UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Ratepayers Association	**:**	**EL20-42-000**

INITIAL COMMENTS OF THE JOINT CONSUMER ADVOCATES

Pursuant to the Federal Energy Regulatory Commission's (FERC) Notice of Petition for Declaratory Order issued on April 15, 2020, as amended by the Notice of Extension of Time issued on May 4, 2020, the Pennsylvania Office of Consumer Advocate[1](PA OCA), the New Jersey Division of Rate Counsel[2] (NJ Rate Counsel), Office of the People's Counsel for the District of Columbia[3] (DC OPC), Maryland Office of People's Counsel[4] (MD OPC), and Iowa Office of Consumer Advocate[5] (IA OCA) (hereinafter Joint Consumer Advocates or JCA) submit these Initial Comments in response to the Petition for Declaratory Order Concerning Unlawful Pricing of Certain Wholesale Sales (Petition) filed by the New England Ratepayers Association (NERA)

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[1] The PA OCA is an independent office within the Pennsylvania Office of Attorney General authorized to represent the interests of Pennsylvania utility consumers before state and federal agencies, as well as state and federal courts, pursuant to Act 161 of the Pennsylvania General Assembly, as amended, 71 P.S. Sections 309.1, et seq.

[2] NJ Rate Counsel is the administrative agency charged under New Jersey law with the general protection of the interests of utility ratepayers. *N.J.S.A.* 52:27EE-46 *et seq*.

[3] DC OPC is an independent agency and the statutory representative of District of Columbia ratepayers, authorized to "represent and appeal for the people of the District of Columbia at proceedings before related federal regulatory agencies and commissions and federal courts." D.C. Code §34-804(d)(2).

[4] MD OPC is an independent state agency designated by law to represent the interests of Maryland residential ratepayers before the Maryland Public Service Commission, federal agencies and the courts, pursuant to Section 2-201 *et seq*. of the Maryland Public Utilities Article (PUA).

[5] IA OCA represents Iowa consumers and the public generally in all proceedings before the Iowa Utilities Board and in proceedings before federal administrative agencies concerning matters that may impact that rates and services of Iowa public utilities. Iowa Code §§ 475A.2(2), (5) (2019).

on April 14, 2020, in the above-captioned proceeding. As detailed in the footnotes below, and discussed *infra,* the JCA are the statutory representatives of utility consumers in their respective states.

I. INTRODUCTION

NERA's Petition should be rejected outright. Contrary to its assertions, the Court of Appeals for the District of Columbia Circuit has not overturned or called into question FERC's prior decisions disclaiming jurisdiction over net metering transactions. NERA's arguments are built upon a mischaracterization of those decisions and a misinterpretation of more recent federal cases. It is clear that net metering transactions are a retail billing matter properly within the jurisdiction of states and state regulatory commissions and Congress has explicitly left the administration of net metering programs and the associated compensation structures to the states. FERC cannot pre-empt state law without clear and manifest intent from Congress, and should not act to undermine individual state laws and policies developed to address state-level concerns.

Through its Petition, NERA requests that FERC declare its jurisdiction over certain electric energy transactions from generation sources located on the customer side of the retail meter.[6] Based on a purported change in the law and allegations of ratepayer harm, NERA argues that FERC should reverse its long-standing disclaimer of jurisdiction over the state administered retail billing practices for this behind the retail meter generation, known as net metering.[7] NERA

[6] Petition at 5-6. More specifically, NERA requests that FERC exercise jurisdiction whenever the output of such generators exceeds the customer's demand or where the energy from such generators is designed to bypass the customer's load and therefore is not used to serve demand behind the customer's meter.

