

172 FERC ¶ 61,042  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick, Bernard L. McNamee,  
and James P. Danly.

New England Ratepayers Association

Docket No. EL20-42-000

ORDER DISMISSING PETITION FOR DECLARATORY ORDER

(Issued July 16, 2020)

1. On April 14, 2020, pursuant to Rule 207 of the Commission’s Rules of Practice and Procedure,<sup>1</sup> New England Ratepayers Association (NERA) filed a petition for declaratory order, requesting that the Commission (1) declare that there is exclusive federal jurisdiction over wholesale energy sales from generation sources located on the customer side of the retail meter and (2) order that the rates for such sales be priced in accordance with the Federal Power Act (FPA)<sup>2</sup> or Public Utility Regulatory Policies Act of 1978 (PURPA),<sup>3</sup> as applicable (Petition). As discussed below, we dismiss the Petition.

**I. Petition**

2. NERA asks the Commission to declare that it has jurisdiction over energy sales from rooftop solar facilities and other distributed generation located on the customer side of the retail meter (1) whenever the output of such generators exceeds the customer’s demand or (2) 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.<sup>4</sup> NERA argues that, in these circumstances, energy is delivered to the local utility for resale to the utility’s retail customers for compensation, making the transactions wholesale sales in interstate commerce, which should be priced at the utility’s avoided cost of energy if the sale is made pursuant to PURPA or a just and reasonable wholesale rate if the sale is made pursuant to the FPA.

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<sup>1</sup> 18 C.F.R. § 385.207(a)(2) (2019).

<sup>2</sup> 16 U.S.C. § 824 *et seq.* (2018).

<sup>3</sup> *Id.* § 824a-3.

<sup>4</sup> Petition at 6.

3. NERA states that its Petition concerns “full net metering,” which it describes as a practice through which an electricity consumer produces electric energy from a generation source (most often solar panels) that is located on the same side of the retail meter as the customer’s load.<sup>5</sup> NERA states that the generation and load are connected to a bidirectional retail meter that measures the total amount of energy produced and used by the customer. NERA explains that, when the customer consumes more energy than it produces, the interconnected utility supplies the difference, and the meter runs forward to measure the amount of retail service sold to the customer. NERA further explains that, when the customer produces more energy than it consumes, the customer is delivering energy to the interconnected utility, and the meter runs backwards. NERA states that the amount of energy the customer produces is netted, usually on a monthly basis, against the amount of energy the customer consumes.<sup>6</sup> NERA states that, to the extent that the customer consumes more than it produced in the month, it is billed for retail electric service based on the net amount of energy the utility delivered to the customer over the course of the month. NERA adds that this billing process results in the customer being compensated for all of the energy it produced behind the meter, including the energy it delivered to the interconnected utility for resale, at the bundled retail electric rate or, in some cases, at a close proxy thereof.<sup>7</sup> For purposes of this order, we will refer to this practice as Net Energy Metering.<sup>8</sup>

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<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* (citing N.H. Rev. Stat. § 362-A:9 (2019); *Connecticut Net Metering*, <https://www.eversource.com/content/ct-c/about/about-us/doing-business-with-us/builderscontractors/interconnections/connecticut-net-metering>; Rhode Island, *Net Metering Provision*, <https://ngus.force.com/servlet/servlet.FileDownload?file=0150W00000ETJ1t>; Massachusetts, *Net Metering Guide*, <https://www.mass.gov/guides/net-metering-guide#-2.-net-metering-creditcalculation-and-billing>).

<sup>8</sup> NERA notes that some states have adopted variations to Net Energy Metering, such as virtual or community net metering programs, which allow multiple consumers to share billing credits from a common generating facility. *Id.* NERA states that its Petition focuses on the more common form of net metering described above because that was the subject of the Commission’s prior rulings. *Id.* However, NERA states that, to the extent these net metering variations result in energy being delivered to the interconnected utility for resale, then the principles set forth in its Petition would apply fully to those net metering variations. *Id.*

4. NERA states that Net Energy Metering transactions are currently treated as if they are retail transactions subject to regulation by various states.<sup>9</sup> NERA further states that, in many cases, the energy produced behind the meter that exceeds the customer's demand or is designed to bypass the customer's load is sold to the local utility for resale to the utility's other customers.<sup>10</sup> NERA argues that the sales at issue are wholesale sales, subject to the Commission's jurisdiction, because the energy is sold to the utility's retail load or for resale by an Independent System Operator or Regional Transmission Organization.<sup>11</sup>

5. NERA argues that the Commission previously erred in disclaiming jurisdiction over most Net Energy Metering sales based upon a theory that the net flow over the retail meter aggregated over a full retail billing cycle determines jurisdiction.<sup>12</sup> NERA asserts that the Commission should not have netted separate services with different cost structures and service characteristics to determine whether a jurisdictional sale occurred. NERA contends that the power flowing over the retail meter to the customer is firm retail requirements service while the power generated behind the retail meter is non-firm energy. NERA also argues that the Commission should not have allowed netting to occur over a full retail billing cycle because the Commission does not permit sellers to net transactions when engaging in simultaneous purchase and sale transactions, even when the simultaneous transactions are for the same service,<sup>13</sup> and consistently requires that wholesale sales be measured on an hourly or shorter-term basis.<sup>14</sup>

6. NERA argues that the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has rejected the Commission's reasoning by holding, in the context of station power, that the Commission cannot determine jurisdiction based on monthly or any other netting of injections into and withdrawals from the electric grid.<sup>15</sup> NERA claims that, in *SoCal Edison* and *Calpine*, the court rejected the premise that it is

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<sup>9</sup> *Id.* at 6.

<sup>10</sup> *Id.* at 6-7.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.* at 11-12 (citing *Sun Edison LLC*, 129 FERC ¶ 61,146 (2009); *MidAmerican Energy*, 94 FERC ¶ 61,340 (2001)).

<sup>13</sup> *Id.* at 12, 19, 22-23.

<sup>14</sup> *Id.* at 19, 26-30.

<sup>15</sup> *Id.* at 12-13 (citing *S. Cal. Edison v. FERC*, 603 F.3d 996 (D.C. Cir. 2010) (*SoCal Edison*); *Calpine Corp. v. FERC*, 702 F.3d 41 (D.C. Cir. 2012) (*Calpine*)).

reasonable to determine the jurisdiction over a sale based on the length of a netting period.<sup>16</sup> NERA asserts that the law is clear that, whenever the amount of energy generated exceeds the retail load behind the meter, regardless of the duration of the excess, state law may not govern the rates for net energy sales and the price of energy must be determined in accordance with federal law.<sup>17</sup>

7. NERA states that the FPA includes within the Commission's exclusive jurisdiction "the sale of electric energy at wholesale in interstate commerce,"<sup>18</sup> which occurs whenever energy is delivered from one entity to another for compensation.<sup>19</sup> NERA states that a sale of electric energy is made at wholesale whenever it is made to any person for resale.<sup>20</sup> NERA asserts that the sale is made in interstate commerce if the energy is delivered to a utility that merges and commingles the energy with other energy sources on the interstate electric grid.<sup>21</sup> NERA adds that the FPA does not recognize a *de minimis* exception with regard to the Commission's jurisdiction over the rates for wholesale sales.<sup>22</sup> NERA argues that, once the Commission's jurisdiction is established

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<sup>16</sup> *Id.* at 16 (citing *S. Cal. Edison v. FERC*, 603 F.3d 996).

<sup>17</sup> *Id.* at 8; 18-19.

<sup>18</sup> *Id.* at 19 (citing 16 U.S.C. § 824(b)(1); *FPC v. S. Cal. Edison Co.*, 376 U.S. 205 (1964) (*Colton*)).

<sup>19</sup> *Id.* at 19-20 (citing *PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251, at 61,889 (2001) (defining a sale as "transaction between two parties, with one party using resources of another party for some form of consideration"))).

<sup>20</sup> *Id.* (citing 16 U.S.C. § 824(d)).

<sup>21</sup> *Id.* (citing *FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 457-58 (1972)).

<sup>22</sup> *Id.* (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,995 (1993) ("The FPA makes no mention of a 'de minimis' exception for otherwise jurisdictional transactions. Moreover, the courts have rejected the notion.") (emphasis in original); *FPC v. Texaco Inc.*, 417 U.S. 380, 394 (1974) (holding that the Commission may not, on *de minimis* grounds, exempt a class of utilities from regulation.); *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 536 (1945) ("We do 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.")).

under the FPA, the Commission must exercise its jurisdiction and has no discretion to allow the states to regulate in areas within exclusive federal authority.<sup>23</sup>

8. NERA asserts that, even if the Commission has discretion to exercise its jurisdiction, it is inappropriate for the Commission to decline to exercise jurisdiction here due to Net Energy Metering's adverse public policy impacts.<sup>24</sup> NERA contends that the generators favored by Net Energy Metering are typically much less efficient than their disfavored competitors and impose significant additional costs on the electric system due to their intermittent nature.<sup>25</sup> NERA also alleges that Net Energy Metering provides perverse incentives for sellers not to invest in storage or other technologies because they are already compensated as if they were supplying a firm, load-following service. NERA claims that the overpayment from Net Energy Metering through compensation at retail rates results in over-investment in the production of less efficient and reliable energy, with a corresponding reduction in investment in both grid-based renewable generation and resources that provide the dispatchable firm power required for reliable operations.<sup>26</sup> NERA also contends that Net Energy Metering will make it more difficult to achieve renewable energy goals because electric consumers are forced to pay the bundled retail rate for one form of variable renewable energy, even though energy with all of the same environmental attributes can be purchased at a fraction of that amount from the grid. NERA argues that, therefore, Net Energy Metering increases utility costs and shifts those costs in an inequitable manner to lower income consumers.<sup>27</sup>

9. NERA also argues that, because nearly all Net Energy Metering sellers are Qualifying Facilities (QFs) pursuant to PURPA because they are behind the retail meter generators that are smaller than 1 MW and utilize renewable or other qualifying energy sources such as rooftop solar, their sales must be priced at the avoided cost rate in accordance with PURPA.<sup>28</sup> NERA claims that Net Energy Metering pricing produces a rate for QF-generated energy that substantially exceeds the purchasing utility's avoided

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<sup>23</sup> *Id.* at 24-25 (citing *Colton*, 376 U.S. 205 at 209 n.5; *Florida Power & Light Co.*, 29 FERC ¶ 61,140, at 61,292 (1984)).

<sup>24</sup> *Id.* at 44.

<sup>25</sup> *Id.* at 37.

<sup>26</sup> *Id.* at 37-38.

<sup>27</sup> *Id.* at 40-43.

<sup>28</sup> *Id.* at 30-32 (citing PURPA § 210, 16 U.S.C. § 824a-3(a) and (b) (“No such rule. . . [shall] provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.”)).

cost because the QF is compensated at the bundled retail rate but is not supplying a firm power product or avoiding the need for utility transmission or distribution and other fixed costs included in the bundled rate.<sup>29</sup> NERA asserts that the need to re-allocate unrecovered costs to other customers means that the rate charged by the QF exceeds the utility's avoided cost.<sup>30</sup> NERA further argues that PURPA section 111(d) provides an offset for energy only, which "infers" that the offset is equal to the avoided cost of energy.<sup>31</sup> NERA claims that, in the few cases in which Net Energy Metering sales from behind a retail meter are not subject to PURPA (i.e., the seller is not eligible to be a QF or is eligible but larger than one megawatt and does not self-certify), the seller is required under the FPA to have a rate approved and on file with the Commission, together with a contract or tariff under which the wholesale purchaser has agreed to purchase its energy at that rate.<sup>32</sup> NERA asserts that, in that case, the rate should be the applicable just and reasonable rate for non-firm energy.

