Stanford Law Review Online

Volume 68 April 2016

ESSAY

FERC v. EPSA: Functionalism and the Electricity Industry of the Future

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Introduction

The Supreme Court's recent decision in *Federal Energy Regulatory Commission v. Electric Power Supply Association* (*EPSA*)[1] may ultimately rank among the most significant energy law cases of all time. Unsurprisingly, the case has received considerable attention within legal circles and even within the popular press.[2] *EPSA* upheld one of the Federal Energy Regulatory Commission's (FERC) signature policies, with potentially enormous economic and reliability benefits.[3] That policy, which addresses "demand response" may also prove essential to incorporating electricity from variable resources, such as wind and solar, and to meeting various state and federal goals for reducing carbon pollution.[4]

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1. 136 S. Ct. 760 (2016).
2. *See, e.g.*, Editorial, *The Supreme Court Rules for Common Sense in Electricity Case*, N.Y. TIMES (Jan. 27, 2016), http://nyti.ms/1OQny3q.
3. *See* Adela Conchado & Pedro Linares, *The Economic Impact of Demand-Response Programs on Power Systems: A Survey of the State of the Art*, *in* HANDBOOK OF NETWORKS IN POWER SYSTEMS I 281, 284-87 (Alexey Sorokin et al. eds. 2012) (summarizing the potential economic benefits of demand response); Owen Comstock, *Demand Response Saves Electricity During Times of High Demand*, U.S. ENERGY INFO. ADMIN. (FEB. 8, 2016), http://www.eia.gov/todayinenergy/detail.cfm?id=24872 (discussing the impact of *EPSA* on demand response).
4. *See* L. BIRD ET AL., NAT'L RENEWABLE ENERGY LAB., INTEGRATING VARIABLE RENEWABLE ENERGY: CHALLENGES AND SOLUTIONS 8 (2013), http://www.nrel.gov/docs/fy13osti/60451.pdf.

But *EPSA* is also notable for another reason—one that has so far gone largely unnoticed, but might ultimately prove every bit as significant for the laws governing how electricity is produced and consumed. The statute at issue in *EPSA*, the Federal Power Act (FPA), is often described as drawing a "bright line" between state and federal jurisdiction over the electricity sector.[5] In broad terms, this division of authority gives the federal government jurisdiction over the interstate aspects of the electricity industry, while leaving the states to regulate its intrastate aspects.[6] This "bright line" has been at the heart of the Supreme Court's FPA jurisprudence since the FPA was enacted in 1935.[7]

Recently, however, a series of regulatory and technological changes in the electricity sector, such as those that enable demand response, have called that bright line into question.[8] In the rule under review in *EPSA*, FERC adopted a functionalist approach to managing the jurisdictional and federalism concerns raised by these changes.[9] That is, it attempted to apply the basic premise behind the FPA's jurisdictional "bright line" to a resource that stood on both sides of that line, notwithstanding the poor fit between demand response and the jurisdictional divisions that Congress laid out in 1935. In particular, FERC took a number of pragmatic steps to allocate authority over demand response in a manner that is consistent with the FPA's division between state and federal jurisdiction.

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5. *See, e.g.*, Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 374 (1988) ("Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates."); Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215-16 (1964) ("Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction . . . .").

6. *See* Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 767-68 (2016).

7. *See* Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. (forthcoming 2016) (manuscript at 1, 3), http://ssrn.com/abstract=2733731 (describing "dual sovereignty" and the "jurisdictional 'bright line'" as the "organizing federalism principle[s]" under the FPA).

8. *See* Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L.J. 203, 206-13 (2015) (discussing recent technological developments that have created "a host of new jurisdictional issues [that] have challenged the states, the FERC, and the courts in applying" the FPA's bright line); Matthew R. Christiansen, Comment, *FPA Preemption in the 21st Century*, 91 N.Y.U. L. REV. ONLINE 1, 9-13 (2016) (explaining how recent "federal and state reforms have cast into doubt some of the clear jurisdictional boundaries at the heart of the FPA").

9. The use of the term "functionalist" draws heavily on Bill Eskridge's discussion of that term in the context of constitutional interpretation. *See* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21-22 (1998).