[7] The JCA do not take the allegations of harm to ratepayers lightly but these matters rest within the parameters of each state's policies under both the Federal Power Act and Energy Policy Act of 2005. It is for the state's to determine the appropriate balance and equities of any net metering program.

requests that FERC find the sale of energy produced behind the meter to be a wholesale sale, price these transactions in accordance with PURPA, and find unlawful state net metering laws.[8]

Net metering refers to a state-administered program provided by an electric utility that 'nets' the generation produced by an end-use customer using rooftop solar facilities, or other distributed generation resources located on the customer side of the retail meter, against the customer's demand over an applicable billing period. In most instances, customers are compensated for the energy they generate at the same rate provided by the electric utility at retail, which includes generation, transmission, and distribution charges. In certain situations, a customer may be generating more electricity at a given time than it uses, causing the meter to run backwards. This excess energy is exported to the distribution grid to meet the utility's retail load elsewhere on the distribution grid, while the customer is still compensated at the retail rate of electricity by offsetting the customer's electric bill on a net basis over the established billing period. Likewise, a customer may bypass its load altogether and use its behind-the-meter energy source to provide power on to the electric grid.

NERA asserts that FERC has authority over these specific net metering transactions by virtue of Section 201 of the Federal Power Act, which grants FERC authority over the sale of electric energy at wholesale in interstate commerce. NERA argues that when a customer's meter runs backwards at any given point in time, or when the generation source is used to bypass the customer's load altogether, these are properly considered wholesale transactions subject to FERC's authority.[9] NERA further asserts that FERC's previous reasons for disclaiming

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[8] Petition at 44-45.

[9] Petition at 7.

jurisdiction over sales from generators behind the meter have since been rejected by the U.S. Court of Appeals for the District of Columbia Circuit in two recent decisions.[10]

In exercising its jurisdiction, NERA requests that FERC treat net metering customers as Qualifying Facilities (QFs) pursuant to the Public Utility Regulatory Policies Act (PURPA).[11] In effect, QF status would alter the compensation structures currently regulated by states such that net metering customers treated as a QF would no longer be able to net energy produced at the same retail rate it consumes electricity. Rather, the net metering customer would be compensated at the utility's avoided cost of procuring that unit of electricity at wholesale, a much smaller unit of compensation in comparison.[12] NERA also requests that FERC set the applicable billing period at hourly intervals, rather than monthly intervals.[13]

Through these Comments, the JCA will demonstrate that, contrary to NERA's assertions, FERC's initial basis for disclaiming jurisdiction over net metering transactions has not been overturned by the D.C. Circuit Court of Appeals. Rather, NERA has mischaracterized FERC's previous decisions and misinterprets the impact of recent federal case law. Notwithstanding, it is clear that net metering transactions are a retail billing matter properly within the jurisdiction of states and state commissions. Congress, through the enactment of the Energy Policy Act of 2005, has explicitly directed states to administer net metering and associated compensation structures. FERC cannot now pre-empt state law without clear and manifest intent from Congress. Accordingly, FERC should deny NERA's Petition.

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[10] Petition at 7-8.

[11] Petition at 8.

[12] Id.

[13] Petition at 26.

II. COMMENTS

NERA's Petition requests that FERC exercise jurisdiction over certain net metering transactions. NERA argues that when a customer's behind-the-meter generator produces more power than the customer consumes, i.e. when the meter runs backwards, or where the generator bypasses the customer's load altogether, that these transactions are properly considered wholesale transactions subject to FERC's jurisdiction under the Federal Power Act. As support for its position, NERA references two recent decisions from the D.C. Circuit Court: S. Cal. Edison Co. v. FERC, 603 F.3d 996 (D.C. Cir. 2010) (S. Cal. Edison Co.) and Calpine Corp. v. FERC, 702 F.3d 41 (D.C. Cir. 2012) (Calpine).

Specifically, NERA asserts that FERC's reasoning for disclaiming jurisdiction over net metering transactions has since been overturned by the D.C. Circuit Court in S. Cal. Edison Co. and Calpine.[14] In MidAmerican Energy Company[15], FERC determined that it did not have jurisdiction over net metering transactions, because, similar to its decision in PJM Interconnection, L.L.C.[16], where FERC determined no sale had occurred in the netting of station power used at a generating station against certain wholesale sales of power from the generating station, no sale occurs where an individual or homeowner installs generation and accounts for its dealings with the utility through the practice of netting. NERA argues, however, that in S. Cal. Edison Co., the D.C. Circuit Court rejected FERC's rationale in PJM, and, for that reason, the Commission's previous disclaimer of jurisdiction over net metering transactions in MidAmerican Energy is no

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14 Petition at 12.