## **II. Notice of Filing and Responsive Pleadings**

10. Notice of NERA's petition was published in the *Federal Register*, 85 Fed. Reg. 22,416 (Apr. 22, 2020), with interventions and protests due on or before June 15, 2020.<sup>33</sup>

11. Numerous entities filed notices of intervention and timely motions to intervene; some of those entities also filed comments.<sup>34</sup> Numerous individuals also filed comments.<sup>35</sup>

12. Environmental Defense Fund; Lincoln Electric System; Maine Governor's Energy Office; and Office of the Nevada Attorney General filed motions to intervene out of time.

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<sup>29</sup> *Id.* at 32-33.

<sup>30</sup> *Id.* at 33.

<sup>31</sup> *Id.* at 35-37 (citing 16 U.S.C. § 2621(d)(11))(2018).

<sup>32</sup> *Id.* at 9.

<sup>33</sup> On May 4, 2020, the comment period was extended from May 14, 2020 to June 15, 2020. *See Notice of Extension of Time*, Docket No. EL20-42-000 (May 4, 2020).

<sup>34</sup> *See* Appendix A.

<sup>35</sup> *See id.*

13. Allco Renewable Energy Limited; Colorado Energy Office; New Energy Equity, LLC.; Organization of MISO States, Inc. and Organization of PJM States Inc.; Public Citizen; and WWALS Watershed Coalition, Inc. filed motions to dismiss or deny.<sup>36</sup> On June 30, 2020, the Michigan Commission filed an answer to the comments supporting the Petition, and the Oxenhams filed an answer supporting Public Citizen's motion to dismiss. On that same date, NERA filed an answer to the protests and motions to dismiss. On July 1, 2020, Public Citizen filed an answer to NERA's answer.

**A. Comments in Support**

14. Americans for Tax Reform, Californians for Green Nuclear Power, Inc., CALifornians for Renewable Energy, Inc., Citizens Against Government Waste, Competitive Enterprise Institute, and Heartland Institute support the Petition.<sup>37</sup>

15. Citizens Against Government Waste argue that granting the Petition would result in fair competition in the energy sector by instituting more energy-efficient practices and would save ratepayers billions of dollars.<sup>38</sup> Heartland Institute asserts that the costs of installing and maintaining resources subject to net metering laws are paid by ratepayers in general, rather than the customers or companies who installed or operate the resources, which results in regressive cost-shifting because rooftop solar owners generally have higher incomes than others so lower income ratepayers end up subsidizing higher-income customers. For this reason, Heartland Institute argues that owners of these resources should be paid at the same rate conventional sources are paid, reflecting the true wholesale cost of electricity.<sup>39</sup>

16. Competitive Enterprise Institute similarly contends that net metering is unfair because it results in a windfall to participants at the expense of other consumers.<sup>40</sup> Competitive Enterprise Institute argues that the Commission has jurisdiction over net

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<sup>36</sup> On June 15, 2020, CALifornians for Renewable Energy, Inc., Michael Boyd, and QF03-76-000 filed a request for joinder. It is unclear which proceedings the entity seeks consolidated or joined; therefore, we are not able to act upon this request.

<sup>37</sup> Institute for Energy Research does not explicitly state that it supports the Petition but contends that net metering programs replace cheap, efficient existing generation capacity with high cost, inefficient rooftop generation, while shifting costs to low-income households. *See* Institute for Energy Research Comments at 1.

<sup>38</sup> Citizens Against Government Waste Comments at 3.

<sup>39</sup> Heartland Institute Comments at 1-3.

<sup>40</sup> Competitive Enterprise Institute Comments at 2-6.

metering transactions because they are wholesale sales and due to the inherently interstate nature of any electric energy delivered to a utility that merges and commingles the energy with other energy sources on the interstate electric grid.<sup>41</sup> Americans for Tax Reform support the Petition because they assert that the regressive cost-shifting associated with net metering benefits wealthy homeowners to the detriment of lower income consumers and provides subsidies that distort competitive markets and conflicts with federal law.<sup>42</sup> Californians for Green Nuclear Power, Inc. supports the Petition because it believes that net metering policies should reimburse wholesale rates instead of retail rates to a solar generation facility owner.<sup>43</sup> CALifornians for Renewable Energy, Inc. supports the Petition “with the modification that the Commission already has ‘exclusive federal jurisdiction over wholesale energy [and capacity] sales from generation sources located on the customer side of the retail meter.’”<sup>44</sup>

## **B. Comments in Opposition**

17. Commenters oppose the Petition for several reasons.

18. First, commenters request that the Commission dismiss the Petition for a variety of procedural defects.<sup>45</sup> Commenters argue that NERA does not disclose its constituent members or the interests it represents; therefore, NERA has not demonstrated that it will be subject to harm based on the outcome of the Petition or that it has an identifiable interest in the proceedings.<sup>46</sup> Commenters allege that NERA mounts broad policy

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<sup>41</sup> *Id.* at 6-7.

<sup>42</sup> Americans for Tax Reform Comments at 1.

<sup>43</sup> Californians for Green Nuclear Power, Inc. Comments at 1.

<sup>44</sup> CALifornians for Renewable Energy, Inc. Comments at 2.

<sup>45</sup> These commenters include entities such as the following: APPA; Berkshire Environmental Action Team; Coalition for Community Solar Access; Colorado Energy Office; CT/NY State Intervenors; Distributed Energy Coalition; Eastern New England Consumer-Owned Systems; Electricity Regulation Scholars; NARUC; National Association of State Utility Consumer Advocates; New England Small Hydro Coalition; NH State Rep. Kat McGhee; Pennsylvania Public Utility Commission; Public Citizen; Public Interest Organizations; Public Utility Commission of Oregon; Public Utility Commission of Texas; Solar Energy Industries Association; and Western Way.