EPSA provides a ringing endorsement of that approach. Justice Kagan's majority opinion articulated a deeply functionalist approach to the FPA, eschewing some of the rhetoric regarding "bright line" rules on which the Court had relied in previous FPA cases in favor of a more flexible approach that applied the FPA's basic premise to the changing industry. In addition, the majority opinion cites with approval FERC's pragmatic efforts to manage the jurisdictional concerns posed by the changing electricity sector.[10] *EPSA* may thus provide a solid foundation for similarly functionalist and pragmatic approaches to adapting electricity regulation to the changing electricity sector.

This Essay begins with a quick survey of the FPA and the issues presented in *EPSA*. Next, it turns to the *EPSA* decision and argues that notwithstanding the "literal"[11] interpretation that is the crux of the Court's holding, the case is best read as an endorsement of a deeply functionalist and pragmatic approach to the FPA. Although *EPSA* is thus another chapter in the familiar debate between textualist and functionalist approaches to statutory interpretation, when it comes to the electricity sector, the consequences are anything but academic. At the end, I explain why.

I. The FPA, FERC, and Demand Response

Understanding *EPSA* requires a quick primer on electricity law. The FPA divides jurisdiction over the electricity sector between state and federal regulators.[12] The Act vests FERC, the federal regulator, with jurisdiction to ensure that *wholesale* sales and transmission of electricity are "just and reasonable."[13] A "wholesale sale" is a "sale for resale"—i.e., a sale of electricity from a power plant to a local utility. The FPA gives states exclusive jurisdiction to regulate *retail* sales of electricity—i.e., the sale of electricity from that local utility to the ultimate consumer.[14] This basic jurisdictional divide has endured since 1935, even as the electricity sector has developed into a complex national network with a level of sophistication that would have been unimaginable to the statute's drafters.

For largely political reasons, most states have chosen to keep the retail rate for electricity stable, even though the wholesale rate varies considerably

10. *Elec. Power Supply Ass'n*, 136 S. Ct. at 775-82.

11. Noah Feldman, *Justices Give Government Power to Cut Electric Use*, BLOOMBERGVIEW (Jan. 25, 2016, 11:54 AM) http://www.bloombergview.com/articles/2016-01-25/justices-give-government-power-to-cut-electric-use (suggesting that "literalism isn't on [dissenting Justice] Scalia's side here; it's on [majority author Justice] Kagan's").

12. *See* 16 U.S.C. § 824 (2014).

13. 16 U.S.C. §§ 824d-824e. This includes practices "affecting" such sales. 16 U.S.C. § 824d.

14. *See* Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 767-68 (2016).

throughout the day and over the course of the year.[15] Electricity consumers thus do not receive a price signal encouraging them to reduce their electricity consumption when costs are high, meaning that the normal forces of supply and demand cannot prevent sharp spikes in the price of wholesale electricity. The result is that electricity costs more than it "should," (i.e., more than it would in a functioning market) and the electricity system is less reliable than it should be (again, relative to a functioning market).

FERC has responded to these concerns by promoting what is known as "demand response." Demand response programs provide consumers with payments to reduce their consumption of electricity at times of peak demand.[16] Demand response programs thus provide an incentive for consumers to reduce their electricity consumption at times of peak demand, even though the actual price of electricity does not change. Order 745, the rule at issue in *EPSA*, required that demand response in wholesale markets—i.e., the markets in which utilities purchase the electricity they sell to the ultimate consumer—be compensated at the same rate as electricity generation.[17] Or, as some have put it, that "negawatts" be paid the same rate as "megawatts."[18]

Although the economic rationale for demand response—i.e., making consumers less price inelastic—is clear,[19] its implications for the FPA's allocation of jurisdiction are far less so. That is because consumers who reduce their electricity consumption in order to secure these payments would otherwise purchase that electricity in the retail market, which, as noted, is under state jurisdiction. As FERC itself put it, "jurisdiction over demand response is a complex matter that lies at the confluence of State and Federal jurisdiction."[20] On the one hand, a commitment to reduce electricity consumption lowers the wholesale rate and helps maintain a reliable supply of electricity—two considerations that are crucial to FERC's obligation to ensure that *wholesale* prices are "just and reasonable." On the other hand, the opportunity to receive a payout for reducing electricity consumption is a

15. *Id.* at 768.

