UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Ratepayers Association) Docket No. EL20-42-000

PROTEST OF THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"),[1] the Commission's April 15, 2020 Notice of Petition for Declaratory Order, and the Commission's May 4, 2020 Notice of Extension of Time, the New England States Committee on Electricity ("NESCOE") files this protest in response to the Petition for Declaratory Order filed by the New England Ratepayers Association on April 14, 2020, in the above-captioned proceeding ("Petition").[2]

I. INTRODUCTION

On April 14, 2020, the "New England Ratepayers Association," or "NERA," filed the Petition requesting that the Commission "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'), as applicable."[3] The Petition seeks "prompt action" based on an articulated concern that the pricing of what NERA refers to as "full net metering" ("FNM") is unsettled.[4]

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[1] 18 C.F.R. § 385.211.

[2] NESCOE filed a doc-less Motion to Intervene in this proceeding on April 28, 2020.

[3] Petition at 1.

[4] *Id*. at 1-2.

The Petition should be denied. NERA seeks to overturn nearly two decades of precedent under which the Commission has consistently disclaimed jurisdiction over retail net metering—precedent on which states have relied over the past nineteen years in developing, implementing and regulating retail net metering programs. Indeed, the Commission's clear and consistent articulation of its position on the jurisdictional divide regarding net metering was reaffirmed as recently as last year, in the Commission's rule addressing the participation of electric storage resources in wholesale markets—a proceeding in which NERA declined to participate. The Petition's theory that a pair of eight-plus-year old United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") cases regarding station power undermines the Commission's disclaimer of jurisdiction over retail net metering is faulty and in no way justifies the Commission's sudden interference in programs that go to the heart of state regulation.

Nor does the Petition provide a sound legal basis to overturn the Commission's decision to respect the dividing line between state and federal jurisdiction, consistent with the Federal Power Act and the Energy Policy Act of 2005[5] ("EPAct 2005").[6] The policy arguments the Petition raises in support of its request are irrelevant to the question of whether the Commission has jurisdiction over retail net metering and ignore the roles that state legislatures, public utility commissions, energy offices, and consumer advocates play in addressing the very policies NERA raises. Issues regarding how to best incentivize investment in local storage and

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[5] Pub. L. No. 109-58, 119 Stat. 594.

[6] *See* Section II.C *infra*.

renewable resources and how best to address income inequalities are precisely the types of issues that states should be addressing in their local jurisdictions.[7]

Granting the Petition would have the opposite result of what NERA purports to seek—clarity.[8] Reversing direction on a long-standing course of disclaimer of jurisdiction over net metering would *create* substantial confusion over the status of existing net metering programs, to the detriment of the millions of residential customers who have already invested in rooftop solar panels, and would undoubtedly result in protracted litigation over the various net metering programs currently in place.[9]

Throughout the Petition, NERA loosely refers to three classifications of net metering programs: "full net metering" programs that NERA says are the subject of its Petition,[10] net metering programs that NERA believes are not currently compliant with the Commission's precedent,[11] and net metering programs that NERA believes are "true" net metering and would still be regulated by the Commission under its view of the world.[12] The fact that NERA may have a competing vision as to which programs should be under the Commission's jurisdiction does not make the Petition actionable. Nor does it outweigh the regulatory disruption that would result if the Commission were to grant the Petition. If there are specific net metering programs

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7 *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("the structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons") (internal quotations and citations omitted).

8 *See* Petition, *e.g.,* at 2 ("it is in the public interest for the Commission to address this Petition promptly so that the pricing of FNM sales becomes settled and affected parties can make appropriate decisions.").

9 According to the U.S. Energy Information Administration Form 861M, as of the end of 2019, there were over two million residential net metering customers. *See* https://www.eia.gov/electricity/data/eia861m/#netmeter.

10 *See* Petition, *e.g.*, at 1-3.

11 *See id., e.g.*, at n.11.

12 *See id., e.g.*, at n.13.

that NERA believes are not complying with the Commission's precedent, it has the right to file a complaint pursuant to FPA section 206.[13] In the absence of any such documented complaint, the Commission should not upend nineteen years of respect for the jurisdictional line between state and federal regulation based on inchoate and unsupported claims. Instead, the Commission should reaffirm its disclaimer of jurisdiction over net metering for what would be the fourth time since its initial disclaimer of jurisdiction in 2001.

