

Net Metering Challenge Could Harm Small-Scale Solar Power

By **Porter Wiseman** (June 12, 2020, 5:08 PM EDT)

On April 14, the New England Ratepayers Association, or NERA, filed a petition for declaratory order asking the Federal Energy Regulatory Commission to reverse its policy on net metering. Specifically, NERA requests that FERC (1) assert its jurisdiction over wholesale energy sales from behind-the-meter resources, and (2) declare that rates for such sales cannot exceed the purchasing utility's avoided cost.

FERC disclaimed jurisdiction over net metering transactions in 2001,[1] and reaffirmed this disclaimer in 2009.[2] Net metering is therefore regulated at the state level, and the majority of states have developed net metering programs to encourage retail customers to install onsite generation, such as rooftop solar.



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The petition focuses on what NERA terms "full net metering," or FNM. Under FNM, a customer-generator receives the utility's "bundled" retail electric rate — i.e., the retail energy price plus the utility's fixed costs, such as system operating and maintenance costs — when selling power from behind-the-meter generation to the utility, when the output of such generation exceeds the customer-generator's own usage.

NERA contrasts this with "net energy metering," or NEM, whereby the customer-generator is paid only the retail price for energy. The bundled retail electric rate is generally significantly higher than the retail price of energy — which is higher, in turn, than the wholesale price of energy.

NERA argues that FERC has relied on a fiction to disclaim jurisdiction over net metering arrangements, whether FNM or NEM. In *MidAmerican* and *Sun Edison*, FERC concluded that only net exports of power from a customer-generator count as wholesale sales. So, even if the customer-generator regularly exports power from rooftop solar panels during the daylight hours, these exports can be offset by its consumption of grid power at night.

FERC has chosen the applicable retail billing period as the netting period for net metering, meaning that so long as the customer-generator does not export more energy than it uses within the state-determined retail billing period, it has not made a FERC-jurisdictional wholesale sale.

This policy has allowed states to adopt net metering policies without FERC interference, leading to the widespread adoption of rooftop solar. FERC reaffirmed its *MidAmerican* and *Sun Edison* decisions in its 2018 and 2019 orders on energy storage, noting that injecting energy into the grid does not necessarily

trigger FERC jurisdiction.[3]

NERA argues that not only is FERC's policy mistaken, it is unlawful. NERA claims that whenever a customer-generator exports power to the grid, it is making a wholesale "sale for resale" that FERC is required to regulate under the Federal Power Act.

NERA further argues that because the vast majority of customer-generators are "qualifying facilities" under the Public Utility Regulatory Policies Act of 1978, or PURPA, they must be compensated for such sales in accordance with PURPA. PURPA requires that the rate for qualifying facility power — at least where the utility is required by law to purchase it — shall not exceed the utility's avoided cost.[4]

Thus, NERA argues, FNM and NEM sales violate PURPA, because the retail rate will always exceed the wholesale rate, and therefore, will always be in excess of avoided cost. In support of its position that FERC's disclaimer of jurisdiction over net metering is incorrect, NERA cites to a pair of appellate court decisions relating to station power — i.e., power drawn from the grid for generation facility operations: SoCal Edison and its successor, Calpine.[5]

NERA claims that these decisions undermine the whole "netting" premise by finding that FERC lacks the authority to set the netting period for station power, which is a form of retail sale. Specifically, FERC may not neutralize state jurisdiction over retail sales by setting a netting interval that offsets the use of station power by the utility with the generation of energy for resale so that the utility can evade paying retail rates for station power.

Therefore, according to NERA, FERC also may not do the converse — disclaim jurisdiction over net metering by saying only net sales are FERC-jurisdictional. NERA reasons that because FERC may not set a netting interval to assert jurisdiction, it equally may not disclaim jurisdiction based on a state-established netting interval.[6] This is, however, an idiosyncratic interpretation of the relevant law.

In the underlying proceeding at issue in SoCal Edison, FERC decided that because a generator would export more power to the grid over a FERC-determined netting period than it would consume as station power, the station power would be netted out at the wholesale rate. The U.S. Court of Appeals for the District of Columbia Circuit concluded that FERC could not seize jurisdiction from the state over a retail sale by manipulating the netting period to assert that no retail sale had occurred.