15 MidAmerican Energy Company, 94 FERC ¶ 61,340, 62,263 (2001) (MidAmerican).

16 PJM Interconnection, L.L.C. 94 FERC ¶ 61,251 (2001) (PJM).

longer valid. Accordingly, NERA believes that the issue of whether net metering transactions is within FERC's wholesale jurisdiction is ripe for review before FERC.

NERA, however, mischaracterizes the D.C. Circuit Court's decision in S. Cal. Edison and Calpine. For one, the Court's decisions were limited to FERC's attempts to assert jurisdiction over setting the netting period for determining whether a retail sale for station power occurred under its transmission authority. The Court did not overturn FERC's decision to disclaim jurisdiction over station power or net metering transactions based on its wholesale authority, but rather upheld this approach concluding that station power transactions are functionally equivalent to retail transactions. Accordingly, FERC's reasoning for disclaiming jurisdiction over net metering in MidAmerican Energy has not been overturned.

Indeed, FERC's reasoning in MidAmerican Energy is correct. Moreover, Congress, through the enactment of the Energy Policy Act of 2005, has explicitly directed states to deal with net metering and how it is compensated. Under the Federal Power Act, FERC has no authority to act on matters left to the states to regulate. FERC cannot now pre-empt State law without the clear and manifest intent from Congress.

A. Legal Background

Section 201 of the Federal Power Act sets forth FERC's jurisdiction with respect to the transmission and sale of electricity. It states in relevant part:

> **(a) Federal regulation of transmission and sale of electric energy.** It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part [16 USCS §§ 824 et seq.] and the Part next following [16 USCS §§ 825 et seq.] and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use of sale of electric energy in interstate commerce.

> **(1)** The provisions of this part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but…shall not apply to any other sale of electric energy…The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction…over facilities used for the generation of electric energy or over facilities used in local distribution…[17]

Notably, the Federal Power Act limits FERC's jurisdiction over the transmission and selling of electric energy in several important ways. First, FERC's jurisdiction is limited to transmission and sale of electric energy in interstate commerce, but does not apply to any other sale of electric energy or facilities used in local distribution. Second, FERC's jurisdiction does not extend to those matters that are subject to regulation by the States. See FPC v. Southern California Edison, 376 U.S. 205, 214-15 (1964) (holding that the Federal Power Act draws a precise line between federal and state power, denying states the ability to regulate sales for resale, but preserving the ability of States to regulate sales at local retail rates to ultimate consumers). The enactment of the Federal Power Act was not meant to displace state authority in regulating electric retail sales, but rather extend federal regulation to areas beyond the reach of state power under the commerce clause.[18,19]

B. FERC's Order in MidAmerican Energy Has Not Been Overturned by Federal Case Law

As the basis for its Petition, NERA asserts that FERC's initial disclaimer of jurisdiction over net metering transactions in MidAmerican Energy has since been overturned by federal case

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[17] 16 U.S.C. § 824(a-b)

[18] New York v. FERC, 535 U.S. 1 (2002).

[19] See also, Oneok, Inc. v. Learjet, Inc., 575 U.S. 373 (2015) (finding that the Natural Gas Act did not preempt state antitrust law because the "target at which the state law aims" is not a matter reserved to FERC's jurisdiction.)

law. The D.C. Circuit Court has not overturned the reasoning in MidAmerican Energy and FERC's reasoning for its disclaimer over jurisdiction remains intact.