16. OFFICE OF ENFORCEMENT, FED. ENERGY REGULATORY COMM'N, ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 44 (Nov. 2015) [hereinafter ENERGY PRIMER].

17. Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16,658, 16,659 (Mar. 24, 2011) (to be codified at 18 C.F.R. pt. 35) [hereinafter Order 745].

18. *See, e.g.*, David Roberts, *The Supreme Court's Big Ruling in Favor of Clean Energy, Explained*, VOX (Jan. 26, 2016, 2:50 PM), http://www.vox.com/2016/1/26/10835042/supreme-court-energy.

19. This is not to suggest that the *level* at which demand response should be compensated is clear. This was a controversial topic both during the rulemaking and the resulting litigation, although the Court ultimately held that FERC's decision was not arbitrary and capricious. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 782-84.

20. Order 745, *supra* note 17, at 16,676.

critical factor in a sophisticated consumer's decision to purchase *retail* electricity—as important, some might argue, as the retail rate itself.

In its rules addressing demand response, FERC responded to this jurisdictional concern by adopting a deeply functionalist approach to the FPA's jurisdictional "bright line." That is, FERC attempted to tailor its regulation of demand response—an aspect of the modern electricity industry that the FPA's drafters certainly did not anticipate—in a manner that is consistent with the FPA's basic allocation of authority, namely giving FERC jurisdiction over wholesale transactions, but leaving it to the states to regulate retail transactions. Two of these steps are especially noteworthy.

First, even though any reduction in consumption could reduce wholesale power prices and help ensure reliable service, FERC limited its demand response rules to "*wholesale* demand response."[21] That is, demand response that participates in the sophisticated regional markets (known as "regional transmission organizations" or "RTOs") in which most of the wholesale sales of electricity in the United States are executed.[22] In so doing, FERC expressly forswore any attempt to regulate *retail* demand response—e.g., demand response programs operated by local utilities, rather than RTOs.[23] That distinction between wholesale and retail demand response is an exercise in fine line drawing—one that the D.C. Circuit subsequently chided as a "metaphysical distinction."[24] Any electricity consumer could, in theory, just as easily participate in a state-regulated retail demand response program *or* a federally regulated one, and both are capable of achieving the same ends: lowering cost and improving reliability. Nevertheless, FERC limited its rules to the latter genre of demand response in an effort to give effect to the FPA's division of authority.

Second, in both of FERC's major demand response rulemakings, FERC gave states the power to "veto" participation in *wholesale* demand response. Specifically, FERC permits states to prohibit demand response resources within the State—e.g., utilities, individual customers, or aggregators of individual customers—from participating in wholesale markets, notwithstanding FERC's belief that it possesses jurisdiction over those resources.[25] Thus, whereas a state rule prohibiting resources from participating in federal markets might ordinarily be preempted on the basis

21. *Id.*

22. ENERGY PRIMER, *supra* note 16, at 40.

23. Order 745, *supra* note 17, at 16,676.

24. Elec. Power Supply Ass'n v. Fed. Energy Regulatory Comm'n, 753 F.3d 216, 223 (D.C. Cir. 2014), *rev'd*, 136 S. Ct. 760 (2016).

25. Wholesale Competition in Regions with Organized Electric Markets, 73 Fed. Reg. 64,100, 64,107 (Oct. 28, 2008) (to be codified at 18 C.F.R. pt. 35).

that it conflicts with the federal scheme, FERC's demand response regulations expressly carve out a space for states to do just that.[26]

II. Demand Response in the Courts

These pragmatic measures did little to help FERC when its most recent demand response rule, Order 745, was challenged in the D.C. Circuit. A divided panel invalidated Order 745, concluding that because demand response effectively sets the opportunity cost of consumption, it amounted to an impermissible regulation of the retail rate.[27] Neither the majority nor the dissenting opinion spent much time discussing these pragmatic measures.

