



Challenge to FERC Disclaimer of Jurisdiction over Net Metering Riles Small-Scale Solar Community

May 26, 2020

Reading Time : **5 min**

The Petition focuses on what NERA terms “Full Net Metering” (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” (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 (FPA). NERA further argues that because the vast majority of customer-generators are "qualifying facilities" (QFs) under the Public Utility Regulatory Policies Act of 1978 (PURPA), they must be compensated for such sales in accordance with PURPA. PURPA requires that the rate for QF 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. 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 D.C. 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.⁶ The D.C. Circuit upheld this conclusion.⁷

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.”⁸ 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/NEM. These arguments are mostly focused on the relatively higher price per MW 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.⁹ Others have questioned the motives of NERA itself, 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.¹⁰

After multiple intervenors requested an extension, FERC extended the comment period until June 15, 2020.

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

⁷ *Calpine*, 702 F.3d at 45, 47-48.

⁸ *Id.* at 48.

⁹ 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>.

¹⁰ See Jeff St. John, *Solar Net Metering Under Threat as Shadowy Group Demands Intervention in State Policies*, Greentech Media (Apr. 20, 2020), <https://www.greentechmedia.com/articles/read/a-new-threat-to-solar-net-metering-arises-as-nonprofit-demands-federal-intervention-in-state-policies>.

Categories



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