II. PROTEST

A. The Petition's Request To Overturn Nearly Two Decades of Precedent Should Be Denied.

1. The Commission Has Consistently Disclaimed Jurisdiction Over Net Metering.

The Commission has for nearly two decades disclaimed jurisdiction over net metering. In response to an argument that net metering (referred to then as "net billing") would require a utility to pay its retail rates for all power generated by an "alternate energy production" facility ("AEP"), the Commission corrected this misunderstanding:

> This is not how net billing works. Net billing involves only one meter and one net transaction. Under net billing, the AEP produces power primarily for the owner's needs. However, at times the AEP generates 'excess' power which is supplied to the utility through the single meter. Other times, the AEP may not generate sufficient power for the owner's needs and the AEP draws power from the utility through the single meter. Electricity flows through the meter in both directions and is netted out and one meter reading made at the end of a billing period. Strictly speaking, MidAmerican only 'pays' for the net negative kWhs, if any, recorded by this single meter. MidAmerican's PURPA

[13] 16 U.S.C. § 824e.

> tariff…applies only if net negative kWhs are recorded in a given billing month.[14]

Just a few years after *MidAmerican*, the Commission reaffirmed its position on net metering in Order No. 2003-A as follows:

> Net metering allows a retail electric customer to produce and sell power onto the Transmission System *without being subject to the Commission's jurisdiction*. A participant in a net metering program must be a net consumer of electricity -- but for portions of the day or portions of the billing cycle, it may produce more electricity than it can use itself. This electricity is sent back onto the Transmission System to be consumed by other end-users. Since the program participant is still a net consumer of electricity, it receives an electric bill at the end of the billing cycle that is reduced by the amount of energy it sold back to the utility. Essentially, the electric meter "runs backwards" during the portion of the billing cycle when the load produces more power that it needs, and runs normally when the load takes electricity off the system.[15]

In response to arguments that the Commission's view of net metering would interfere with state authority, the Commission emphasized that "under most circumstances the Commission does not exert jurisdiction over a net energy metering arrangement when the owner

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[14] *MidAmerican Energy Co.*, Order Denying Request for Declaratory Order, 94 FERC ¶ 61,340, at 62,262 (2001) ("*MidAmerican*") (finding that the Iowa Utilities Board's ("Iowa Board") implementation of Iowa's Alternative Energy Production Statute, which requires the use of net billing, was not preempted by PURPA).

[15] *Standardization of Generator Interconnection Agreements and Procedures*, *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220, at P 744 (2004) (emphasis supplied) ("Order No. 2003-A"), *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007) ("*National Association*"). In the Commission's small generator interconnection rulemaking, the Commission was faced with a request whether that rule "would apply to a net metering arrangement that allows a Small Generating Facility to net only a portion of its output and resell the remainder to the host utility…[and]… what happens if it sells the non-net metered portion of its output to a third party." *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, 111 FERC ¶ 61,220, at P 476 (2005) ("Order No. 2006"), *order on reh'g*, Order No. 2006-A, 113 FERC ¶ 61,195 (2005), *order granting clarification*, Order No. 2006-B, 116 FERC ¶ 61,046 (2006). Although the Commission did not explicitly address the net metering question, it did state that "the Commission's assertion of jurisdiction in this Final Rule is identical to the jurisdiction asserted in Order Nos. 2003 and 888." Order No. 2006 at P 481.

of the generator receives a credit against its retail power purchases from the selling utility. Only if the Generating Facility produces more energy than it needs and makes a net sale of energy to a utility over the applicable billing period would the Commission assert jurisdiction."[16]

Order No. 2003 was appealed at the D.C. Circuit. And while the Court rejected arguments that the Commission had exceeded its authority in claiming jurisdiction over dual-use (transmission-distribution) facilities,[17] no one objected at that time to the Commission's continuing disclaimer of jurisdiction over net metering.

Several years after Order No. 2003-A, the Commission reiterated this same definition of net metering in its *SunEdison* decision.[18] The Commission also reiterated the guidance it had provided eight years earlier in *MidAmerican*:

> 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. Only if the end-use customer participating in the net metering program produces more energy than it needs over the applicable billing period, and thus is considered to have made a net sale of energy to a utility over the applicable billing period, has the Commission asserted jurisdiction.[[19]]

Finally, in 2018, the Commission reaffirmed its perspective on jurisdiction over net metering in its rulemaking addressing participation of electric storage resources in wholesale

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[16] Order No. 2003-A at P 747.

[17] *National Association*, 475 F.3d at 1282 (rejecting challenge to FERC's "assertion of jurisdiction over interconnections with dual-use facilities (ones for transmission and local distribution)" (citing to Order No. 2003-A at P 730)).

[18] *Sun Edison LLC*, Declaratory Order, 129 FERC ¶ 61,146, at P 17 (2009) ("*SunEdison*") (quoting Order No. 2003-A at P 744), *reh'g granted on other grounds*, 131 FERC ¶ 61,213 (2010).

[19] *SunEdison* at P 18 (citing *MidAmerican* at 62,262-63).

markets: "We note that injections of electric energy back to the grid do not necessarily trigger the Commission's jurisdiction."[20] No one sought rehearing of that finding and the case is currently pending at the D.C. Circuit on other grounds.

2. There Is No Merit to NERA's Argument That the Commission's Prior Cases Disclaiming Jurisdiction Over Net Metering Should Be Overturned Now.

Eleven years after *SunEdison* was issued, NERA now complains that the Commission "never explained in *SunEdison* why it was appropriate to net the inflows and outflows in order to determine whether a jurisdictional transaction has occurred in these circumstances,"[21] and suggests that this lack of explanation renders *SunEdison* invalid. It does not. Had NERA thought that the Commission's explanation in *SunEdison* was inadequate it could have sought rehearing. No party sought rehearing. To the contrary, this precedent has been left intact, with states having relied on the Commission's consistent and clear delineation of jurisdiction in adopting laws and regulations and implementing state retail net metering programs.

The Petition's primary theory is that eight years ago (*i.e.*, "recently"), in an opinion affirming the Commission's disclaimer of jurisdiction over station power, the D.C. Circuit explained that FERC's jurisdiction cannot be established based on the interval deemed appropriate for netting station power. And that this "recent" development has rendered the Commission's prior disclaimers of jurisdiction over retail net metering invalid. And that as a

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[20] *Elec. Storage Participation in Mkts. Operated by Regional Transmission Orgs. and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127, at n.49 (2018) ("Order No. 841"), *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,154, at n.12 (2019) ("Order No. 841-A"), *appeal pending sub nom. Nat'l Ass'n of Regulatory Utility Comm'rs, et al. v. FERC*, Nos. 19-1142, *et al*. (D.C. Cir. filed July 11, 2019).

[21] Petition at 12.

result, according to the Petition, confusion has ensued, and the Commission must act promptly to clear up said confusion.

Drilling further into NERA's analysis does not help the Petition's cause. NERA contends that the reasoning of *SunEdison* "*was always* inconsistent with Commission precedent"[22] and that "[t]he Commission never explained in *SunEdison* why it was appropriate to net the inflows and outflows in order to determine whether a jurisdictional transaction has occurred in these circumstances."[23]

To analyze these claims, it is helpful to begin with examining *SunEdison*'s predecessor case, *MidAmerican*. There, the Commission rejected a petition for enforcement filed pursuant to section 210(h) of PURPA[24] and denied MidAmerican's request for a declaratory order that certain orders of the Iowa Board were preempted by federal law.

The Commission framed the issue as follows:

> In essence, MidAmerican is asking this Commission to declare that when, for example, individual homeowners or farmers install small generation facilities to reduce purchases from a utility, a state is preempted from allowing the individual homeowner's or farmer's purchase or sale of power from being measured on a net basis, i.e., that PURPA and the FPA require that two meters be installed in these situations, one to measure the flow of power from the utility to the homeowner or farmer, and another to measure the flow of power from the homeowner or farmer to the utility. MidAmerican argues that every flow of power constitutes a sale, and, in particular, that every flow of power from a homeowner or farmer to MidAmerican must be priced consistent with the requirements of either PURPA or the FPA. We find no such requirement.[[25]]

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22 *Id*. (emphasis supplied).

23 *Id*.

24 16 U.S. Code § 824a–3(h).

25 *MidAmerican* at 62,263.

The Commission emphasized that "[i]n implementing PURPA, the Commission … recognized that net billing arrangements like those at issue here would be appropriate in some situations, and left the decision of when to do so to state regulatory authorities."[26] The Commission found that in this case, the Iowa Board "permitted the netting to be measured over the normal monthly billing cycle for retail customers." The Commission concluded that there was "no reason…to interfere with the Iowa Board's determination to permit net metering, and to permit it on a monthly basis."[27]

Next, in *SunEdison*, the Commission (after reiterating its Order No. 2003-A definition of net metering and the delineation of when FERC jurisdiction kicks in)[28] explained that "[o]nly if the end-use customer participating in the net metering program produces more energy than it needs over the applicable billing period, and thus is considered to have made a net sale of energy to a utility over the applicable billing period, has the Commission asserted jurisdiction."[29] The Commission noted that it previously found in *MidAmerican* "that a one-month billing period was reasonable, but indicated that other billing periods could also be reasonable."[30] The Commission explained further:

> [U]nder the holding of *MidAmerican*, where there is no net sale over the applicable billing period to the local load-serving utility, there is no sale; accordingly, where there is no net sale over the

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[26] *Id*. (citing *Small Power Production and Cogeneration Facilities: Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. Regulations Preambles 1977-1981 ¶ 30,128 at 30,879 (1980), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. Regulations Preambles 1977-1981 P30,160 (1980), *aff'd in part and vacated in part, American Electric Power Services Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir 1982), *rev'd in part, American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983)).

[27] *MidAmerican* at 62,264.

[28] *SunEdison* at P 17 (quoting Order No. 2003-A at P 744). *See* n.15 *supra*.