<sup>46</sup> *See, e.g.*, Eastern New England Consumer-Owned Systems Comments; Public Citizen Motion to Dismiss.

arguments without reference to specific parties or factual circumstances.<sup>47</sup> For instance, Pennsylvania Public Utility Commission asserts that the net metering regulatory scheme is already well established and the Petition fails to identify a specific state net metering scheme that is at issue, even though the Commission requires a concrete case or controversy with limited exceptions.<sup>48</sup> Commenters also claim that Commission's net metering precedent is sound and there is no controversy or uncertainty to resolve.<sup>49</sup> APPA points to the fact that (1) the Commission has reaffirmed its precedent on retail net metering jurisdiction in a number of contexts, (2) the precedent is consistent with PURPA section 111(d)(11), and (3) NERA does not cite any particular case or controversy from which the issues addressed in the Petition are alleged to have arisen, let alone a case that raises new or unsettled issues.<sup>50</sup> Commenters also assert that the Petition would create a controversy rather than resolve one.<sup>51</sup> Commenters also contend that the Petition should have been filed as a complaint or as a petition for enforcement under PURPA.<sup>52</sup>

19. Second, commenters argue that the Commission should defer net metering to the states because states should establish standards whenever possible and not expressly prohibited by law.<sup>53</sup> Commenters contend that states are appropriately implementing net metering and that the Commission's assertion of jurisdiction would initiate a "slippery slope" toward federal control of retail rates.<sup>54</sup> Coalition for Community Solar Access argues that the Commission should defer jurisdiction to the states because federal

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<sup>47</sup> See, e.g., AEE Comments at 7-10; Electricity Regulation Scholars Comments at 4-5; NARUC Comments at 12-16.

<sup>48</sup> Pennsylvania Public Utility Commission Comments at 2-3.

<sup>49</sup> See, e.g., APPA Comments at 4-5; Electricity Regulation Scholars Comments at 5-8; New England Small Hydro Coalition Comments at 4.

<sup>50</sup> APPA Comments at 5.

<sup>51</sup> See, e.g., APPA Comments at 5-6; Colorado Energy Office Comments at 7-12; Electricity Regulation Scholars Comments at 8; NARUC Comments at 13-15; Solar Energy Industries Association Comments at 6-7.

<sup>52</sup> See, e.g., Electricity Regulation Scholars Comments at 7; NESCOE Comments at 14; Public Interest Organizations Comments at 9-10.

<sup>53</sup> See, e.g., Conservatives for Responsible Stewardship Comments at 1-2.

<sup>54</sup> See, e.g., Clean Coalition Comments at 6; Conservative Energy Network Comments at 4.

jurisdiction would likely fail to effectively take regional variability in state net metering programs into account.<sup>55</sup>

20. Third, commenters contend that granting the Petition will unravel years of long-settled state net metering policies that consumers and businesses have relied upon to make investments, which would result in severe disruption to the energy industry and state environmental and clean energy goals.<sup>56</sup> For instance, NARUC asserts that granting the Petition will disrupt the significant and long-term investments in rooftop solar made by millions of retail customers.<sup>57</sup> Commenters claim that granting the Petition will cause significant economic harm by increasing costs to consumers, putting solar industry jobs at risk, and decreasing investment in renewable energy resources like rooftop solar.<sup>58</sup>

21. National Fuel Cell Research Center contends that granting the Petition would undermine state economic policies and constitute a *de facto* repeal of net metering. National Fuel Cell Research Center points to Nevada and Maine as examples of how the repeal of net metering has devastated other distributed generation industries.<sup>59</sup> Rural Nebraskans argue that net metering policy, which is designed to capture the economic benefits of distributed generation, should be left to local policymakers, ratepayers, and customer-generators. Organization of MISO States, Inc. and Organization of PJM States, Inc. contend that their members, nearly all of which have some form of net metering based on local conditions and policy goals, should be allowed to exercise their jurisdiction over net metering “based on state policy, utility and stakeholder goals, and/or other considerations under state and retail jurisdiction.”<sup>60</sup> Commenters also claim that a jurisdictional shift on issues related to the value of net metering, cross-subsidization, and

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<sup>55</sup> Coalition for Community Solar Access Comments, Affidavit at 12.

<sup>56</sup> *See, e.g.*, 31 State Attorneys General Comments at 2; AEE Comments at 25; Berkshire Environmental Action Team Comments at 2-3; NARUC Comments at 43.

<sup>57</sup> NARUC Comments at 43.

<sup>58</sup> *See, e.g.*, Center for Rural Affairs Comments at 1-2; Coalition for Community Solar Access Comments at 8; New Energy Equity LLC Comments at 4-6; Ohio Environmental Council Comments at 2.

<sup>59</sup> National Fuel Cell Research Center Comments at 1.

<sup>60</sup> Organization of MISO States, Inc. and Organization of PJM States, Inc. Comments at 15.

technical considerations, which are within state jurisdiction, would be detrimental to the long-term investments made under the retail ratemaking process.<sup>61</sup>

22. Fourth, commenters argue that net metering is an integral element of retail billing, which is strictly a state jurisdictional issue, and not a sale for resale.<sup>62</sup> Electricity Regulation Scholars assert that the Commission does not have authority to require states to adopt a methodology for calculating retail sales or allocating costs of retail service among ratepayers because it is “widely understood that net metering is a component of retail service.”<sup>63</sup> AEE and NARUC claim that NERA has failed to provide any evidence of a sale for resale, such as taxation, transfer of title, a utility recording the cost of an acquisition, engineering data, power flow data, accounting studies, or some other proof of sale, which AEE argues NERA has the burden to prove.<sup>64</sup> New Jersey Board of Public Utilities contends that, because it prohibits generation from exceeding demand over the netting interval, no sale could ever occur under NERA’s reasoning.<sup>65</sup>

23. APPA asserts that net metering transactions are local by effect and in nature because net metering concerns “the relationship between the retail customer and the local utility, how to measure the quantity of energy provided by the utility, the amount due for that retail service, and the terms of that service.”<sup>66</sup> Charles J. Cicchetti & Jon Wellinghoff contend that a part of the determination of what constitutes a sale for resale depends on the intent of the parties, noting that there is a distinction between the intent of a party participating in net metering who infrequently injects power into the grid and the intent of traditional generators who compete in wholesale markets.<sup>67</sup> Commenters claim that a finding that net metering is a sale for resale would upset related precedent (i.e.,

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<sup>61</sup> *See, e.g., id.*

<sup>62</sup> *See, e.g.,* NARUC Comments at 19-22 (also distinguishing net metering as “flows,” not sales); *see also* Electricity Regulation Scholars Comments at 15 (describing an accounting method for retail service); Charles J. Cicchetti & Jon Wellinghoff Comments at 7 (describing net metering as “a credit,” a “wash trade,” or a “retail swap”).

<sup>63</sup> Electricity Regulation Scholars Comments at 13-18.

<sup>64</sup> AEE Comments at 20; NARUC Comments at 20.

<sup>65</sup> New Jersey Board of Public Utilities Comments at 18.

<sup>66</sup> APPA Comments at 13-14.

<sup>67</sup> Charles J. Cicchetti & Jon Wellinghoff Comments at 8.

disclaimed jurisdiction in sub-metering agreements,<sup>68</sup> certain *de minimis* contracts,<sup>69</sup> and interconnection procedures) and create uncertainty regarding the regulatory framework for energy storage resources.<sup>70</sup>

24. Finally, commenters assert that the Commission does not have jurisdiction over net metering, which they contend is an intrastate transaction, because, under the FPA, the Commission has jurisdiction over only transactions in interstate commerce, and all other transactions fall under state jurisdiction, regardless if a sale for resale occurs.<sup>71</sup> Maryland Energy Administration contends that net metering is wholly intrastate because no commingling of energy occurs on the interstate transmission grid.<sup>72</sup> NARUC asserts that, contrary to NERA's assertion, even if there were commingling of a retail customer's generation onto a local distribution network containing energy that flowed in interstate commerce, Commission jurisdiction does not attach to net metering if the customer's generation does not subsequently flow across state lines, which NARUC asserts it does not.<sup>73</sup> AEE contends that, even if commingling does occur, NERA has the burden to support that assertion, which it fails to do.<sup>74</sup>

25. Maryland Energy Administration also argues that, according to the test used to determine whether net metering is in interstate commerce (i.e., the seven-factor test in Order No. 888 used to determine whether a facility is local distribution), the Commission

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<sup>68</sup> *E.g.*, Distributed Energy Coalition Comments at 10-11.

<sup>69</sup> *E.g.*, NESCOE Comments at 16-17.

<sup>70</sup> *E.g.*, APPA Comments at 15.

<sup>71</sup> *See, e.g.*, Indiana Utility Regulatory Commission Comments at 14-16; Maryland Energy Administration Comments at 3-4; NARUC Comments at 37-41; New Jersey Board of Public Utilities Comment at 22.

<sup>72</sup> Maryland Energy Administration Comments at 3-4.

<sup>73</sup> NARUC Comments at 37-41 (distinguishing wholesale and transmission jurisdiction as described in *Florida Power & Light* and noting that unintended flow that crossed state boundaries was "too remote" in character, as described in *Superior Oil Co. v. Miss. ex rel. Knox*, 280 U.S. 390 (1930), and that *U.S. v. Pub. Util. Comm'n of Cal.*, 345 U.S. 295 (1953) among others upholds and reinforces this distinction about interstate character of transactions based on intent and knowledge of interstate nature).

<sup>74</sup> AEE Comments at 20; Coalition for Community Solar Access Comments at 16.

would not have jurisdiction over net metering.<sup>75</sup> Separately, APPA asserts that regulating net metering would regulate the wires within homes and result in improper use of the interstate commerce clause.<sup>76</sup>

C. Answers

26. The Oxenhams support Public Citizen's motion to dismiss and argue that NERA's failure to disclose the nature of its interest in the Petition's subject matter warrants dismissing the Petition.<sup>77</sup>

27. In response to commenters supporting the Petition, the Michigan Commission asserts that their policy rationales do not justify the requested relief and fail to recognize the diversity of state policies regarding net metering. The Michigan Commission objects to arguments that net metering programs overcompensate customers for the excess electricity, subsidize rooftop solar electricity generation, and cost shift from higher-income customers to lower-income customers, arguing that these criticisms are not applicable to the programs in Michigan.<sup>78</sup> The Michigan Commission further argues that states have jurisdiction over distributed generation resources and local net metering programs.<sup>79</sup> The Michigan Commission contends that net metering programs do not interfere with interstate commerce or set wholesale rates and that, as the Commission's *MidAmerican* and *SunEdison* orders and the D.C. Circuit's *SoCal Edison* and *Calpine* opinions reveal, state net metering programs are not preempted.<sup>80</sup>

28. In its answer, NERA responds to arguments that the Commission cannot or should not rule on the merits of the Petition. NERA contends that it appropriately filed its Petition under Rule 207(a)(2), asking the Commission to resolve a key jurisdictional issue under the FPA and a controversy affecting the efficiency of wholesale markets and the rates paid by millions of retail electric consumers.<sup>81</sup> NERA states that the Commission has previously confirmed that subject matters involving questions relating to

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<sup>75</sup> Maryland Energy Administration Comments at 3.

<sup>76</sup> APPA Comments at 15.

<sup>77</sup> Oxenhams Answer at 2-18.

<sup>78</sup> Michigan Commission Answer at 4-9.

<sup>79</sup> *Id.* at 9-19.

<sup>80</sup> *Id.* at 20.

