

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

New England Ratepayers Association)

Docket No. EL20-42-000

**COMMENTS OF THE COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

I. Introduction

On April 14, 2020, the New England Ratepayers Association (NERA), filed a petition for Declaratory Order requesting that the Federal Energy Regulatory Commission (FERC) declare that there is exclusive federal jurisdiction over wholesale energy sales from generation sources located on the customer side of the retail meter, and order that the rates for such sales be priced in accordance with the Public Utility Regulatory Policies Act of 1978 (PURPA) or the Federal Power Act (FPA).¹

II. Comments

The Commonwealth of Pennsylvania Department of Environmental Protection (Department) submits the following general comments in opposition to NERA's petition for Declaratory Order. In addition, the Department supports the comments submitted by the Pennsylvania Public Utility Commission (PA PUC) and the National Association of State Energy Officials to Docket No. EL20-42-000.

A. States have jurisdiction over net metering rules and regulations

In the petition, NERA claims that FERC's jurisdiction includes all deliveries of energy, for compensation, from a net metered customer to an Interconnected Utility. The Department disagrees. To the contrary, states have jurisdiction over net metering rules and regulations. Under the FPA, FERC has jurisdiction over sales of energy at wholesale in interstate commerce and FERC's jurisdiction only extends to matters that are not subject to state regulation.² States have authority over "any other sale of electric energy."³ In addition, through the Energy Policy Act of 2005, the U.S. Congress amended PURPA and directed each state's regulatory authority to consider whether it is appropriate to implement net metering standards in their state.⁴ It is notable that the U.S. Congress provided this directive to state regulatory authorities and not FERC. In fact, nothing in the Energy Policy Act of 2005 or PURPA provides FERC with authority over this state policy decision. Clearly, it is within state purview to decide if and how to regulate net metering contrary to NERA's claim.

¹ Petition for Declaratory Order of New England Ratepayers Association concerning unlawful pricing of certain wholesale sales, April 14, 2020, Docket No. EL20-42-000.

² 16 U.S.C.A. § 824(a).

³ 16 U.S.C.A. § 824(b)(1).

⁴ 16 U.S.C.A. § 2621.

Furthermore, FERC has disclaimed jurisdiction over net metering on at least two occasions, stating that the flow of power from a customer to the electric grid is not sufficient to provide FERC with authority and that it does not amount to a wholesale sale of energy. In *MidAmerican Energy Co.*, FERC found that “no sale occurs when an individual homeowner or farmer (or similar entity such as a business) installs generation and accounts for its dealings with the utility through the practice of netting.”⁵ FERC also noted that under PURPA net billing decisions are left to state regulatory authorities.⁶

In *SunEdison LLC*, FERC stated: “Where there is no net sale over the billing period, the Commission has not viewed its jurisdiction as being implicated; that is, the Commission does not assert jurisdiction when the end-use customer that is also the owner of the generator receives a credit against its retail power purchases from the selling utility.”⁷ FERC further states that when a customer participating in net metering does not make a net sale to a utility, there is no wholesale sale of energy and FERC jurisdiction under the FPA is not implicated.⁸

The D.C. Circuit Court of Appeals has also determined that states have jurisdiction over net metering rules and regulations. In *S. Cal. Edison Co. v. FERC*, the D.C. Circuit Court mentioned that “FERC has jurisdiction over wholesale sales and transmission, whereas the states maintain jurisdiction over retail distribution.”⁹ Moreover, the Court was clear that it is the states that have the authority to set the pricing mechanism in the retail market, not FERC.¹⁰ In *Calpine Corp v. FERC*, the D.C. Circuit Court reaffirmed that retail charges are not within FERC’s jurisdiction.¹¹

It is also worth noting that net metering does not amount to a wholesale sale of energy. In the petition, NERA improperly characterizes customer generators as sellers of energy. However, customer generators are not reselling energy back to the utility, instead they are receiving a credit on their electric bill. The PA PUC regulations are clear that Electric Distribution Companies are to “*credit* a customer-generator at the full retail kilowatt-hour rate...up to the total amount of electricity used by that customer during the billing period [emphasis added].”¹² Customers install distributed solar generation primarily to deploy clean energy and reduce their demand on the electric grid, not to generate power for sale.

For these reasons, NERA’s claim that FERC’s jurisdiction includes all deliveries of energy, for compensation, from a net metered customer to an Interconnected Utility is unfounded and contrary to recent case law.

B. Net Metering is a State Policy Decision and is good Public Policy

⁵ *Midamerican Energy Co.*, 94 FERC 61340, 62263 (Mar. 28, 2001).

⁶ *Id.*

⁷ *Sun Edison LLC*, 129 FERC 61146, 61620 (Nov. 19, 2009).

⁸ *Id.* at 61621.

⁹ *S. Cal. Edison Co. v. FERC*, 603 F.3d 996, 997 (D.C. Cir. 2010).

¹⁰ *Id.* at 1002.

¹¹ *Calpine Corp. v. FERC*, 702 F.3d 41, 50 (D.C. Cir. 2012).

¹² 52 Pa. Code § 75.13.

In the petition, NERA is requesting that FERC take jurisdiction over state policy decisions. If FERC were to grant the petition, FERC would clearly be infringing on state policy directives. State energy policies and programs, including those in Pennsylvania, recognize the importance and primacy of state jurisdiction in specifically defined areas, such as net metering.