[29] *Id*. at P 18.

[30] *Id.* at n.10 (citing *MidAmerican* at 62,262-64).

> applicable billing period to the local load-serving utility by the end-use customer that is the purchaser of SunEdison's solar-generated electric energy, SunEdison is likewise not making a sale "at wholesale," i.e., a "sale for resale."[[31]]

NERA has not put forth any legitimate reason for the Commission to start interfering with states' determinations to permit net metering in the first instance—determinations which include the right to decide the appropriate billing interval. There appear to be three components to NERA's argument: (i) that the D.C. Circuit opinion in *Calpine*[32] has undermined the validity of *MidAmerican* and *SunEdison* (not to mention Order No. 2003-A and Order No. 841, although NERA's Petition is conspicuously absent of any discussion of those rulemakings); (ii) the Commission must suddenly, after nineteen years, start interfering with the decisions of states to set the relevant netting period for retail net metering programs and (iii) that the relevant period that the Commission must adopt is an interval of an hour or less. These arguments are all without merit.

The heart of NERA's argument, that "the D.C. Circuit has more recently rejected the 'netting' theory of jurisdiction that stands at the heart of *SunEdison*[,]"[33] fails for several reasons.

First, as a preliminary matter, it is questionable whether an opinion issued eight years ago can be characterized as particularly "recent," when the recency of the opinion is the purported basis for a sudden and pressing need to overturn decades of precedent (on an expedited schedule during a worldwide pandemic). What *is* more recent, however, is the Commission's electric storage participation rule, issued in 2018, in which the Commission reaffirmed its disclaimer of

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[31] *Id*. at P 19.

[32] *Calpine Corp*. *v*. *FERC*, 702 F.3d 41 (D.C. Cir. 2012) ("*Calpine*").

[33] Petition at 12 (citing *Calpine*).

jurisdiction over net metering: "We note that injections of electric energy back to the grid do not necessarily trigger the Commission's jurisdiction."[34] In Order No. 841, the Commission described *SunEdison's* holding as follows: "the Commission's jurisdiction would arise only when a facility operating under a state net metering program produces more power than it consumes over the relevant netting period."[35] Several parties sought appellate review of Order Nos. 841 and 841-A. Indeed, briefing was just completed in this case earlier this year and oral argument held in early May 2020. NERA had the opportunity to seek rehearing of the Commission's statements in Order Nos. 841 and 841-A reaffirming the Commission's description of net metering and disclaimer over jurisdiction over retail net metering programs. NERA chose not to do so. It would be inappropriate to grant a Petition for Declaratory Order that seeks to overturn nineteen years of well-settled legal precedent—particularly when this precedent was recently affirmed in a rulemaking proceeding that is currently pending at the D.C. Circuit.

Second, NERA's contention that "[t]he court's reversal of the Commission's station power cases removes the foundation upon which the Commission rested its disclaimer of jurisdiction in Sun *Edison*"[36] mischaracterizes both the D.C. Circuit's holdings and their applicability to retail net metering. A fundamental point that NERA glosses over is that in the D.C. Circuit opinions it cites, the Court upheld FERC's determination that it *lacked* jurisdiction over station power.

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[34] Order No. 841 at n.49; Order No. 841-A at n.12.

[35] Order No. 841 at n.49.

[36] Petition at 13.

NERA contends that the D.C. Circuit "has held that the Commission cannot determine jurisdiction based on monthly (or any other) netting of injections into and withdrawals from the electric grid. The law is now clear that a wholesale sale of energy is being made *whenever the amount of energy generated exceeds the retail load behind the meter*, regardless of the duration of the excess, and the price of energy must be determined in accordance with federal law."[37] In other words, NERA's arguments rest on the notion that the Commission's prior disclaimers of jurisdiction were a product of the Commission having decided the netting interval was one month. And that in NERA's view, one month has always been and is certainly now too long to be appropriate any further—and must be remedied with prompt action.

NERA misses the main point. The issue is not the length of the netting period. And the issue is not that the Commission's disclaimer of jurisdiction ever hinged on the length of the netting period. To the contrary, the D.C. Circuit held that the Commission lacks jurisdiction to set netting intervals for retail charges, period. Specially, in *So. Cal. Edison*, the Court held that the Commission does not have the authority to "preempt the state's authority to set the netting period [] in the retail market."[38]

NERA tries to support its position by referring to a hypothetical that the Court discussed in *Calpine*.[39] However, NERA ignores that in responding to the hypothetical presented in *Calpine*, the Court framed its response by stating: "But suppose (*as is the case*) that FERC lacks jurisdiction to set netting intervals for retail charges and that a state established *hourly* netting for

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[37] *Id*. at 8 (emphasis supplied).

[38] *So. Cal. Edison* Co. *v. FERC*, 603 F.3d 996, 1002 (2010).