In 2001, MidAmerican Energy Company (MidAmerican) challenged the Iowa Utilities Board's (Iowa Board) requirement that it interconnect with three alternate energy facilities and provide net-metering arrangements because it would require MidAmerican to pay for power in excess of avoided cost as required by PURPA.[20] In its decision, FERC determined that it should not interfere with the Iowa Board's determination to permit net metering on a monthly billing period.[21] FERC stated:

> 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…
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> This case presents an issue similar to that in our recent decision addressing the netting of station power used at a generating station against certain wholesale sales from the generating station. In that case, in the context of the FPA, the Commission found that there is no sale (for end use or otherwise) between two different parties when one party is using its own generating resources for the purpose of self-supply of station power, and accounting for such usage through the practice of netting. In the case before us we find likewise 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.[22]

As stated above, FERC reasoned that net metering is similar to the provision of station power, where a generator self-supplies power to meet its demand. In these situations, FERC found that no sale occurs when a customer utilizes behind-the-meter generation and accounts for its dealings with the utility through netting. FERC also went on to state:

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20 MidAmerican, 94 FERC at ¶ 62,261.

21 Id., at ¶ 62,264.

22 Id., at ¶ 62,263.

> In implementing PURPA, the Commission similarly 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.[23]

For this reason, FERC determined that it had no jurisdiction over net metering transactions under its wholesale authority.

FERC reaffirmed its lack of jurisdiction over net metering transactions in SunEdison, LLC, stating as follows:

> We agree that, where the net metering participant (i.e., the end-use customer that is the purchaser of the solar-generated electric energy from SunEdison) does not, in turn, make a net sale to a utility, the sale of electric energy by SunEdison to the end-use customer is not a sale for resale, and our jurisdiction under the [Federal Power Act (FPA)] is not implicated. That is, under 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…
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> * * *
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> Because we have found that, where the end-use customer makes no net sale to the local load-serving utility with which it has a net metering arrangement, the sale of electric energy by SunEdison to the end-use customer in such circumstances does not constitute a sale for resale (and also would not involve transmission in interstate commerce), and in such circumstances the sales are not subject to the Commission's jurisdiction under Part II of the FPA, we find that the rates for these sales would not be "jurisdictional rates" for purposes of [Public Utility Holding Company Act of 2005 (PUHCA 2005)] and our regulations implementing PUHCA 2005.[24]

In SunEdison, FERC reasoned that when a net metering participant is a net consumer over an applicable billing period, there is no sale for resale subject to FERC's jurisdiction and, furthermore, any associated net metering compensation structure would not be considered jurisdictional rates subject to FERC's jurisdiction.

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[23] 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 P30,128 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 Corporation v. FERC, 675 F.2d 1226 (D.C. Cir 1982), rev'd in part, American Paper Institute, Inc. v. American Electric Power Service Corporation, 461 U.S. 402 (1983).

[24] SunEdison LLC, 129 F.E.R.C. ¶ 61,146, 61,621 (2009) (citations omitted) (SunEdison).

Shortly after the Commission's SunEdison decision, the D.C. Circuit Court issued its decision in S. Cal. Edison. Southern California Edison appealed a Commission decision that required the California Independent System Operator (CAISO) to utilize a monthly netting period for the provision of station power, a practice where generating facilities utilize their own generation to meet their electric demand. FERC reasoned, pursuant to its transmission authority, that it could set the applicable billing period to determine whether a retail sale occurred.

As recognized by the D.C. Circuit, FERC had exceeded its jurisdiction in a setting a netting period for station power. The Court reasoned that the use of station power is functionally equivalent to a retail sale:

> Prior to unbundling, utilities which owned and operated the generators would not, of course, charge themselves for the use of station power; they simply subtracted ("netted") their own use against their gross output. But now, when the generating facilities use station power -- even when they get it from their own facilities -- it is arguably functionally equivalent to a retail sale falling within the jurisdiction of the states, not FERC.[25]

The D.C. Circuit went on to state that FERC's claim of jurisdiction over setting the netting period for a retail sale based on FERC's conclusion that no retail sale had taken place was inappropriate:

> Perhaps of even greater difficulty, we do not understand why FERC is empowered to conclude that a retail sale has not taken place unless it can claim the transaction is, instead, a wholesale sale or a transmission. To simply declare that the state lacks jurisdiction because FERC believes no retail sale has taken place really begs the jurisdictional question. Unless a transaction falls within FERC's wholesale or transmission authority, it doesn't matter how FERC characterizes it.[26]

The Court concluded by stating:

> FERC has yet to explain why that general concern can be grounds to preempt the state's authority to set the netting period for station power -- i.e., the pricing mechanism -- in the retail market or to allow utilities to impose consumption charges.[27]

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25 S. Cal. Edison Co., 603 F.3d at 997.

26 Id., at 1001.

27 Id., at 1002.

Accordingly, the D.C. Circuit remanded the case back to FERC for further consideration.

Upon remand, FERC determined that based on S. Cal. Edison Co. it did not have jurisdiction over setting the netting period for station power under either its transmission or wholesale authority.[28] This decision was subsequently challenged by Calpine Corporation before the D.C. Circuit.[29] The Court held, however, that FERC's disclaimer of jurisdiction over setting the netting periods for station power was not arbitrary or capricious.[30]

As shown above, the Commission's MidAmerican and SunEdison decisions disclaiming jurisdiction over net metering are not affected by the D.C. Circuit's recent decisions in S. Cal. Edison and Calpine. In MidAmerican and SunEdison, the Commission recognized that where a consumer owns generation and accounts for its dealings with the utility through the practice of netting, it has no authority under its wholesale jurisdiction because no wholesale sale occurred. The Commission likewise recognized that this is similar to station power transactions, over which it had also disclaimed jurisdiction under its wholesale authority. Indeed, this was upheld by the D.C. Circuit Court in Calpine:

> In PJM Interconnection, LLC, the Commission specifically confronted the question of whether it had wholesale jurisdiction over the third-party provision of station power. FERC held that when station power is acquired in such a manner, "the energy being sold is not sold for resale, and therefore it is not a transaction which we can regulate under the [Federal Power Act]." Id. at 61,891. FERC likewise held that when a generator self-supplies, either on-site or remotely, "there is no sale (for end use or otherwise)," id., so no means of procuring station power could plausibly be construed as a sale for end use subject to FERC's wholesale jurisdiction.[31]

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[28] Duke Energy Moss Landing LLC v. California Independent System Operator Corporation, et al., 134 FERC ¶ 61,151 (2011).

[29] Calpine, 702 F.3d at 41.

[30] Calpine, 702 F.3d at 50.

[31] Id., at 47.

Here, the Court recognized that nothing was wrong in the reasoning FERC used to disclaim jurisdiction over station power transactions under its wholesale authority. Likewise, there is no error in FERC's determinations in MidAmerican and SunEdison.

NERA's characterization of the recent D.C. Circuit Court decision is incorrect. If anything, NERA is requesting that the Commission assert jurisdiction over net metering transactions by changing the state determined net metering billing periods, which would result in FERC pre-empting states that have enacted valid and enforceable net metering legislation. This type of issue was directly addressed in S. Cal. Edison and Calpine, and the Court upheld FERC's disclaimer of jurisdiction. Accordingly, FERC has properly settled this issue and there is no basis for further FERC review of this matter.

C. Net Metering is a Retail Billing Matter Reserved for State Regulation.

As expressed by federal law and FERC precedent, net metering transactions are properly considered retail billing matters properly reserved for the states to regulate. As part of PURPA, Congress acknowledged the right of states to regulate retail electric energy. Congress directed each state regulatory authority to consider various standards and make a determination whether these standards were appropriate to implement.[32] In its initial inception these standards, included, among others, declining block rates, time-of-day rates, seasonal rates, interruptible rates, and load management techniques.[33] It is important to note that PURPA did not pre-empt the ability of states to regulate electric retail sales, but merely directed them to consider certain regulatory practices. See FERC v. Mississippi, 456 U.S. 742, 765-66 (1982) (holding that while Congress can pre-empt States in the regulation of electric retail sales, Congress adopted a less intrusive scheme and

[32] Id., Section 111(a) (codified at 16 U.S.C. § 2621(a)).

