diverse resources, including DR resources, in wholesale energy markets administered by independent system operators (“ISO”) and regional transmission organizations (“RTO”). Joint Petitioners also share the Commission’s objective that barriers to DR participation in those markets (if any) be appropriately addressed. But the Commission must do more than pay lip service to the “confines of [its] statutory authority.”<sup>8</sup> The Commission may not regulate DR compensation as contemplated by the Final

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<sup>6</sup> NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million consumers in 47 States or 12 percent of the nation’s population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. NRECA members generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. The vast majority of NRECA members are not-for profit, consumer-owned cooperatives. NRECA’s members also include approximately 66 generation and transmission (“G&T”) cooperatives, which generate and transmit power to 668 of the 846 distribution cooperatives. The G&Ts are owned by the distribution cooperatives they serve. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost.

<sup>7</sup> *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322 (2011) (the “Final Rule”).

<sup>8</sup> *Id.* at P 115.

Rule, because it would have the Commission setting rates for non-jurisdictional, retail non-purchases that fall well outside the Commission’s delegated authority.<sup>9</sup>

## I.

### **STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS**

In accordance with Rules 713(c)(1) and 713(c)(2) of the Commission’s Rules of Practice and Procedure,<sup>10</sup> Joint Petitioners hereby specify each alleged error in the Final Rule and list each issue on which they seek rehearing of the Final Rule, providing representative precedent in support of their positions:

1. The Commission lacks authority under Section 205 or 206 of the FPA to set rates, either directly or indirectly, for DR compensation because DR is a non-jurisdictional, retail non-purchase over which Commission has no jurisdiction under Section 201(b) of the FPA. *See, e.g.*, 16 U.S.C. §§ 824, 824d, 824e (2006); 18 C.F.R. § 35.28(b)(5) (2009); *EnergyConnect, Inc.*, 130 FERC ¶ 61,031 (2010) (“*EnergyConnect*”); *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (2005) (“*BPA*”).
2. The Commission’s determination that it has authority over DR compensation as a practice “affecting” jurisdictional rates is improper and contrary to law. There is an insufficient nexus between DR compensation practices and jurisdictional rates to justify an exercise of the Commission’s “affecting” jurisdiction, and the Commission may not accomplish indirectly what it is prohibited from accomplishing directly. *See, e.g.*, 16 U.S.C. § 824e (2006); *Richmond Power & Light v. FERC*, 574 F.2d 610 (D.C. Cir. 1978) (“*Richmond*”).
3. The Commission’s determination that it has authority over DR compensation, a retail non-purchase, is arbitrary and capricious because it rests on an improper and unreasonable interpretation of its statutory authority under the FPA as extending into areas traditionally regulated by States, even though Congress has given no indication (and certainly no clear statement) that it intended to grant the Commission such far-reaching authority. *See, e.g.*, *American Bar Ass’n v. Federal Trade Comm’n*, 430 F.3d 457, 471-472 (D.C. Cir. 2005) (“*ABA*”).
4. The Commission’s determination that it has authority over DR compensation is not supported by substantial evidence. *See, e.g.*, 5 U.S.C. § 706(2)(E) (2006); *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) (“*ICC*”).

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<sup>9</sup> Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 115.

<sup>10</sup> 18 C.F.R. § 385.713(c)(2) (2010).

5. The Final Rule rests on an indefensible and unreasonable interpretation of Section 1252(f) of the Energy Policy Act of 2005 (“EPAAct 2005”), Pub. L. No. 109-58, 119 Stat. 594, 965 (2005), as supporting the Commission’s assertion of jurisdiction to regulate DR compensation. *See, e.g.*, EPAAct 2005, § 1252(f); *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010) (“*Comcast*”).
6. The Final Rule is arbitrary and capricious and contrary to law because it fails to address serious objections to the Commission’s exercise of jurisdiction over DR compensation, and it does not draw a rational connection between the Commission’s exercise of jurisdiction and the indisputable facts. *See, e.g.*, *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”); *Moraine Pipeline Co. v. FERC*, 906 F.2d 5 (D.C. Cir. 1990) (“*Moraine Pipeline*”); *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001) (“*CAPP*”).