[39] Petition at 17 (citing to *Calpine* at 46, 48).

this purpose…"[40] Indeed, as the Court pointed out, the Commission's remand order had acknowledged "that it lacked a jurisdictional basis to determine when the provision of station power constitutes a retail sale and indicating that the netting interval in the CAISO tariff could only govern Commission-jurisdictional transmission charges, not retail charges."[41]

The Court's statement that the Commission lacks jurisdiction to set netting intervals for retail charges reinforces, rather than undermines, the Commission's decisions in *MidAmerican* and *SunEdison* to allow the states to determine the relevant netting interval for the retail net metering programs. As the D.C. Circuit held in *Calpine*:

> [The] situation — where utilities were treating wholesale transactions as retail sales — is worlds apart from the present case, which deals with FERC's authority to regulate truly local charges. As our analysis thus far should make clear, the tariff's netting interval does not "allocate power" between energy consumed as station power and energy available at wholesale; it simply determines under what conditions generators will be assessed transmission and retail charges for their use of station power.[[42]]

In short, the D.C. Circuit opinions cited by NERA support the Commission's disclaimer of jurisdiction in *MidAmerican* and *SunEdison*. And, more importantly, they support the Commission's denial of NERA's Petition here.

NERA's conclusion that "*MidAmerican Energy* and *SunEdison* are now 'dead letters' even assuming that they were properly decided in the first instance"[43] is wrong. This statement evinces a lack of understanding of what a "dead letter" is. A "dead letter" is "a statute, law or

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40 *Calpine* at 48 (first emphasis supplied; second emphasis in original).

41 *Id.* at 45.

42 *Calpine* at 50 (with "that situation" referring to the Court's decision in *Entergy Services, Inc. v. FERC*, 400 F.3d 5 (D.C. Cir. 2005)).

43 Petition at 18.

ordinance that is no longer enforced but has not been formally repealed."[44] The Commission has never stopped "enforcing" *MidAmerican* and *SunEdison*. Just because NERA wishes this precedent were no longer in effect does not render them "dead letters."

B. The Commission and Courts Have Already Rejected Arguments That the Commission's Authority Over Wholesale Transactions Requires the Commission to Assert Jurisdiction Over Retail Net Metering.

NERA's argument that the Commission has plenary authority over net metering because of the Commission's jurisdiction over wholesale energy transactions[45] is without merit. NERA's argument that a wholesale sale takes place *whenever* the amount of energy generated exceed the amount used apparently hinges on a theory that the billing interval should be an hour or less. As discussed above, the determination of that interval is set by the states, not the Commission. And as discussed in Section II.D, *infra*, this aspect of the Petition seems to be a thinly veiled and unsubstantiated complaint against certain unidentified state rules, rather than a request for a declaratory order, and should be rejected for failing to meet the FPA section 206 burden.

This argument has already been raised and disposed of by the very D.C. Circuit cases on which NERA relies. The Petitioner in *Calpine* made the same argument as NERA now makes. In *Calpine*, the Court explained that although *So. Cal. Edison* did not squarely reject this same argument, the Court had not found it compelling:

> Calpine is therefore correct that *Southern California Edison* did not specifically preclude FERC from asserting alternate bases for

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[44] Collins Dictionary of Law © W.J. Stewart (2006), retrieved May 23, 2020 from https://legal-dictionary.thefreedictionary.com. *See Hays v. City of Urbana*, 104 F.3d 102, 103 (7th Cir. 1997) ("The City Attorney has not announced that the amended ordinance is a dead letter, never to be enforced"); *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 835 (1950) ("Respondent did not seek to have this provision of the agreement enforced, and the decree of the District Court does not enforce it. It may well have been a dead letter from the beginning, as indicated by the fact that, as petitioner averred in its answer, it has never observed this provision of the agreement.").

[45] *See* Petition at 18-24.

> jurisdiction upon remand…[including] as Calpine primarily argues, by relying on FERC's jurisdiction over wholesale. Our opinion did note that we failed to see any strong basis for jurisdiction on this latter basis, but FERC had not relied on its wholesale jurisdiction, so it is fair to say that we did not decide this question.[[46]]

The Court in *Calpine* went on to explain that "Petitioners make no real further attempt to connect FERC's jurisdiction *over transmission* to state netting rules (understandably in light of our prior opinion); instead, their focus is on FERC's wholesale jurisdiction. *The Commission concluded on remand, however, that its own prior decisions had already rejected its wholesale jurisdiction as a basis for regulating station power.*"[47] The Court explained further that in *PJM II*, specifically confronted with the question of whether the Commission had wholesale jurisdiction over third-party provision of station power, the Commission held that just as self-supply of station power does not constitute a sale "for end use or otherwise," "no means of procuring station power [including third-party provision] could plausibly be construed as a sale for end use subject to FERC's wholesale jurisdiction."[48]

Reaching even farther, NERA drops in a footnote an argument that "…the mispriced FNM energy distorts outcomes in the wholesale markets subject to this Commission's jurisdiction. A reasonable argument could be made, consistent with the holding in *FERC v. Elec. Power Supply Ass'n,* 136 S. Ct. 760, 773 (2016) [(*"EPSA"*)], that the Commission has authority

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[46] *Calpine* at 46 (citing *So. Cal. Edison*, 603 F.3d at 999 n.5).