The case was remanded to FERC for further consideration, and returned to the court in Calpine. On remand, FERC concluded it lacked jurisdiction to overrule the state's authority to set the netting period for retail sales.[7] The D.C. Circuit upheld this conclusion.[8]

The petition relies heavily on dicta in Calpine, where the court noted that the length of a netting interval does not determine the amount of energy actually available at wholesale. However, the court made that statement while dismissing the argument that setting the netting interval to determine whether a sale is wholesale or retail is itself, by definition, "regulation of the wholesale market." [9] The court did not take the position, as NERA seems to claim, that FERC may not conclude that it lacks jurisdiction over a given transaction based on a state-regulated netting period.

NERA also advances a number of public policy arguments against FNM and NEM. These arguments are mostly focused on the relatively higher price per megawatt of rooftop solar as opposed to utility-scale solar, and the shifting of fixed costs from consumer-generators onto customers that do not have private generation installed.

The petition has caused alarm in the small-scale solar community, which is already facing challenges due to the COVID-19 pandemic. A number of industry figures, including the president of the National Association of Regulatory Utility Commissioners, have opposed the petition.[10]

Others have questioned NERA's motives, as it is a new 501(c)(4) social welfare organization, like the National Rifle Association or the American Civil Liberties Union, that is not required to disclose its donors.[11] That NERA has legal standing to file the petition is not in doubt; FERC rarely considers standing issues, and has expressly stated that there is no standing requirement to file a petition for a declaratory order.[12]

However, the timing of the petition has been questioned, considering that SoCal Edison and Calpine date from 2010 and 2012, respectively, and there has been no more recent legal development to trigger the filing. Some critics have therefore alleged that the petition, which requests "prompt Commission action" despite relying on legal developments that are approximately a decade old, was specifically timed to take advantage of the drain on state resources caused by the COVID-19 pandemic.

But a petition for a declaratory order does not require that NERA demonstrate its bona fides to request that FERC rule on the petition. And NERA's motives are unlikely to play a major role in the commission's decision-making process.

How FERC will handle the petition is unclear. We do not believe that FERC will summarily dismiss it, and whichever way FERC rules on the petition is likely to face appeal.

The petition alone represents a considerable investment: It costs more than \$30,000 to file a petition for a declaratory order at FERC,[13] not to mention the costs of preparing the petition and its supporting testimony. In fact, the petition gives the impression of being a well-funded effort targeted at eventual appellate review.

Beyond believing that FERC's order on the petition will be substantive and built on a dense record, we can see the commission going either way. The current commission has sought to expand its authority into territory previously believed to be held by the states, as shown in its recent orders on PJM Interconnection LLC's minimum offer price rule,[14] and has been aggressive in seeking to expand its jurisdiction in other ways as well.[15]

The commission has likewise recently seemed indifferent to the concerns of renewable generation.[16] These factors might weigh in favor of NERA.

On the other hand, making the findings sought by NERA would expand the commission's jurisdiction by an unprecedented amount. FERC has previously asserted jurisdiction over electricity traveling over the FERC-regulated transmission system, regardless of whether it crosses interstate boundaries. But here it would be asserting jurisdiction over electricity that is traveling over the state-regulated distribution system.

Although FERC has previously refused to disclaim jurisdiction over sales of electricity made by generators connected to the distribution system,[17] there is a serious question whether electricity netted out at the distribution level can be said to be transmitted or sold in interstate commerce, and thus in FERC's jurisdiction.[18] Support under SoCal Edison and Calpine is dubious at best, leaving a FERC order in favor of NERA open to reversal on appeal.

There are also political considerations. The COVID-19 pandemic has cost thousands of jobs in the small-scale solar industry, and FERC may be reluctant to cause further harm. If FERC were to adopt NERA's position, the impact will vary from state to state, and even within states. Most state-regulated distributed energy programs would be impacted to some extent.

Even those programs that use a market pricing mechanism similar to PURPA's avoided cost calculation, such as New York's Value of Distributed Energy Resources program, may need to make adjustments, as these programs were not developed with PURPA compliance in mind. But those states that have FNM programs will be the most heavily impacted.