## II.

### BACKGROUND

In the Final Rule, the Commission adopts the proposal set forth in its March 18, 2010 notice of proposed rulemaking<sup>11</sup> to require ISOs and RTOs to pay DR resources the full locational marginal price (“LMP”) for energy, provided that (1) the DR resource “has the capability to balance supply and demand as an alternative to a generation resource;”<sup>12</sup> and (2) “dispatch of that [DR] resource is cost-effective as determined by the net benefits test.”<sup>13</sup> In a cursory response to challenges to its jurisdiction to set rates for DR compensation, the Final Rule states that Section 205 of the FPA grants the Commission responsibility to “ensur[e] that all rates and charges for or ‘in connection with’” Commission-jurisdictional services “are just and reasonable,”<sup>14</sup> and asserts that the Commission has jurisdiction over DR compensation in

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<sup>11</sup> *Demand Response Compensation in Organized Wholesale Energy Markets*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,656 (2010) (the “NOPR”).

<sup>12</sup> Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 2.

<sup>13</sup> *Id.* at P 2.

<sup>14</sup> *Id.* at P 112 (citing 16 U.S.C. § 824d (2006)).

ISO/RTO-administered markets “because it directly affects wholesale rates.”<sup>15</sup> The Commission also invokes the statement of congressional policy in Section 1252(f) of EAct 2005 as supporting its claimed jurisdiction to set rates for DR compensation.<sup>16</sup>

### III.

#### **REQUEST FOR REHEARING**

In enacting the FPA, Congress sought “to draw a bright line easily ascertained, between state and federal jurisdiction,” with the Commission enjoying broad and “plenary” jurisdiction over rates for wholesale sales in interstate commerce but no such jurisdiction over rates for retail sales.<sup>17</sup> Despite acknowledging that its “ability to address . . . barriers [to DR participation] is limited to the confines of [its] statutory authority,”<sup>18</sup> the Commission has crossed that bright line in the Final Rule. The Commission lacks authority under the FPA to set rates for DR compensation, and contrary to what the Final Rule suggests, Section 1252(f) of EAct did not expand the Commission’s ratemaking jurisdiction in the slightest, and certainly not to the extent that could justify the Commission’s assertion of jurisdiction over DR compensation. The Commission’s Final Rule also relies on an unreasonable interpretation of the statutory requirements, and it utterly fails to respond to serious objections that were raised and thoroughly articulated in comments submitted on the NOPR.

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<sup>15</sup> Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 112 (citing *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh’g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 47, *order on reh’g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009)).

<sup>16</sup> Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 113.

<sup>17</sup> *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964).

<sup>18</sup> Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 115.

**A. The Commission Lacks Authority To Set Rates, Either Directly or Indirectly, For DR Compensation.**

As a “creature of statute,” the Commission has only such authority as has been conferred upon it by Congress, and “if there is no statute conferring authority, FERC has none.”<sup>19</sup> It is therefore significant that Congress limited the Commission’s ratemaking authority under the FPA only to rates charged by “public utilities” for services subject to the Commission’s jurisdiction — that is, for wholesale sales or transmission of electric energy in interstate commerce.<sup>20</sup> Section 201(b)(1) of the FPA makes clear that, subject only to certain exceptions not relevant here, the provisions of Part II of the FPA “shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy in interstate commerce, but . . . shall not apply to any other sale of electric energy . . . .”<sup>21</sup>

The Commission lacks authority to set “just and reasonable” rates for DR, because, as the Commission held in *EnergyConnect* and recognized in the Final Rule, the provision of DR service does not involve a sale for resale of electric energy, and DR is not a jurisdictional service.<sup>22</sup> Moreover, because there is no meaningful nexus between DR compensation and jurisdictional rates, the Commission’s “affecting or pertaining to” jurisdiction may not be used to regulate DR and, in any event, the Commission has made no findings that could support the exercise of its “affecting or pertaining to” jurisdiction. The Commission’s expansive

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<sup>19</sup> *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 7 (D.C. Cir. 2002) (internal quotations omitted) (citing *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001); *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)).

<sup>20</sup> See 16 U.S.C. §§ 824, 824d, 824e (2006).

<sup>21</sup> 16 U.S.C. §§ 824(b)(1) (2006). See *Panhandle E. Pipe Line Co. v. FPC*, 332 U.S. 507, 516-17 (1947) (discussing analogous provision of the Natural Gas Act); *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006) (explaining that under Section 201(b) of the FPA, the Commission “has jurisdiction over both the interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce,” while “States retain jurisdiction over retail sales of electricity and over local distribution facilities”).

<sup>22</sup> Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 64.

interpretation of its jurisdiction in the Final Rule would eviscerate the statutory limits on its authority. Hence, the Commission’s interpretation of its statutory authority under the FPA is unreasonable.<sup>23</sup>

**1. The Commission Lacks Authority To Directly Set Rates For DR, Because DR Does Not Involve Jurisdictional Wholesale Sales.**

Section 35.28(b)(5) of the Commission’s regulations appropriately recognizes that DR is “a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.”<sup>24</sup> Because DR is a *retail “non-purchase”* — a retail purchase that will not be, or was not, made — it is the polar opposite of a Commission-jurisdictional *wholesale sale*.<sup>25</sup> The Commission emphatically reaffirmed this definition of DR in the Final Rule.<sup>26</sup>

Because the Commission’s ratemaking and refund jurisdiction under Sections 205 and 206 are expressly limited to rates charged by public utilities for jurisdictional services,<sup>27</sup> the Commission may not regulate, either directly or indirectly, the rates for retail purchases,

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<sup>23</sup> See *Chevron U.S.A. Inc. v NRDC, Inc.*, 467 U.S. 837, 845 (1984).

<sup>24</sup> 18 C.F.R. § 35.28(b)(5) (2010).

<sup>25</sup> In *EnergyConnect*, the Commission held that:

[W]here an entity is only engaged in the provision of demand response services, and makes no sales of electric energy for resale, that entity would not own or operate facilities that are subject to the Commission’s jurisdiction and would not be a public utility that is required to have a rate on file with the Commission.

*EnergyConnect*, 130 FERC ¶ 61,031 at P 30.

<sup>26</sup> See Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 64 (“[A]s the Commission previously stated in *EnergyConnect*, the Commission does not view demand response as a resale of energy back into the energy market.”).

<sup>27</sup> See *BPA*, 422 F.3d at 918.

including retail purchases made by *non*-public utility providers of DR services.<sup>28</sup> The same result holds for non-jurisdictional DR services provided by an entity that is a public utility for other purposes (as was the case in *EnergyConnect*). It is well settled law that, where a regulated entity provides both Commission-jurisdictional and non-jurisdictional services, the Commission may exercise its ratemaking authority only with respect to the jurisdictional services.<sup>29</sup>

Because DR is not a jurisdictional service, the Commission has no delegated authority to regulate it. Accordingly, regardless of whether compensation to DR providers is (or is not) too “high”<sup>30</sup> or too “low,”<sup>31</sup> DR compensation, as such, is outside of the Commission’s jurisdiction. There are certainly a variety of ways in which the Commission could work to remove barriers to increased DR participation. But what it cannot do is intrude upon State jurisdiction over the rates, terms and conditions of retail electric service, no matter how frustrated the Commission may be with the pace of regulatory change at the State level.<sup>32</sup>

## **2. The Commission Cannot Set Rates For DR Compensation As A Rule Or Regulation “Affecting Or Pertaining To” Jurisdictional Rates.**

The Commission has made no showing, or supported its order with any evidence, demonstrating that DR participation is causing jurisdictional rates to become unjust and

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<sup>28</sup> See, e.g., *New York v. FERC*, 535 U.S. 1, 20 (2002) (explaining that the Commission’s “jurisdiction over the sale of power has been specifically confined to the wholesale market”); *FPC v. Conway Corp.*, 426 U.S. 271, 276-77 (1976) (“*Conway*”) (stating that the Commission “has no power to prescribe the rates for retail sales” and that the FPA was structured to “foreclose the possibility that the Commission would . . . regulat[e] the nonjurisdictional, retail price”).

<sup>29</sup> See *Conway*, 426 U.S. at 279 (1976).

<sup>30</sup> See, e.g., *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945).

<sup>31</sup> See, e.g., *United Gas Pipe Line Co.*, Opinion No. 671, 50 F.P.C. 1348, 1387 (1973).

<sup>32</sup> See *Demand Response Compensation in Organized Wholesale Energy Markets*, Transcript at 234:3-11 (Chairman Wellinghoff), Docket No. RM10-17-000 (Sept. 13, 2010).

unreasonable.<sup>33</sup> Even if the Commission had made this showing (and it has not), any remedy may “operate only against the rate of jurisdictional sales.”<sup>34</sup> Although the Commission’s “affecting” jurisdiction may be broad, it is not broad enough to overcome the express limits on its authority to regulate non-jurisdictional rates. In other words, Sections 205 and 206 of the FPA<sup>35</sup> do not empower the Commission to regulate rates beyond the reach of its jurisdiction under Section 201(b) of the FPA.<sup>36</sup> Consequently, the Commission may not directly regulate the non-jurisdictional rates that DR service providers receive as a rule or regulation “affecting or pertaining to” Commission-jurisdictional rates.<sup>37</sup>

The Commission is similarly foreclosed from indirectly regulating non-jurisdictional rates through the exercise of its authority over public utilities’ jurisdictional rates.<sup>38</sup> The Final Rule, which requires public utilities (*i.e.*, each ISO and RTO) to pay qualifying DR resources full LMP, would do precisely that. Because DR is not a service subject to the Commission’s ratemaking jurisdiction, however, the Commission’s proposal represents an impermissible “attempt[] to do indirectly what it [may] not do directly. . . .”<sup>39</sup>

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<sup>33</sup> See *ICC*, 576 F.3d at 477 (explaining that a reviewing court cannot “uphold a regulatory decision that is not supported by substantial evidence on the record as a whole.”).

<sup>34</sup> *Conway*, 426 U.S. at 279.

<sup>35</sup> 16 U.S.C. §§ 824d, 824e (2006).

<sup>36</sup> 16 U.S.C. § 824(b) (2006).

<sup>37</sup> Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 112 (*citing* 16 U.S.C. § 824d (2006)).

<sup>38</sup> See, *e.g.*, *Richmond*, 574 F.2d at 620 (rejecting petitioner’s argument that the Federal Power Commission (the “FPC”) could indirectly impose a requirement on a public utility (involuntary wheeling) that the FPC could not impose directly, by conditioning its approval of the public utility’s jurisdictional rates on the wheeling requirement, because “[w]hat the Commission is prohibited from doing directly it may not achieve by indirection.”).

<sup>39</sup> *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996).

To be sure, the holding in *Connecticut Department of Public Utility Control v. FERC*<sup>40</sup> underscores the fact that the Commission does, in fact, possess broad jurisdiction to regulate practices affecting rates for wholesale sales. But this decision cannot be read to support the assertion of jurisdiction over DR compensation. In *Connecticut DPUC*, the Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit”) held that, because the Commission had jurisdiction *directly* to regulate the capacity prices in question (that is, to set rates charges by public utilities for wholesale sales of electric capacity), it could also *indirectly* regulate capacity prices through setting the inputs that would affect the prices paid for capacity.<sup>41</sup> In other words, the power to set rates directly “include[s] the power to do so indirectly.”<sup>42</sup> Unlike the capacity prices at issue in *Connecticut DPUC*, however, the Commission lacks the authority to set rates for retail sales directly. Because this antecedent condition is not satisfied, *Connecticut DPUC* provides no support for the Commission’s assertion of jurisdiction over rates for DR services.

The Commission is not allowed to circumvent the express limitations on its ratemaking authority. The Commission’s “affecting” jurisdiction under the statutory provisions extends only to “classifications, practices, and regulations,” as well as contracts, affecting “such rates,” *i.e.*, rates charged by public utilities for FERC-jurisdictional sales.<sup>43</sup> Notably absent from this list are “rates” for (or terms and conditions of) non-jurisdictional service that affect public utilities’ jurisdictional rates. The logic of the Commission’s claim to possess “affecting” jurisdiction over

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<sup>40</sup> 569 F.3d 477 (D.C. Cir. 2009) (“*Connecticut DPUC*”).

<sup>41</sup> In *Connecticut DPUC*, the Court of Appeals for the D.C. Circuit upheld a Commission order accepting the Installed Capacity Requirement (the “ICR”), which the court described as “a key input into the market-based mechanism” for determining prices in the capacity market administered by ISO New England Inc. *Id.* at 478-79.

<sup>42</sup> *Id.* at 482.

<sup>43</sup> 16 U.S.C. §§ 824d(a), 824d(c), and 824e(a) (2006).

DR compensation<sup>44</sup> would lead inexorably to the exercise of jurisdiction over State-regulated retail rates, because retail rates regularly have an indirect effect on wholesale rates, *e.g.*, by increasing or decreasing consumption in a manner that would, in turn, affect prices in wholesale markets. Such a result is at war with both the letter and intent of the FPA.

DR is no different than any other non-jurisdictional factor that may “affect” the price of jurisdictional rates (*e.g.*, steel, cement, coal, etc.). Even if an increase in DR compensation in energy markets might lower jurisdictional rates, that effect would not, in and of itself, empower the Commission to set rates for DR, any more than the Commission would be justified in reaching out to regulate retail electric rates or the prices of cement, steel, coal, or other goods or services that affect the price of electricity. To argue that it does would read out of the FPA the express restrictions on the Commission’s ratemaking authority and would thus violate one of the cardinal rules of statutory construction — namely, that a statute must be read to “avoid an interpretation . . . that renders any part of it superfluous and does not give effect to all of the words used by Congress.”<sup>45</sup>

Nor can the Commission assert jurisdiction over DR compensation as a “component” of jurisdictional, market-based rates for energy in organized markets. DR represents retail purchases of electric energy that have *not* been made. By no stretch of the imagination can the rate for a non-jurisdictional, retail non-purchase be described as a “component” of a rate for wholesale sales. And, in any event, nothing in the Commission’s order makes that connection in a manner that would be considered reasoned decisionmaking by a Court.

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<sup>44</sup> See Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 112.

<sup>45</sup> *Beisler v. Comm’r*, 814 F.2d 1304, 1307 (9<sup>th</sup> Cir. 1987).

The level of DR compensation is vitally different from the non-jurisdictional rates at issue in *Transmission Agency of Northern California v. FERC*.<sup>46</sup> In that case, the D.C. Circuit held that the Commission was permitted to review whether a non-jurisdictional “rate,” which was to be used as a component to calculate a jurisdictional rate, was just and reasonable *solely* for the purpose of ensuring that the jurisdictional rate in question was just and reasonable,<sup>47</sup> but *not* to determine whether the non-jurisdictional seller was receiving adequate or excessive compensation. In fact, notwithstanding the Commission’s finding that the non-jurisdictional rate that was a component of the jurisdictional rate was excessive, the court rejected the Commission’s attempt to order refunds.<sup>48</sup>

### **3. The Commission’s Interpretation Of Its Statutory Authority Is Unreasonable.**

Even assuming *arguendo* that the Commission’s assertion of jurisdiction over DR compensation were not foreclosed by the FPA’s plain terms, it is still an unreasonable interpretation of the Commission’s statutory authority under the FPA. That is to say, even if there were some ambiguity in Sections 205 and 206 regarding the scope of the Commission’s

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<sup>46</sup> *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663 (D.C. Cir. 2007) (“*TANC*”).

<sup>47</sup> In *TANC*, the Court affirmed the Commission’s decision to review the justness and reasonableness of the transmission revenue requirement (“TRR”) of the City of Vernon, California (“Vernon”), a governmental entity excluded from the definition of public utility, because Vernon’s TRR would be added to the TRR of other transmission owners and used to determine the rates for jurisdictional transmission service on the California Independent System Operator Corporation (“CAISO”) grid. The court found that the Commission had “sufficiently demonstrated that it is impossible to ensure that CAISO’s rates are just and reasonable without reviewing Vernon’s TRR under the same standard.” *Id.* at 672.

<sup>48</sup> *Id.* at 674; *see also BPA*, 422 F.3d at 921 (noting that the Commission’s “long-standing interpretation of §§ 205 and 206 confirm that governmental entities/non-public utilities lie outside its ratemaking and refund authority”). While the *BPA* and *TANC* courts discussed the exclusion of governmental entities from the definition of public utility in FPA Section 201(f), 16 U.S.C. § 824(f) (2006), this statutory exemption was not the sole or even principal basis for their holdings. Instead, the crucial issue for both the *BPA* and *TANC* was that the Commission’s ratemaking and refund jurisdiction under Sections 205 and 206 is expressly limited to *public utilities*, and these holdings apply equally to any entity that is not a public utility, irrespective of whether that entity also enjoys the exemption for governmental entities.

authority to regulate practices that “affect” jurisdictional rates, such ambiguity, without more, may not be interpreted as a congressional delegation of authority to resolve that ambiguity.<sup>49</sup>

Courts are particularly reluctant to infer a delegation of authority where, as here, a federal agency seeks to regulate an area that has been traditionally regulated by the States.<sup>50</sup> As the Supreme Court has explained, Congress is presumed not to extend federal regulation to areas that have traditionally fallen under the States’ control through “muffled hints” or “obscure grant[s] of authority.”<sup>51</sup> When Congress’s intent to displace historical State practice “is doubtful, our federal system demands deference to long-established traditions of state regulation.”<sup>52</sup> Accordingly, courts will uphold an agency’s assertion of jurisdiction to reach into areas of traditional State sovereignty only where Congress has made “its intention to do so ‘unmistakably clear in the language of the statute.’”<sup>53</sup>

DR is a retail non-purchase, and retail rates have traditionally been subject to State or local regulation. There is nothing in the FPA suggesting, much less stating in clear and

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<sup>49</sup> See, e.g., *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (“[m]ere ambiguity in a statute is not evidence of a delegation of authority.”). By the same token, the Commission may not presume that it is authorized to regulate DR from the fact that the FPA does not expressly preclude the Commission from regulating DR. See, e.g., *Ry. Labor Exec. Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994).

<sup>50</sup> See, e.g., *ABA*, 430 F.3d at 471-472 (affirming district court’s finding that the Federal Trade Commission had exceeded its statutory authority under a statutory provision governing financial institutions where it sought to regulate the practice of law, which “is traditionally the province of the states.”).

<sup>51</sup> *Gonzales v. Oregon*, 546 U.S. 243, 274-75 (2006).

<sup>52</sup> *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 546 (1994)

<sup>53</sup> *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). The Supreme Court has explained that this “plain statement rule”:

is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, power with which Congress does not readily interfere.

*Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

unmistakable terms, that Congress intended to authorize the Commission to regulate DR compensation. The Commission’s assertion that Congress has delegated its authority to regulate this non-jurisdictional, retail non-purchase is an impermissible and unreasonable interpretation of its statutory authority under the FPA.

**B. The Energy Policy Act Of 2005 Did Not Empower The Commission To Regulate DR Compensation.**

In addition to asserting that it may regulate DR compensation pursuant to Section 205 of the FPA,<sup>54</sup> the Commission implies that Section 1252(f) of EAct 2005 — which states that “[i]t is the policy of the United States” to encourage DR and to remove barriers to the participation of DR in energy markets<sup>55</sup> — supports its claim of jurisdiction over DR compensation.<sup>56</sup> The Commission’s apparent reliance on this provision is misplaced. Section 1252(f) of EAct 2005 is a statement of policy; it does not expand the Commission’s jurisdiction to implement that policy.<sup>57</sup> As the D.C. Circuit recently observed in striking down the Federal Communications Commission’s “net neutrality” rules: “Policy statements are just that — statements of policy.

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<sup>54</sup> Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 112 (*citing* 16 U.S.C. § 824d (2006)).

<sup>55</sup> EAct 2005 § 1252(f).

<sup>56</sup> Final Rule, FERC Stats. & Regs. ¶ 31,322 at PP 11, 113.

<sup>57</sup> Subsequent legislation has provided further clarification, if any were needed, that the Commission has not been granted ratemaking jurisdiction with respect to DR. Specifically, the Energy Independence and Security Act of 2007 (“EISA”), Pub. L. No. 110-140, 121 Stat. 1492 (2007), includes provisions addressing the Commission’s authority and responsibilities with respect to DR, none of which delegate to the Commission the authority to adopt mandatory rules of any kind. EISA includes provisions directing the Commission to collaborate with other federal agencies to develop standards and protocols for “smart grid” technologies, including DR. *See* EISA §1305(d) (*to be codified at* 15 U.S.C. § 17385(d)). These standards would not be mandatory or enforceable by the Commission. *See Smart Grid Policy*, 128 FERC ¶ 61,060 at P 23 (2009). Moreover, Section 529 of EISA directs the Commission, working with public and private stakeholders, to prepare two reports (a “National Assessment of Demand Response” and a “National Action Plan on Demand Response” (or “National DR Action Plan”)) to develop recommendations to Congress regarding measures that would facilitate the adoption and implementation of DR by the States and market participants.

They are not delegations of authority.”<sup>58</sup> The Commission cannot rely on a policy statement alone as the legal basis for promulgating a given regulation; it must show that its actions in furtherance of the policy are supported by “an express delegation of authority.”<sup>59</sup>

To the extent the Commission wishes to regulate DR compensation, it would need to rely on an express delegation of authority under the FPA. Reliance on Section 1252(f) of EPAct 2005 is particularly misplaced where the actions contemplated directly contravene the duly enacted express limitations on the Commission’s authority, like those in Sections 201, 205 and 206 of the FPA.<sup>60</sup> Moreover, the Commission’s apparent urgency to take actions to promote DR that are not mandated, or even authorized, by this provision is hard to square with the leisurely pace with which the prime DR-related initiative actually required by Congress (namely, adoption of the National DR Action Plan pursuant to EISA Section 529<sup>61</sup>) is being pursued by the federal government.<sup>62</sup>

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<sup>58</sup> *Comcast*, 600 F.3d at 654 (striking down an FCC order regulating the internet network management practices of a cable television provider that the FCC claimed was authorized under a similar provision of the Federal Communications Act, which stated that “[i]t is the policy of the United States ... to promote the continued development of the Internet and other interactive computer services,” 47 U.S.C. § 230(b) (2006)).

<sup>59</sup> *Comcast*, 600 F.3d at 652.

<sup>60</sup> *See, e.g., Richmond*, 574 F.2d at 620 (noting that the FPC had the “authority to impose conditions or requirements ‘necessary or appropriate to promote the policies’” of the FPA, but that “such conditions may not contravene” the express requirements of the FPA) (internal citations omitted).

<sup>61</sup> EISA § 529 (*to be codified at* 42 U.S.C. § 8279).

<sup>62</sup> Joint Petitioners recognize that the delay in implementing the National DR Action Plan appears to be attributable to inaction on the part of the Office of Management and Budget, and certainly not to any inaction on the part of the Commission.

**C. The Commission’s Decision Is Arbitrary and Capricious Because It Fails To Address Serious Objections To The Commission’s Proposed Approach.**

The Final Rule ignores, or cursorily dismisses, the jurisdictional arguments set forth above,<sup>63</sup> which were presented, in detail, in comments on the NOPR.<sup>64</sup> Instead, the Commission simply repeats its assertion that it may regulate DR compensation pursuant to Section 205 of the FPA “because it directly affects wholesale rates”<sup>65</sup> and because the Commission’s actions are consistent with the policy statement in EPC Act Section 1252(f).<sup>66</sup> By failing to respond meaningfully to the serious objections to its jurisdiction, the Commission failed to satisfy its “fundamental obligation to engage in reasoned decision making,”<sup>67</sup> which necessarily “renders its decision ... arbitrary and capricious.”<sup>68</sup>

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<sup>63</sup> See Final Rule, FERC Stats. & Regs. ¶ 31,322 at PP 112-113.

<sup>64</sup> See, e.g., Comments of the Electric Power Supply Association at 31-37, Docket No. RM10-17-000 (filed May 12, 2010); Reply Comments of the Electric Power Supply Association at 49-53, Docket No. RM10-17-000 (filed June 30, 2010).

<sup>65</sup> Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 112 (citations omitted).

<sup>66</sup> See *id.* at PP 11, 113.

<sup>67</sup> *Moraine Pipeline*, 906 F.2d at 8.

<sup>68</sup> *CAPP*, 254 F.3d at 299; see also *State Farm*, 463 U.S. at 29.

IV.

**CONCLUSION**

**WHEREFORE**, for the foregoing reasons, Joint Petitioners respectfully request that the Commission grant rehearing of the Final Rule.

Respectfully submitted,

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