The Supreme Court proved a different story. The Court upheld FERC's jurisdiction to issue Order 745, concluding (1) that demand response was a practice affecting wholesale rates and (2) that regulation of wholesale demand response did not violate the FPA's prohibition on federal regulation of the retail electricity sales.[28] As noted, that conclusion is significant development for the electricity sector and it has received ample, well-deserved attention. What has not received as much attention is *how* the Court reached that second conclusion. The rest of this Essay will explain that, by countenancing FERC's functionalist approach to the FPA's jurisdictional "bright line," *EPSA* strongly supports the use of similarly pragmatic approaches to addressing future jurisdictional challenges posed by the rapidly evolving electricity sector.

As noted, the critical issue for *EPSA* was whether FERC's regulation of demand response regulated retail sales, thereby exceeding FERC's jurisdiction under the FPA. The Court answered that question by holding that states' exclusive jurisdiction over the retail rate is limited to just that, the actual price consumers pay for electricity.[29] As a result, the Court explained, the FPA does not necessarily preclude FERC from regulating in a manner that affects the retail purchasing decision, so long as it does not regulate the actual retail rate.[30] This strictly literal reading might, at first, seem like the antithesis of a functionalist approach.[31] After all, the opportunity to receive a payment in exchange for reducing electricity consumption surely affects the *economic*

26. Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 779 (2016) (noting that FERC gave states this authority even though it believed it had the authority "to negate such State decisions").

27. *Elec. Power Supply Ass'n*, 753 F.3d at 223. In an alternative holding, the D.C. Circuit also held that the decision was arbitrary and capricious. *Id.* at 224-25.

28. *Elec. Power Supply Ass'n*, 136 S. Ct. at 775-82.

29. *Id.* at 777-78 ("[T]he rate is what it is. It is the price paid, not the price paid *plus* the cost of a forgone economic opportunity." (citation omitted)).

30. *Id.*

31. *See* Feldman, *supra* note 11.

price of that electricity, even if it does not affect the *actual* price—otherwise there would be no point to the payment.

Nevertheless, it is important to remember that the Court here was explaining what the FPA *prevents* FERC from regulating. By constraining the states' exclusive jurisdiction, the Court freed up FERC to regulate the wholesale-market effects of a resource that stands on both sides of the FPA's jurisdictional "bright line."[32] The Court's literal interpretation of the retail rate thus set up a deeply functionalist interpretation of the FPA. It allowed FERC to regulate resources that can participate in the wholesale markets under its jurisdiction, even if those resources have their roots in the retail markets. And as the Court later explained, an expansive interpretation of states' exclusive jurisdiction "would conflict with the Act's core purposes by preventing all use of a tool that no one (not even EPSA) disputes will curb prices and enhance reliability in the wholesale electricity market."[33]

In addition, and quite unlike the D.C. Circuit decision, the Court gave significant weight to the pragmatic steps that FERC took to address the jurisdictional and federalism concerns posed by Order 745. The Court noted that, notwithstanding the fact that FERC's definition of demand response reached practices on both sides of the FPA's jurisdictional divide, FERC took pains to limit Order 745's applicability only to demand response that fell clearly within federal jurisdiction. To make that point clear, the Court described the scope of the rule, italicizing the word "wholesale" six times in a single paragraph.[34]

The Court also cited with approval the "veto" that FERC gave States. Explaining that FERC's "notable solicitude toward the States" was "the finishing blow" to EPSA's jurisdictional arguments, the Court described the veto as powerful evidence that Order 745 represented "a program of cooperative federalism," consistent "with [the FPA's] allocation of federal and state authority."[35]

In brief, the Court concluded that not every slope is slippery, and that FERC's functionalist approach to the FPA's "bright line" aligned well with the "core objects" of federal jurisdiction under the FPA, namely "protect[ing] 'against excessive prices' and ensur[ing] effective transmission of electric power," while nevertheless preserving for the states' jurisdiction to regulate retail sales.[36] By drawing lines consistent with the FPA's underlying purpose,

32. For the argument that *EPSA* may represent a retreat from the "bright line" understanding of the FPA, see Rossi, *supra* note 7 (manuscript at 35-39).

33. *Elec. Power Supply Ass'n*, 136 S. Ct. at 773.

34. *Id.* at 776.

35. *Id.* at 779-80.

36. *Id.* at 781; *see also* New York v. Fed. Energy Regulatory Comm'n, 535 U.S. 1, 6 (2002) (describing the FPA's purpose as "provid[ing] effective federal regulation of the

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FERC had adapted the Act's jurisdictional scheme to accommodate a resource that that Act's drafters could not have anticipated. And by giving states the ability to limit the rule's application within their jurisdiction, FERC had mitigated the federalism concerns created by its regulation of demand response.

III. *EPSA* and the Electricity Industry of the Future

EPSA's functionalist approach to the FPA bodes well for the future of electricity regulation. The electricity sector is becoming increasingly complicated and, in so doing, putting greater stress on the basic jurisdictional divide underlying the FPA. Variable sources of electricity generation, such as wind and solar, are changing the way electricity is produced. And a host of new technologies, including those that support demand response, are changing the way it is consumed. The Court's functionalist approach to the FPA, and especially its endorsement of Order 745's pragmatic approach to jurisdiction and federalism concerns, should empower FERC to address the regulatory challenges posed by the changing electricity sector. A full discussion of those challenges—and the steps FERC has or could take to address them—is well outside the scope of this Essay. Two examples, however, suffice to illustrate the importance of *EPSA* for the future of the FPA.

First, consider the case of "net metering." As a general matter, net metering programs give the owners of distributed photovoltaic solar panels a credit equal to the retail rate for any electricity that they export to the grid—i.e., the surplus electricity generated after subtracting the owner's electricity consumption.[37] Net metering thus effectively pays the owners of distributed solar the retail rate for any electricity that they send to the grid.[38] That excess electricity can then be sold to other electricity consumers.

Like demand response, net metering presents a jurisdictional quandary. On the one hand, the sale of electricity to a local utility, which then sells that electricity to a third party, sounds a lot like "a sale for resale," the basis for federal jurisdiction under the FPA.[39] On the other hand, however, net metering is a retail billing practice that has a primarily local effect,[40] and there

expanding business of transmitting and selling electric power in interstate commerce" (quoting *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758 (1973)).

37. *Net Metering*, SOLAR ENERGY INDUSTRIES ASSOCIATION, http://www.seia.org/policy/distributed-solar/net-metering (last visited Apr. 24, 2016).

38. At least so long as the owner is a net consumer, and those credits can be applied to reduce the net amount of electricity purchased from the local utility.

39. *See, e.g.*, David B. Raskin, *The Regulatory Challenge of Distributed Generation*, 4 HARV. BUS. L. REV. ONLINE 38, 45 (2013).

40. That is, the electricity exported to the grid under net-metering arrangements generally remains on the same local distribution circuit and thus does not enter the interstate

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is little reason to believe that the drafters of the FPA would have intended it to apply to individual homeowners.[41]

FERC has steadfastly declined to exercise jurisdiction over "net metering." To date, it has resolved this jurisdictional quandary by concluding that there is no sale for resale unless the owner is a net exporter of energy over a particular period—i.e., the solar panels produce more electricity than their owner consumes during a month, year, etc.[42] Although FERC's approach has received a mixed reception in the literature,[43] it has yet to be challenged in the courts.

EPSA, of course, does not say anything about the specific way in which FERC has approached net metering. Nevertheless, FERC's attempt to draw quasi-jurisdictional lines consistent with the purposes underlying the FPA is exactly the type of functional approach to its jurisdiction that the Court endorsed in *EPSA*. By interpreting the FPA to apply only to net exports of electricity, FERC has drawn a line that separates the most jurisdictionally problematic cases from those that are clearly within its bailiwick. That type of jurisdictional line drawing bears a strong resemblance to the manner in which FERC limited Order 745 to *wholesale* demand response. Accordingly, *EPSA*'s reasoning may suggest that FERC's approach to net metering is on more solid ground than its critics contend.

Second, a number of states are considering reforms to their basic model of electricity regulation.[44] These reforms are motivated in large part by the emergence of new technologies for generating and consuming electricity. The leading example of these reforms is the New York State Public Service Commission's "Reforming the Energy Vision" proceeding (REV), which

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transmission grid over which FERC exercises jurisdiction. *See* Frank R. Lindh & Thomas W. Bone, Jr., *State Jurisdiction over Distributed Generators*, 34 ENERGY L.J. 499, 521-22, 524-25 (2013).