[47] *Id*. at 47 (citing *PJM Interconnection, LLC*, 94 FERC ¶ 61,251 (2001) ("*PJM II*")) (emphasis supplied).

[48] *Id*. at 47 (quoting *PJM II* at 61,891).

to assert jurisdiction over the entirety of this energy output due to the substantial impact of FNM on wholesale prices."[49]

This footnote's affects-wholesale-prices argument has also been rejected by the D.C. Circuit case on which the Petition relies. The Court in *Calpine* explained that *PJM II* "rejected the claim that the third-party provision of station power was within FERC's jurisdiction because it 'affects or relates' to wholesale services. That station power was a necessary input to energy production did not constitute a sufficient 'nexus' with wholesale transactions to justify the assertion of jurisdiction."[50] Indeed, as the Commission explained in its brief to the Court in the *Calpine* appeal, "[t]hroughout the development of its station power policies, the Commission 'considered and rejected arguments' that the procurement of station power involves a wholesale sale or 'affects or pertains' to wholesale services, and ultimately 'based its station power authority on its jurisdiction over interstate transmission service.'"[51]

NERA goes on to argue that the Commission must reverse its disclaimer of jurisdiction over retail net metering because "[t]he FPA recognizes no '*de minimis*' exception with regard to FERC's jurisdiction over the rates for wholesale sales."[52] NERA's argument is not supported by the *Prior Notice Rule*, in which the Commission addressed a request for it to decline jurisdiction

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49 Petition at n.15.

50 *Calpine* at 47 (quoting *PJM II* at 61,894). *See also id*. at 47-48 (quoting *City of Cleveland, Ohio v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) ("[t]here is an infinitude of practices affecting rates and service. The statutory directive must reasonably be read to require the recitation of only those practices that affect rates and service *significantly*…") (emphasis in original)).

51 Brief of Respondent Federal Energy Regulatory Commission (Feb. 9, 2012) at 32, *Calpine Corp. v. FERC*, D.C. Cir. Case No. 11-1122 (quoting *Duke Energy Moss Landing LLC v. California Independent System Operator Corp.*, 134 FERC ¶ 61,151, at P 20 (2011)).

52 Petition at 20 (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,995 (1993) ("*Prior Notice Rule*"); additional citations omitted).

over “*de minimis* contracts.” The Commission explained that the term *de minimis* “usually denotes transactions producing revenue below a stated amount of money.”[53] In the paragraph directly preceding the quotation in NERA’s Petition,[54] the Commission explained that:

> The general topic of jurisdiction over *de minimis* transactions has arisen in other contexts. The question has come up in two guises: one, whether Congress erected a jurisdictional threshold; the other, whether the Commission may, in its discretion, decline to regulate in marginal situations. As to the first, the courts have unequivocally held that Congress did not. *The Commission, on the other hand, may selectively decline jurisdiction*.[[55]]

NERA conveniently omits this last sentence. Similarly, NERA ignores that in *Connecticut Power & Light Company v. FPC*, while the Court did “not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not think it would be appropriate to supply such a jurisdictional limitation by construction,”[56] “[t]he Court left the door open for some ‘*de minimis*’ exemption. The majority opinion added in *dictum*, without elaboration…that ‘Congress appears to have left to the Commission’s sound administrative discretion to determine whether or not to assert its authority in such situations.’”[57]

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[53] *Prior Notice Rule* at 61,994.

[54] NERA Petition at n.41 (“The FPA makes no mention of a ‘de minimis’ exception for otherwise jurisdictional transactions. *Moreover, the courts have rejected the notion*.’ (alteration in original))” (quoting *Prior Notice Rule* at 61,995) (emphasis in Petition).

[55] *Prior Notice Rule* at 61,995 (emphasis supplied).

[56] Petition at n.41 (quoting *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 536 (1945)).

[57] *Prior Notice Rule* at 61,995 (quoting *Conn. Light & Power Co.*, 324 U.S. at 536).

C. The Commission's Precedent Disclaiming Jurisdiction Over Retail Net Metering Is Consistent with the Dividing Line That Congress Has Established.

The Federal Power Act divides jurisdiction over the sale of electricity between the Commission and the states. The Commission's jurisdiction is expressly limited to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce."[58] Section 201(b)(1) of the FPA goes on to state that Commission jurisdiction does not extend to "any other sale of electric energy."[59] As discussed above in Section II.B, retail net metering is *not* considered part of the Commission's transmission jurisdiction; nor is it considered part of the Commission's jurisdiction over wholesale sales.

Moreover, Section 1251 of EPAct 2005 amended PURPA, requiring states to consider, among other things, certain standards, including net metering. Section 1251 of EPAct 2005 defined "net metering service" as "service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period."[60] Granting the broad, sweeping declaration of jurisdiction over net metering that the Petition requests would be inconsistent with this provision of the legislation which left it to the states—not the Commission—to consider whether to implement net metering.

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[58] 16 U.S.C. § 824(b)(1).

[59] *Id.*

[60] Section 1251 of EPAct 2005 modified section 111(d) of PURPA; the definition of "net metering service" is codified at 16 U.S.C. § 2621(d)(11).

NERA's theory is not borne out by the plain language in the statute. It is a "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.' Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law."[61]

When EPAct 2005 was enacted, FERC had already disclaimed jurisdiction over net metering in *MidAmerican* and in Order 2003-A. Had Congress in its extensive, thorough piece of legislation wanted to change this approach to jurisdiction over net metering, it could have, but chose not to do so. There is no basis to conclude that EPAct 2005's requirement that states consider whether to adopt net metering programs indicated a reversal in the entity—FERC rather than the state—that has jurisdiction over such programs. As NERA itself recognizes, the amendment to PURPA section 111(d) "does not purport either to change the existing rules for the pricing of [qualifying facility or] QF energy or to redefine the jurisdictional line between FERC and State jurisdiction."[62] The Petition provides no sound legal basis to redefine any jurisdictional lines over net metering fourteen years after EPAct 2005 was enacted.

Inconsistently and inexplicably, NERA argues that (i) the amendment to PURPA implemented by this provision of EPAct 2005 entitles a net metered customer "to an offset for '*energy* provided by the electric utility to the electric customer during the applicable billing

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[61] *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (quoting *Perrin v. United States*, 444 U. S. 37, 42 (1979)).

[62] Petition at 37.

[cycle];"[63] and (ii) this provision therefore does not apply to (still unidentified) "state FNM programs today, in which the customer is given an offset equal to the full retail electric rate, which includes *not only energy but also transmission, distribution, ancillary services and other state-imposed costs*."[64] NERA ignores that net metering is part of state-regulated bundled retail service, however.[65] NERA's view, if sanctioned by the Commission, would in essence unbundle retail net metering from other state-regulated services. This would be contrary to *New York v. FERC*,[66] however, in which the Supreme Court held that the Commission properly declined to exercise jurisdiction over bundled retail transmission. As the Court explained:

> [E]ven if we assume, for present purposes, that Enron is *correct* in its claim that the FPA gives FERC the authority to regulate the transmission component of a bundled retail sale, we nevertheless conclude that the agency had discretion to decline to assert such jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues. Like the Court of Appeals, we are satisfied that FERC's choice not to assert jurisdiction over bundled retail transmissions in a rulemaking proceeding focusing on the wholesale market "represents a statutorily permissible policy choice."[[67]]

Just as the Commission's determination not to exercise its discretion to assert jurisdiction over bundled retail transmission was reasonable and appropriate, continuing to decline to assert jurisdiction over retail net metering would represent a "statutorily permissible policy choice." And this is a policy choice the Commission should continue to make.

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[63] *Id*. at 35 (citing 16 U.S.C. § 2621(d)(11) (emphasis supplied by NERA)).

[64] *Id*. at 36 (emphasis supplied).

[65] *See* "The Case Against Direct FERC Regulation of Distributed Energy Resources," Ari Peskoe, *Harvard Law School Environmental & Energy Law Program* (Sept. 20, 2018), at 17.

[66] 535 U.S. 1 (2002).

[67] *New York v. FERC*, 535 U.S. at 28 (quoting case below, *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 695-696 (D.C. Cir. 2000)).

This choice would be consistent with the cooperative federalism approach commended by the Supreme Court in *EPSA*. The demand response program at issue in *EPSA* is not unlike retail net metering programs in relevant ways. Under that demand response rule, FERC allowed states "veto power" over demand response participation in the wholesale market "in recognition of the linkage between wholesale and retail markets and the States' role in overseeing retail sales."[68] The Supreme Court characterized this arrangement as "cooperative federalism, in which the States retain the last word[,]"[69] noting that wholesale and retail markets "are not hermetically sealed from each other."[70] Granting NERA's Petition would represent a significant and unwarranted retrenchment from the concept of "cooperative federalism," endorsed by the Supreme Court. "The FPA is a paragon of cooperative federalism; it divides responsibility for the regulation of energy between state and federal regulators."[71] As Justice Sotomayor explained:

> In short, the Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence. Pre-emption inquiries related to such collaborative programs are particularly delicate. This Court has said that where "coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." That is not to say that pre-emption has no role in such programs, but courts must be careful not to confuse the 'congressionally designed interplay between state and federal

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68 *EPSA*, 136 S. Ct. at 779.