[33] Id., Section 111(d) (codified at 16 U.S.C. § 2621(d)).

allowed the States to continue regulating in this area on the condition that they consider suggested federal standards).[34]

On August 8, 2005, the Energy Policy Act of 2005 was passed into law amending portions of PURPA. Specifically, Section 1251 of the Energy Policy Act of 2005, entitled "Net Metering and Additional Standards," directed states to consider net metering policies. It states in relevant part:

> **Sec. 1251. NET METERING AND ADDITIONAL STANDARDS.**
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> (a) ADOPTION OF STANDARDS. – Section 111(d) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2621(d)) is amended by adding at the end the following:
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> "(11) NET METERING. – Each electric utility shall make available upon request net metering service to any electric consumer that the electric utility serves. For purposes of this paragraph, the term 'net metering service' means service to an 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.
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> (b) COMPLIANCE. –
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> (1) TIME LIMITATIONS. – Section 112(b) of the Public Utility Regulatory Policies Act of 1978 is amended by adding at the end the following:

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[34] See also Reference Manual and Procedures for Implementation of the PURPA Standards in the Energy Policy Act of 2005, March 22, 2006, https://www.energy.gov/sites/prod/files/Manual%20for%20Implementation%20of%20PURPA%20Standards%20in%20EPACT%202005%20%28March%202006%29.pdf

> PURPA did not take the primary responsibility over electric utility rates from the states. The Title I standards impose certain obligations on state regulatory commissions and give certain rights to persons to go before state regulatory commissions and state courts. However, under PURPA and its amendments, states retain primary responsibility with respect to retail electric rates. PURPA and the three purposes are intended to supplement state law, but do not override state law. Also, states may consider other purposes as well that are not specified by PURPA. State commissions and unregulated utilities are not required to take actions that conflict with state law. The legislators' intention was to preserve the discretion of state commissions and unregulated utilities that is provided by state law – except to the extent that Title I imposes procedural requirements, such as requirements to hold hearings and consider and make a determination, as discussed above.

> "(3)(A) Not later than 2 years after the enactment of this paragraph, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority)…shall commence the consideration referred to in section 111…
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> "(B) Not later than 3 years after the date of the enactment of this paragraph, each State regulatory authority…shall complete the consideration, and shall make the determination, referred to in section 111 with respect to each standard established by paragraphs (11) through (13) of section 111(d).[35]

Congress included net metering within PURPA's regulatory scheme, thereby affirming the right of States to regulate net metering and its associated compensation structures. And, importantly, the federal definition of net metering acknowledges that this is a service provided to an end-user that only extends to local distribution facilities.[36] Congress' clear direction for states to regulate net metering in the Energy Policy Act of 2005 demonstrates that the request made by NERA is beyond FERC's authority.

To overcome this clear authority, NERA attempts to suggest that net metering, operating on local distribution systems, should be regulated by FERC under its wholesale jurisdiction. This argument proves too much under a net metering system, as FERC and the Courts have properly recognized. FERC's authority under the FPA only extends to wholesale transactions in interstate commerce. 16 U.S.C. § 824(b). As expressed by the Supreme Court:

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35 Energy Policy Act of 2005, 119 Stat. 594, Section 1251 (2005) (codified at 16 U.S.C. § 2621(d)).

36 FERC has also defined net metering as a retail billing matter outside of its jurisdiction in its Order 2003-A, which established standard interconnection procedures. FERC stated 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.

18 CFR Part 35 Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003-A, 106 FERC ¶ 61,220, 2004 FERC LEXIS 449 at *413-414 (2004).