In Pennsylvania, net metering is defined as “the means of measuring the difference between the electricity supplied by an electric utility and the electricity generated by a customer-generator when any portion of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator’s requirements for electricity.”¹³ Thus, the intent of net metering is to offset customer load not to become a generator of energy. This also aligns closely with the definition of net metering service under PURPA, where the U.S. Congress also refers to net metering as providing an offset of electric energy, not a sale.¹⁴

NERA claims that net metering makes achieving state renewable energy goals more difficult. However, one of the main reasons states like Pennsylvania have made the policy decision to implement net metering is to encourage distributed renewable energy. In Pennsylvania, distributed generation is a key driver of achieving the current and potentially future Alternative Energy Portfolio Standard (AEPS) goals of the AEPS Act.¹⁵

Pennsylvania recently completed a 30-month stakeholder-driven solar future planning process to identify pathways to achieve an aspirational goal of 10% in-state solar generation by 2030. Pennsylvania’s Solar Future Plan (“the Plan”)¹⁶ predicts that deployment of 1-3 gigawatts (GW) of distributed solar and 7–9 GW of utility scale solar would be needed to meet the 10% aspirational goal. Net metering plays a significant role in achieving the distributed solar component of the goal. In fact, the Plan anticipates that Pennsylvania’s net metering policy remains in place.

In addition, Pennsylvania has already implemented recommendations from the Plan including the addition of a requirement that solar photovoltaic systems installed to satisfy the goals under the AEPS Act be connected to an electric distribution company within Pennsylvania. This allows for Pennsylvanians to fully benefit from the buildout of solar within the state while incentivizing distributed generation through net metering.

NERA also claims that investing in distribution generation means states are not investing as much in utility scale generation. However, it is up to each state to decide as a policy decision where to encourage investments and incentivizing investments in distributed generation does not

¹³ 73 P.S. § 1648.2.

¹⁴ 16 U.S.C.A. § 2621(d)(11).

¹⁵ 73 P.S. §§ 1648.1—1648.8.

¹⁶ Pennsylvania’s Solar Future Plan, Strategies to increase electricity generation from in-state solar energy, November 2018,

<http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=1413595&DocName=PENNSYLVANIA%26%2339%3bS%20SOLAR%20FUTURE%20PLAN.PDF%20%20%3cspan%20style%3D%22color:blue%3b%22%3e%28NEW%29%3c%2Fspan%3e>.

mean states cannot also encourage utility scale solar. In Pennsylvania, for instance, the Department has encouraged both distributed and utility scale solar.

In the petition, NERA references net metering in states like California and New York to help support its assertion that FERC should take jurisdiction over net metering policies. However, it is important to note that these states are quite different and further along in terms of net metering and renewable energy goals than states like Pennsylvania, as discussed further below. NERA also mentions that New York, New England states and California have high residential retail rates, higher than 20 cents per kilowatt hour (kWh) as a reason why net metering should be priced at the wholesale rate. Again, Pennsylvania is very different in this respect. In fact, retail energy rates in Pennsylvania are closer to 13 cents per kwh or lower. These significant differences underscore why net metering billing decisions should be left to state policymakers.

Every state is different, and the Department contends that lumping all of the states together under one policy would be harmful to the public interest. Furthermore, net metering is good public policy because it helps states, like Pennsylvania, lower greenhouse gas emissions and increase diversity and reliability of the electric grid. All of which are essential to the Department's duty to protect the public health and welfare through a cleaner environment.

C. Net metering is not widespread and growing as NERA claims

NERA requests prompt action from FERC based on its claim that net metering is currently widespread and growing. However, net metering is not widespread in Pennsylvania, especially in regard to behind the meter solar. Under the AEPS Act, Pennsylvania's solar energy goal is to achieve 0.5% of electricity generation from solar by 2021.¹⁷ Pennsylvania has yet to achieve that goal. The majority of the 0.5% comes from distributed solar generation sources. If Pennsylvania's net metering policies, which provide an incentive for distributed solar, were to be further limited, it is unlikely that Pennsylvania would achieve this goal.

In fact, Pennsylvania already provides a limitation on the generation potential of a net metering facility. The AEPS Act defines a customer-generator as "a nonutility owner or operator of a net metered distributed generation system with a nameplate capacity of not greater than 50 kilowatts if installed at a residential service..."¹⁸ Residential systems are thus limited in size to discourage customer generators from becoming merchant generators whose primary intent is to sell energy.

III. Conclusion

The adverse public policy implications of net metering that NERA claims to exist in the petition are not present in Pennsylvania and support of this nascent technology and industry is still growing. Additionally, this petition could interfere with Pennsylvania's ability to meet its AEPS goals, as well as undermine progress toward meeting greenhouse gas reduction goals. If net metering policies were to be eliminated in Pennsylvania, the public including those who have installed solar under the current state net metering rules will be harmed, as will the future

¹⁷ 73 P.S. § 1648.3.

¹⁸ 73 P.S. § 1648.2.

expansion of solar technology and the environmental benefits to be obtained from that expansion. The Department therefore recommends that FERC reject the petition for Declaratory Order submitted by NERA.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Patrick McDonnell". The signature is fluid and cursive, with the first name "Patrick" written in a larger, more prominent script than the last name "McDonnell".

Patrick McDonnell
Secretary

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Harrisburg, PA this 15th day of June 2020.

Respectfully submitted,

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FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION