##### February 15, 2016

**TO:** All Interested Parties

**FROM:** Elizabeth Mallett, NAESB Deputy Director

**RE: FERC Order No. 745 Demand Response Update**

**Update on FERC Order No. 745 Demand Response –**

As you may remember, the NAESB Demand-Side Management - Energy Efficiency (DSM-EE) Specifications Task Force previously determined that the potential development of an RMQ Demand Response (DR) Measurement and Verification (M&V) Specification to support a certification program for the DSM-EE WEQ and RMQ standards should be postponed due to the pending litigation surrounding FERC Order No. 745, *Demand Response Compensation in Organized Wholesale Energy Markets*.[[1]](#footnote-1) On January 25, 2016, the Supreme Court of the United States ruled 6-2 in favor of the Federal Energy Regulatory Commission (FERC) in the case of *FERC v. Electric Power Supply Association* (EPSA).[[2]](#footnote-2) The decision upholds the demand response regulations issued in FERC Order No. 745 on March 15, 2011 in Docket No. RM10-17-000 and reverses and remands the United States Court of Appeals for the District of Columbia Circuit Court decision[[3]](#footnote-3) to vacate the order.

In the majority opinion, the Supreme Court first undertook a three part analysis to hold that the Federal Power Act “provides FERC with the authority to regulate wholesale market operators’ compensation of demand response bids.” [[4]](#footnote-4) First, the Court’s analysis confirmed that the practices at issue in FERC Order No. 745 directly affect wholesale rates and, therefore, are under FERC’s exclusive jurisdiction under the Federal Power Act. Second, the Court decided that FERC Order No. 745 does not regulate retail electricity sales in violation of the Federal Power Act. Third, the Court determined that the EPSA position would subvert the intent of the Federal Power Act. Specifically, the Court explained that if neither FERC nor the states could regulate wholesale demand response, “then by definition no one can.” Additionally, the Court found that the FERC decision to compensate demand response providers at the same prices paid to generators, is not arbitrary and capricious. Justice Elena Kagan authored the opinion for the majority, while Justice Antonin Scalia filed a dissenting opinion that was joined by Justice Clarence Thomas. Justice Samuel Alito did not take part in the consideration.

The NAESB DR and EE M&V Specification effort began in response to the August 6, 2013 request from Dominion Voltage Inc. to consider the development of the specification. The first part of the DR and EE specification effort - the EE M&V products and services specification has been completed and is now available to the industry. Given the Supreme Court ruling, the DSM-EE Specifications Task Force will be brought back into action and soon announce its first meeting of the year to continue to address the potential development of the DR M&V specification for the certification program.

1. *Demand Response Compensation in Organized Wholesale Energy Markets*, FERC Order No. 745, 76 Fed. Reg. 16658 (March 24, 2011), FERC Stats. and Regs. ¶ 31,322 (2011) (codified 18 CFR §35.28(g)(1)(v)). [↑](#footnote-ref-1)
2. *FERC v Elec. Power Supply Ass’n*, 577 U.S.\_\_, No. 14-840, slip op. (Jan. 25, 2016). [↑](#footnote-ref-2)
3. *Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) [↑](#footnote-ref-3)
4. Federal Power Act, 41 Stat. 1063, as amended, 16 U.S.C. §791a-828c (2012). [↑](#footnote-ref-4)