<sup>81</sup> NERA Answer at 12-13.

its jurisdiction are particularly appropriate to be addressed in petitions for declaratory orders.<sup>82</sup> NERA further argues that its Petition raises the concrete and narrow issue of “monthly netting”<sup>83</sup> and that the Commission’s rules do not require that NERA challenge a specific state’s net metering program.<sup>84</sup> NERA claims that the Commission has both the right and the obligation to fix its errors.<sup>85</sup>

29. In response to arguments about NERA’s failure to disclose its membership, NERA states that it is a non-profit organization incorporated in the Commonwealth of Massachusetts and, thus, considered “a person” eligible to file a petition for declaratory order under Rule 207.<sup>86</sup> NERA asserts that Rule 207 does not require that a person have “standing” before filing a petition for declaratory order.<sup>87</sup> NERA notes that the Commission granted NERA’s petition for declaratory order last year in Docket

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<sup>82</sup> *Id.* at 13-14 & n.23 (citing *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157, at PP 18-19 (2008) (stating that because petitions for declaratory orders are subject to a public comment process, it is formal, binding and “the most reliable form of guidance available from the Commission”); *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064, at P 16 (2020) (granting a petition for declaratory order based upon a finding of uncertainty as to the proper role of the Commission in condemnation proceedings); *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206, at P 42 (2016) (stating that the determinations that the Commission makes in a declaratory order are “generally legal in nature” and encompass a broad range of issues, including “jurisdictional issues” arising “under the statutes that the Commission administer[s]”)).

<sup>83</sup> *Id.* at 6-7.

<sup>84</sup> *Id.* at 14 (citing *Advanced Energy Econ.*, 161 FERC ¶ 61,245, at P 58 (2017) (rejecting various procedural arguments in opposition to a petition for declaratory order concerning energy efficiency resources and holding it appropriate to address the merits of the petition because “the novel issues of federal and state jurisdiction presented . . . warrant Commission guidance”), *reh’g order*, 163 FERC ¶ 61,030 (2018); *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,061, at P 92 (2007) (“Providing general guidance on policy issues is precisely the function of this Commission in ruling on a petition for declaratory order.”)).

<sup>85</sup> *Id.* (citing *FCC v. Fox Television Stations*, 556 U.S. 502, 513 (2009)).

<sup>86</sup> *Id.* at 15 (citing 18 C.F.R. 385.102(d) (2019)).

<sup>87</sup> *Id.* (citing *Enbridge Offshore Facilities, LLC*, 116 FERC ¶ 61,001, at P 16 (2006); *SFPP, L.P.*, 102 FERC ¶ 61,089, at P 11 (2003); *Proteus Oil Pipeline Co., LLC*, 102 FERC ¶ 61,333, at P 30 (2003); *Caesar Oil Pipeline Co., LLC*, 102 FERC ¶ 61,339, at P 32 (2003); *Express Pipeline P’ship*, 75 FERC ¶ 61,303 (1996)).

No. EL19-10-000 and, although unnecessary, it is voluntarily attaching an affidavit from one of its members confirming that the member's interests as a ratepayer will be directly affected by the outcome of this proceeding.<sup>88</sup>

30. NERA also responds to protests challenging the merits of the Petition. NERA argues that protestors' assertion that the Commission does not have jurisdiction over sales subject to net metering programs under FPA section 201(b) because there is no wholesale sale of electric energy is contrary to the plain language of FPA section 201(b) and constitute collateral attacks on the Commission's decisions in *MidAmerican* and *Sun Edison*.<sup>89</sup> NERA disagrees that Net Energy Metering transactions are in intrastate commerce, arguing that, consistent with Supreme Court precedent, the Commission has consistently and uniformly held that wholesale sales from power generated on the distribution system, including from behind the retail meter, are jurisdictional sales in interstate commerce.<sup>90</sup> NERA also contends that protestors' arguments seek to overturn *MidAmerican* and *Sun Edison* on grounds not asserted by NERA.

31. NERA argues that protestors incorrectly assert that the Commission has the discretion to decline its jurisdiction under the FPA.<sup>91</sup> NERA states that, while the Commission must provide a clear explanation for changing its interpretation of its jurisdiction and has not done so often, there is no law prohibiting the Commission from doing so.<sup>92</sup> NERA disagrees with protestors' characterization of the decisions in *SoCal Edison* and *Calpine*.<sup>93</sup> NERA asserts that section 1251 of the Energy Policy Act 2005, which amends PURPA section 111(d), does not change the Commission's jurisdiction over net metered wholesale sales.<sup>94</sup> NERA also responds to other protestors' concerns: policy arguments; universality of net metering programs in states; technical feasibility of using wholesale market prices to price the sales of excess energy from net metered transactions; reference to net metering as a billing convention; reliance on the seven-factor test adopted in Order No. 888; the applicability of the enforcement framework in PURPA section 210; contention that the pricing of energy delivered to the distribution

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<sup>88</sup> *Id.* at 16.

<sup>89</sup> *Id.* at 17-21.

<sup>90</sup> *Id.* at 21-30.

<sup>91</sup> *Id.* at 31-34.

<sup>92</sup> *Id.* at 34-35.

<sup>93</sup> *Id.* at 38-39.

<sup>94</sup> *Id.* at 39-42.

utility is a sale at a valid avoided cost rate under PURPA; use of federalism principles to reject the Petition or find that preemption is not warranted; and argument that NERA asks the Commission to construe its FPA jurisdiction in a manner that raises questions under the Tenth Amendment.<sup>95</sup>

32. In its answer to NERA's answer, Public Citizen contends that NERA is not a ratepayer group, but rather a trade association representing energy interests, as confirmed by the affidavit of Geoffrey Mitchell.<sup>96</sup> Public Citizen argues that, by claiming Mr. Mitchell is a ratepayer and member but omitting that Mr. Mitchell is President of Brant Energy Inc. and aligned with the financial interests of electric utilities, NERA intentionally mischaracterizes itself as a ratepayer organization to shield the true economic interests motivating the Petition.<sup>97</sup> Public Citizen also argues that NERA has a sister organization, the Ratepayers Legal Defense Fund, Inc., and that any Commission action to require disclosure of NERA's membership should also apply to that organization.<sup>98</sup>

### **III. Discussion**

#### **A. Procedural Matters**

33. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), we grant Environmental Defense Fund's, Lincoln Electric System's, Maine Governor's Energy Office's, and Office of the Nevada Attorney General's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.<sup>99</sup>

34. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits answers to protests and answers to answers unless

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<sup>95</sup> *Id.* at 42-46.