> Alongside those grants of power, however, the Act also limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction. As pertinent here, §824(b)(1) — the same provision that gives FERC authority over wholesale sales — states that "this subchapter," including its delegation to FERC, "shall not apply to any other sale of electric energy." Accordingly, the Commission may not regulate either within-state wholesale sales or, more pertinent here, retail sales of electricity (i.e., sales directly to users). State utility commissions continue to oversee those transactions.[37]

FERC's authority does not extend to intra-state wholesale sales or retail sales over the local distribution system.[38] Net metering is a retail billing methodology within the state's authority that determines a customer's retail bill.

FERC has no authority to pre-empt state law without a clear and manifest intent from Congress. Section 201 of the Federal Power Act limits FERC's ability to regulate matters left for the states to regulate.[39] As stated by the Supreme Court, FERC may not interfere with the authority of states to regulate electric retail sales:

> The above conclusion does not end our inquiry into the Commission's statutory authority; to uphold the Rule, we also must determine that it does not regulate retail electricity sales. That is because, as earlier described, §824(b) 'limit[s] FERC's sale jurisdiction to that at wholesale,' reserving regulatory authority over retail sales (as well as intrastate wholesale sales) to the States. FERC cannot take an action transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates. Suppose, to take a far-fetched example, that the Commission issued a regulation compelling every consumer to buy a certain

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[37] FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 768 (2016) (citations omitted).

[38] See also Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1292 (2016):

> Under the FPA, FERC has exclusive authority to regulate 'the sale of electric energy at wholesale in interstate commerce.' A wholesale sale is defined as a 'sale of electric energy to any person for resale.' The FPA assigns to FERC responsibility for ensuring that '[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable.' 'But the law places beyond FERC's power, and leaves to the States alone, the regulation of 'any other sale'—most notably, any retail sale—of electricity.' The States' reserved authority includes control over in-state "facilities used for the generation of electric energy.'

(citations omitted).

[39] 16 U.S.C. § 824(a).

> amount of electricity on the retail market. Such a rule would necessarily determine the load purchased on the wholesale market too, and thus would alter wholesale prices. But even given that ineluctable consequence, the regulation would exceed FERC's authority, as defined in §824(b), because it specifies terms of sale at retail—which is a job for the States alone.[40]

Accordingly, FERC must ensure that its exercise of jurisdiction does not interfere with the right of states to regulate.

If the Commission were to grant NERA's Petition, however, it would be doing just that. In the Energy Policy Act of 2005, Congress specifically directed States to consider net metering policies and associated compensation structures. It determined that the best approach was a state-by-state approach, where legislation and implementation could be catered to the unique needs and policy goals of each state.

Under the directive of the Energy Policy Act of 2005, many states have since developed net metering laws and regulations. As of April 2019, 40 states have developed net metering policies, utilities in five other states have adopted net metering style compensation structures.[41] About 1% of U.S. electricity customers participated in net metering in 2018.[42]

In New Jersey, New Jersey's Electric Discount and Energy Competition Act of 1999 directed, *inter alia*, the New Jersey Board of Public Utilities to establish net metering and interconnection standards requiring electric power suppliers and basic generation service providers to offer net metering at non-discriminatory rates to residential and small commercial customers that generate electricity, on the customer's side of the meter. The New Jersey Board of Public Utilities ("Board") through the state's public regulatory process established rules in the

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[40] FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 775 (2016) (citations omitted).

[41] Ashley J. Lawton, Cong. Research Serv., R46010, *Net Metering: In Brief*, pg. 2, fn. 7.

[42] Id.

state's Administrative Code at Title 14 Chapter 8 Subchapter 4 that have evolved with changes in law and the renewable energy market. The state's EDCs have provided net metering to over 120,000 residential customer-generators with 1 Gigawatt of dc capacity and over 7000 commercial or industrial customer-generators with 1.6 Gigawatt of dc capacity. This capacity is estimated to have required an aggregate level of investment from a variety of market participants exceeding $10 billion.