Not only is a finding in favor of NERA likely to slow the expansion of small-scale solar in these states, there may be significant ripple effects if FERC makes its decision retroactive. In that case, homeowners and businesses that have installed solar panels based on certain economic assumptions may find themselves stripped of much of the benefit of their investments. Further complicating the situation is that some states have FNM up to a fixed cap — meaning not all small generation in a state will be affected in the same way.

FERC set June 15 as the due date for comments on the petition.

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[1] MidAmerican Energy Co., 94 FERC ¶ 61,340 (2001) ("MidAmerican").

[2] Sun Edison LLC, 129 FERC ¶ 61,146 (2009) ("Sun Edison").

[3] See Elec. Storage Participation in Mkts. Operated by Regional Transmission Orgs. & Indep. Sys. Operators, Order No. 841, 162 FERC ¶ 61,127, at n.49 (2018), order on reh'g & clarification, Order No 841-A, 167 FERC ¶ 61,154, at n.12 (2019).

[4] 16 U.S.C. § 824a–3(b) (2012).

[5] Calpine Corp. v. FERC, 702 F.3d 41 (D.C. Cir. 2012) ("Calpine"); S. Cal. Edison v. FERC, 603 F.3d 996 (D.C. Cir. 2010) ("SoCal Edison").

[6] NERA often speaks as if FERC has set a monthly netting interval for FNM, playing down the fact that the billing interval for retail service is set by the state. See MidAmerican at 62,264 ("Here the Iowa Commission has permitted the netting to be measured over the normal monthly billing cycle for retail customers. On the facts before us, this time period is a reasonable one to measure the netting").

[7] See Duke Energy Moss Landing LLC v. Cal. Indep. Sys. Operator Corp., 132 FERC 61,183, at P 16 (2010).

[8] Calpine, 702 F.3d at 45, 47-48.

[9] *Id.* at 48.

[10] Press Release: NARUC Granted Partial Extension to File Comments in Net Metering Proceeding (May 5, 2020), <https://www.naruc.org/about-naruc/press-releases/naruc-granted-partial-extension-to-file-comments-in-net-metering-proceeding>.

[11] See Jeff St. John, Solar Net Metering Under Threat as Shadowy Group Demands Intervention in State Policies, Greentech Media (April 20, 2020), <https://www.greentechmedia.com/articles/read/a-new-threat-to-solar-net-metering-arises-as-nonprofit-demands-federal-intervention-in-state-policies>.

[12] See Enbridge Offshore Facilities LLC, 116 FERC ¶ 61,001, at P 16 (2006) ("Rule 207 of the Commission's Rules of Practice and Procedure provides that a person must file a petition when seeking a declaratory order. The rule does not include any requirement that a person have 'standing' before filing a petition for a declaratory order. Thus, whether to consider providing declaratory relief under this provision is discretionary with the Commission"); SFPP LP, 102 FERC ¶ 61,089, at P 11 (2003) (same).

[13] See FERC Filing Fees, FERC.gov (last updated May 7, 2020), <https://www.ferc.gov/docs-filing/fee-sched.asp>.

[14] See, e.g., Calpine Corp. v. PJM Interconnection LLC, 171 FERC ¶ 61,035 (2020); Calpine Corp. v. PJM Interconnection LLC, 169 FERC ¶ 61,239 (2019) (together, the "PJM MOPR Orders").

[15] See, e.g., *In re FirstEnergy Solutions Corp.*, 945 F.3d 431 (6th Cir. 2019); *In re PG&E Corp.*, Nos. 19-16833, et al. (9th Cir. Sept. 18, 2019).

[16] See, e.g., the PJM MOPR Orders.

[17] California Public Utilities Commission, 132 FERC ¶ 61,047 at P 72 (2010).

[18] See generally Ari Peskoe, Harvard L. The Case Against Direct FERC Regulation of Distributed Energy Resources (2018), <http://eelp.law.harvard.edu/wp-content/uploads/The-Case-Against-Direct-FERC-Regulation-of-Distributed-Energy-Resources-....pdf>.