<sup>96</sup> Public Citizen Answer at 1.

<sup>97</sup> *Id.* at 1-2.

<sup>98</sup> *Id.* at 2.

<sup>99</sup> The entities and individuals that filed comments but did not file motions to intervene are not parties to this proceeding. *See* 18 C.F.R. §§ 385.102(c)(3), 385.214(a)(3) (2019).

otherwise ordered by the decisional authority. We accept the Michigan Commission's, NERA's, and Public Citizen's answers because they have provided information that assisted us in our decision-making process. Answers to motions are permitted.<sup>100</sup>

## **B. Substantive Matters**

35. Declaratory orders to terminate a controversy or remove uncertainty<sup>101</sup> are discretionary.<sup>102</sup> We find that the issues presented in the Petition do not warrant a generic statement from the Commission at this time. Therefore, we exercise our discretion to decline to address the issues set forth in the Petition, and, accordingly, we dismiss the Petition.

36. The manner in which the Commission addresses a petition for declaratory order depends on the "specific facts and circumstances" presented to the Commission.<sup>103</sup> NERA in its Petition makes general assertions that Net Energy Metering policies adopted by various states improperly intrude on the Commission's authority under the FPA and PURPA. NERA states that "it is in the public interest for the Commission to address this Petition promptly so that the pricing of [Net Energy Metering] sales becomes settled and

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<sup>100</sup> See 18 C.F.R. § 385.213(a)(3) (an answer may be made to any pleading, if not prohibited by paragraph (a)(2) of that section); 18 C.F.R. § 385.202 (2019) (a motion is a type of pleading).

<sup>101</sup> 18 C.F.R. § 385.207(a)(2).

<sup>102</sup> See, e.g., 5 U.S.C. § 554(e) (2018) (stating that, under the Administrative Procedure Act, the "agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty"); *Continental Oil Co. v. FPC*, 285 F.2d 527, 527 (5th Cir. 1961) (*per curiam*); *Stowers Oil & Gas Co.*, 27 FERC ¶ 61,001, at 61,001 (1984) (noting that "there is ample authority for the proposition that Commission action on petitions for declaratory order is discretionary with the agency"); *accord Morgan Stanley Capital Group, Inc.*, 119 FERC ¶ 61,298, at P 17 (2007) (Commission "has discretion as to whether to issue a declaratory order in particular circumstances in order to terminate a controversy or remove uncertainty"); *Ark. Power & Light Co.*, 35 FERC ¶ 61,358, at 61,818 (1986) (granting of petition for declaratory order "is a matter of agency discretion").

<sup>103</sup> *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206 at PP 44-45 & n.72 (quoting *Puget Sound Energy Inc.*, 139 FERC ¶ 61,241, at P 12 (2012)); *accord Sharyland Utils., L.P.*, 121 FERC ¶ 61,006, at P 23 (2007) (granting petition for declaratory order "[b]ased on the specific facts presented. . .").

affected parties can make appropriate decisions.”<sup>104</sup> NERA further states that the Petition “focuses on the more common form of [Net Energy Metering] described above, as that was the subject of the Commission’s prior rulings in *MidAmerican* and *Sun Edison*.”<sup>105</sup> The Petition, however, does not identify a specific controversy or harm that the Commission should address in a declaratory order to terminate a controversy or to remove uncertainty. In contrast, *MidAmerican* and *SunEdison* related to the implementation of specific net metering programs or the participation in such programs by specific parties.<sup>106</sup> For this separate reason as well, we decline to issue the requested order.

37. Lastly, to the extent that NERA is concerned that certain state regulatory authorities in New England are not pricing sales from QFs in accordance with PURPA,<sup>107</sup> we find the Petition does not meet the requirements for enforcement under PURPA section 210(h).<sup>108</sup>

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<sup>104</sup> See Petition at 2.

<sup>105</sup> *Id.* at 5 n.11.

<sup>106</sup> See *Sun Edison LLC*, 129 FERC ¶ 61,146 at P 1 (seeking a declaratory order confirming that certain of its subsidiaries' sales to end-use customers do not constitute the sale of electric energy at wholesale in interstate commerce or the transmission of electric energy in interstate commerce for purposes of the Federal Power Act); *MidAmerican*, 94 FERC ¶ 61,340 at P 1 (objecting to the Iowa Utilities Board’s implementation of final orders issued pursuant to Iowa’s Alternate Energy Production Statute and § 199-15.11(5) of the regulations thereunder, directing *MidAmerican* to interconnect with three Alternate Energy facilities and to offer net billing arrangements to those facilities).

<sup>107</sup> See 16 U.S.C. § 824a-3(b). NERA states that “[i]n the case of behind the retail meter generators utilizing renewable or other qualifying energy sources (such as rooftop solar), the sellers are virtually always QFs pursuant to PURPA” and that “[t]he Commission’s prior disclaimer of jurisdiction has permitted states to employ [full net metering] in order to price these QF sales significantly above avoided cost in violation of PURPA.” Petition at 8.

<sup>108</sup> Section 210(h) of PURPA specifies that only electric utilities, qualifying small power production facilities and qualifying cogeneration facilities may petition for enforcement of PURPA. 16 U.S.C. § 824a-3(h)(2)(B). NERA does not appear to fall within any of those categories.

The Commission orders:

NERA's Petition is hereby dismissed, as discussed in the body of this order.

By the Commission. Commissioner McNamee is concurring with a separate statement attached.