The state of Maryland has also passed comprehensive legislation to encourage net energy metering as a means to support state energy policies.[43] As a result, installed capacity for net-metering facilities has grown from less than a MW in 2007 to over 754 MW.[44] As of March 2020, approximately 71,225 residential customers and 1,269 commercial and industrial customers in Maryland utilize net metering.[45]

Pennsylvania enacted into law the Alternative Energy Portfolio Standards Act (AEPS Act), 73 P.S. Sections 1648.1-1648.8, which established the Commonwealth's existing net metering framework, including a compensation scheme. As described in the Pennsylvania Public Utility Commission's (PA PUC) "Net Metering & Interconnection Report 2017-2019," as of May 31, 2019, there are 26,016 customer-generators participating in the Commonwealth's net metering program, with an estimated net metering capacity of 381,574 kW.[46]

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43 See, PUA Sec. 7-306.

44 See, MD Public Service Commission Report to the General Assembly on Status of Net Energy Metering, dated September 1, 2019.

45 EIA Form 861 data at https://www.eia.gov/electricity/data/eia861m

46 Bureau of Technical Utility Service, Net Metering & Interconnection Report 2017-2019 at 4 (2019), http://www.puc.pa.gov/Electric/pdf/AEPS/Net_Metering-Interconnection_Report_2017-19.pdf.

The District of Columbia's net metering program was developed initially pursuant to the Retail Electric Competition and Consumer Protection Act of 1999, D.C. Law 13-107. In 2013, the District Council passed the Community Renewable Energy Amendment Act of 2013, D.C. Law 20-47, to allow for virtual net metering through participation in authorized community renewable energy facilities (CREF). The District of Columbia Public Service Commission is currently developing rules aimed at increasing the net metering thresholds, improving the interconnection process, and facilitating CREF participation.

Iowa has had a net metering rule for more than two decades. 199 IAC 15.11(5). The Iowa legislature recently enacted net metering provisions in Senate File 583, an Act relating to billing methods that may be utilized in connection with distributed generation facilities.

A decision by FERC that exercises jurisdiction as requested by NERA would be detrimental to the validly enacted legislation of the states, to millions of customers that have invested in alternative energy sources on the basis of statewide compensation plans, and to many of the stakeholders that have worked hard to craft policies around net metering that enable them to meet state legislative goals. The individual states are in a position to make adjustments over time to reflect new circumstance and re-balance those interests in light of any circumstances that arise, if the states find it necessary.

In effect, NERA's Petition would ask that FERC subvert the current regulatory scheme, exceed the limitations of its jurisdiction, and infringe on the sovereignty of States. FERC, however, has no authority to act where Congress has not given it authority to do so. <u>New York v. FERC</u>, 535 U.S. 1, 18 (2002) ("The other context in which 'pre-emption' arises concerns the rule 'that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[,] . . . [for] an agency literally has no power to act, let alone

pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.'").[47] Accordingly, as demonstrated by the Energy Policy Act of 2005 and Section 201(a) of the Federal Power Act, Congress has not provided FERC the authority to act here.

[47] See also Department of Revenue v ACF Indus., 510 U.S. 332, (1994) (Under principles of federalism, Supreme Court, when determining breadth of federal statute that impinges upon or preempts states' traditional powers, is hesitant to extend statute beyond its evident scope; court will interpret statute to preempt traditional state powers only if that result is clear and manifest purpose of Congress).

III. CONCLUSION

The Joint Consumer Advocates submit that FERC should deny NERA's Petition. NERA's basis for requesting that the Commission re-examine its decisions in MidAmerican and SunEdison mischaracterizes the basis for FERC's disclaimer of jurisdiction over net metering transactions and misinterprets recent decisions from the D.C. Circuit Court. Regardless, net metering transactions are retail billing matters properly reserved for the states. The regulatory scheme established by Congress through the Energy Policy Act of 2005 affirms that net metering is wholly within the purview of state regulation that FERC cannot pre-empt, without clear and manifest intent from Congress. For these reasons, net metering transactions are not subject to FERC's jurisdiction and, accordingly, FERC has no authority to act here.

Respectfully Submitted,

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