69 *Id*. at 780.

70 *Id*. at 776.

71 *Coal. for Competitive Elec. v. Zibelman*, 272 F. Supp. 3d 554, 567 (S.D.N.Y. 2017) (citing *Hughes v. Talen Energy Mktg.*, LLC, 136 S. Ct. 1288, 1292 (2016) ("*Hughes*")).

> regulation," for impermissible tension that requires pre-emption under the Supremacy Clause.[72]

Exercising discretion to continue to disclaim jurisdiction over retail net metering would further the goal of cooperative federalism.[73] To accomplish this important objective, and remain consistent with Congressional intent, the Commission must deny the Petition.

D. To the Extent the Commission Does Not Deny the Petition Outright, It Should Dismiss Those Aspects of the Petition That Are Thinly Veiled and Unsupported Complaints.

In addition to asking the Commission to declare full jurisdiction over retail net metering programs, the Petition aimlessly weaves in different requests for relief throughout. NERA complains at times that existing state net metering programs are not compliant with even NERA's view of what the dividing line of jurisdiction is. For example, the Petition complains that "many states are not even in compliance with existing Commission precedent for determining whether a wholesale sale has taken place,"[74] going so far as to tuck into a footnote a broad yet vague request that "whether or not the Commission grants this Petition, it should direct all sellers of energy to comply with federal law with respect to these excess sales."[75] It is unclear what remedy NERA has in mind with respect to this blanket request, due to the lack of detail and supporting information in the Petition.

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72 *Hughes* at 1300 (Sotomayor, J., concurring) (quoting *New York State Dept. of Social Servs. v. Dublino*, 413 U. S. 405, 421 (1973); and quoting *Northwest Central Pipeline Corp. v. State Corporation, Comm'n of Kan.*, 489 U. S. 493, 518 (1989)).

73 *See also* Order No. 841-A, McNamee, Commissioner, dissent, 167 FERC ¶ 61,154, P 3 (footnotes & citations omitted) ("[E]ven if the majority thought they could rightly exercise jurisdiction in this matter, I think they should have furthered the path of 'cooperative federalism' by permitting the states to choose whether or not behind-the-meter and distribution-connected [energy storage resources] may participate in the wholesale markets through an opt-out provision.") (citing *EPSA* at 779-80).

74 *Id*. at 4.

75 *Id*. at n.10.

The Petition acknowledges that "[t]o the extent that no excess energy or energy physically delivered to the local utility is involved (*i.e.*, no wholesale energy sale is taking place), the problem with FNM pricing should be resolved at the State level through the appropriate pricing of retail service"[76] and notes that it is "not asking the Commission to assert jurisdiction in these circumstances."[77] However, tucked into a footnote, NERA then argues to the contrary, that "[a] reasonable argument could be made, consistent with the holding in [*EPSA* at 773], that the Commission has authority to assert jurisdiction over the entirety of this energy output due to the substantial impact of FNM on wholesale prices."[78] There is no basis for this argument as discussed above in Section II.B.

NERA's scattershot arguments reinforce the point that to the extent that the Petition's objection is to specific state laws or regulations that it believes do not comport with the Commission's clear and long-standing precedent on net metering, a request for a declaratory order is not the appropriate vehicle. Rather, NERA needs to file a complaint pursuant to section 206 of the FPA identifying with specificity what law, rule or regulation it believes to be non-compliant and shouldering the burden of demonstrating that such law, rule or regulation is preempted by the FPA or otherwise unjust, unreasonable or unduly discriminatory or preferential. Similarly, to the extent that NERA believes that a specific state law or regulation is inconsistent with PURPA, it has the right to ask the Commission to take enforcement action

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[76] *Id*. at 10-11.

[77] *Id*. at 11.

[78] *Id*. at n.15.

pursuant to section 210(h) of PURPA.[79] But again, a basic starting point would be to identify the specific offending net metering program rule.

In the meantime, what is before the Commission is a plea for prompt action that is a legally unsupported request for the Commission to disrupt state retail net metering programs that have been implemented on the basis of the Commission's prior reasonable disclaimers of jurisdiction over net metering. This request should be denied.

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[79] 16 U.S.C. § 824a-3(h).

III. CONCLUSION

For the reasons discussed above, NESCOE respectfully requests that the Commission deny the relief requested in the Petition and maintain balance between state and federal authority over net metering as the Commission has consistently done over nearly the past two decades.

Respectfully Submitted,

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Date: June 15, 2020

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 15th day of June, 2020.

/s/ Phyllis G. Kimmel

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