41. Jim Rossi, *Federalism and the Net Metering Alternative*, 29 ELEC. J. 13, 13 (2016) (arguing that "nothing in federal law supports FERC extending the reach of its jurisdiction to . . . net metering terms for the hundreds of thousands of retail customers that deploy generation resources in compliance with state or utility net metering programs"); *see* Lindh & Bone, *supra* note 40, at 501-02.

42. *Sun Edison LLC*, 129 FERC 61,146 ¶ 2 (2009); *MidAmerican Energy* Co., 94 FERC 61,340 (2001).

43. *Compare* Raskin, *supra* note 39, at 44 (criticizing "FERC's theory that the existence of a 'sale' can be determined by netting metered inflows and outflows over the course of a month") *and* Rossi, *supra* note 41 (contending that FERC's decision to disclaim jurisdiction over net metering is "valid and . . . entirely consistent with the FPA and case law").

44. *See* Julio Romero Agüero & Amin Khodaei, *Roadmaps for the Utility of the Future*, 28 Electricity J. 7, 8 fig.1 (2015) (identifying "Utility of the Future" programs throughout the United States).

envisions a fundamental shift in how the retail electricity sector is regulated.[45] REV contemplates, among other things, developing a state-level analog to the RTOs that operate federal electricity markets.[46] These reforms have the potential to create exactly the sort of "complex matter[s] that lie[] at the confluence of State and Federal jurisdiction" that FERC addressed with respect to demand response in Order 745.[47] Indeed, New York itself has acknowledged the potential jurisdictional issues posed by REV, as the envisioned platform will perform many functions similar to those performed by federal markets.[48]

The REV proceeding is ongoing and it is impossible to say at this point what steps, if any, FERC might take to address the jurisdictional quandaries that it may present.[49] What is important for this Essay, however, is the fact that REV and other state reforms are likely to create more of the jurisdictional challenges on display in *EPSA*. These reforms will, in short, continue to challenge the "bright line" model of the FPA.

EPSA's functionalist approach to the FPA—and its endorsement of FERC's pragmatic efforts to address the jurisdictional and federalism concerns associated with demand response—provides an indication of how FERC can manage these challenges. By endorsing FERC's efforts to apply the FPA's basic jurisdictional model to demand response, *EPSA* should give FERC leeway to pursue similarly pragmatic responses to the challenges posed by reforms such as REV. *EPSA* should thus go a long way toward ensuring that the FPA's basic

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45. State of New York Pub. Serv. Comm'n, Order Adopting Regulatory Policy Framework and Implementation Plan, Case No. 14-M-0101, at 1-2 (Feb. 26, 2015) [hereinafter REV Track One Order].

46. *See id.* at 31-35, 40-45.

47. *See* Order 745, *supra* note 17, at 16,676 and accompanying text.

48. *See* REV Track One Order, *supra* note 45, at 43.

49. In addition, the Supreme Court recently decided another case involving the FPA. Hughes v. Talon Energy Mktg., LLC, No. 14-614, 2016 WL 1562481 (U.S. Apr. 19, 2016). *Hughes* may ultimately have greater implications than *EPSA* for REV and similar reforms. *See* Christiansen, *supra* note 8, at 2-3, 20-24 (discussing the potential implications of *Hughes* for state regulation of the electricity sector). *Hughes* represents, in some sense, the inverse of *EPSA* in that the Court had to determine whether a Maryland regulation crossed the FPA's bright line into impermissible regulation of matters under FERC's jurisdiction. The Court held that it did, although its decision was a very narrow one—finding the Maryland program preempted because it conditioned a subsidy on a generator's successful participation in the RTO market, a rare feature for state-level electricity regulation. *Hughes*, slip op. at 10-11, 2016 WL 1562481, at *8. REV contains no similar mechanism and so *Hughes* appears, at least initially, to have relatively little to say about any jurisdictional quandaries that REV may produce. Nevertheless, how courts apply *Hughes*—and how they consider the interaction between *Hughes* and *EPSA*—will prove tremendously important for the FPA's application to the electricity sector of the future.

jurisdictional framework remains vibrant and can accommodate the fundamental changes that will come with the electricity sector of the future.