Commissioner Danly is concurring with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

**Appendix A****Intervention Only**

- |  |  |
|--|--|
| 1. Acadia Center   | Island Power Authority (New York Transmission Owners)                              |
| 2. Allegheny Electric Cooperative, Inc.  | 18. Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California |
| 3. Alliant Energy Corporate Services, Inc.   | 19. Citizens Energy Corporation  |
| 4. Ameren Services Company   | 20. Citizens Utility Board of Illinois   |
| 5. American Electric Power Service Corporation   | 21. City of Farmington, New Mexico, d/b/a Farmington Electric Utility System       |
| 6. American Wind Energy Association  | 22. City of New York   |
| 7. Appalachian Voices  | 23. Clean Wisconsin  |
| 8. Arkansas Electric Cooperative Corporation   | 24. Clearway Energy Group LLC  |
| 9. Arkansas Public Service Commission  | 25. Cogentrix Energy Power Management, LLC   |
| 10. Avista Corporation   | 26. Connecticut Consumer Counsel   |
| 11. Berkshire Environmental Action Team, Inc.  | 27. Connecticut Department of Energy and Environmental Protection                  |
| 12. Borrego Solar Systems, Inc.  | 28. Connecticut Public Utilities Regulatory Authority                              |
| 13. California Justice Department  | 29. Conservation Law Foundation  |
| 14. California Municipal Utilities Association   | 30. Consolidated Edison Development, Inc.  |
| 15. CALifornians for Renewable Energy, Inc.  | 31. Consumer Energy Alliance   |
| 16. Calpine Corporation  | 32. Consumers Energy Company   |
| 17. Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York Power Authority, Niagara Mohawk d/b/a/ National Grid, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Long Island Lighting Company d/b/a Power Supply Long Island, Long | 33. Convergent Energy and Power LP   |
|  | 34. Cooperative Energy   |
|  | 35. CPV Power Holdings, LP   |
|  | 36. Direct Energy Services, LLC and Direct Energy Business, LLC                    |
|  | 37. Dominion Energy Services, Inc.   |
|  | 38. Duke Energy Corporation  |
|  | 39. East Kentucky Power Cooperative, Inc.  |
|  | 40. Eastern Generation, LLC  |
|  | 41. Edison Electric Institute  |

42. El Paso Electric Company
43. Electric Power Supply Association
44. Energy New England, LLC
45. Energy Storage Association
46. EnergySage
47. ENGIE North America Inc.
48. Entergy Services, LLC; Entergy Louisiana, LLC; Entergy Mississippi, LLC; Entergy New Orleans, LLC; Entergy Texas, Inc.; Entergy Arkansas, LLC
49. Environmental Law and Policy Center
50. Exelon Corporation
51. FirstEnergy Service Company
52. FirstLight Power Inc.
53. Georgia Interfaith Power & Light, North Carolina Interfaith Power & Light, South Carolina Interfaith Power & Light
54. Gravity Renewables, Inc.
55. Harvard Electricity Law Initiative
56. Helix Maine Wind Development, LLC, et. al.
57. Helix Ravenswood LLC
58. Idaho Conservation League
59. Idaho Power Company
60. Illinois Commerce Commission
61. Illinois Municipal Electric Agency
62. Imperial Irrigation District
63. Independent Market Monitor for PJM
64. Indiana Utility Regulatory Commission
65. Iowa Attorney General and Iowa Office of Consumer Advocate
66. Iowa Environmental Council
67. Iowa Office of Consumer Advocate
68. Iowa Solar Energy Trade Association
69. James J. Apple
70. Joy Loving
71. Kathleen Jennings, Attorney General for the State of Delaware
72. Los Angeles Department of Water and Power
73. Louisiana Public Service Commission
74. Louisville Gas and Electric Co./ Kentucky Utilities Co.
75. Maine Public Utilities Commission
76. Marin Clean Energy
77. Massachusetts Attorney General Maura Healey
78. Massachusetts Department of Public Utilities
79. Massachusetts Municipal Wholesale Electric Company
80. Michigan Attorney General
81. Michigan Public Power Agency
82. Michigan Public Service Commission (Michigan Commission)
83. Minnesota Attorney General's Office
84. MISO Transmission Owners
85. Modern Energy Resources, LLC
86. National Grid
87. NC WARN
88. NEPOOL Participants Committee
89. New England Power Generators Association, Inc.
90. New Hampshire Electric Cooperative, Inc.
91. New Hampshire Public Utilities Commission
92. New Jersey Division of Rate Counsel
93. New Jersey Office of Attorney General

94. New York State Attorney General's Office
95. New York State Energy Research and Development Authority
96. New York State Public Service Commission
97. NextEra Energy, Inc.
98. North Carolina Attorney General's Office
99. North Carolina Sustainable Energy Association
100. North Carolina Utilities Commission
101. NRG Power Marketing LLC
102. Office of the Attorney General for the District of Columbia
103. Office of the Attorney General of Maryland
104. Old Dominion Electric Cooperative
105. Omaha Public Power District
106. Oncor Electric Delivery Company LLC
107. Organization of MISO States, Inc.
108. Pacific Gas & Electric Company
109. Peninsula Clean Energy Authority
110. Pennsylvania Office of Consumer Advocate
111. PJM Interconnection, L.L.C.
112. Portland General Electric Company
113. PPL Electric Utilities Corporation
114. PSEG Companies
115. Public Service Commission of Kentucky
116. Public Utilities Commission of Ohio
117. Public Utilities Commission of The State of California
118. Public Utility District No. 1 of Snohomish County, Washington
119. Renew Wisconsin
120. Rhode Island Attorney General
121. Rhode Island Division of Public Utilities and Carriers
122. Sacramento Municipal Utility District
123. Safari Energy, LLC
124. Salt River Project Agricultural Improvement & Power District
125. San Diego Gas & Electric Company
126. Solar United Neighbors
127. South Carolina Coastal Conservation League
128. Southern Alliance for Clean Energy
129. State of New Hampshire
130. State of Washington
131. Sunrun Inc.
132. Sustainable FERC Project and Natural Resources Defense Council
133. Talen Energy Corporation
134. TerraForm Power, Inc.
135. The Heartland Institute
136. The People of the State of Illinois
137. Upstate Forever
138. William Tong, Attorney General for the State of Connecticut
139. Xcel Energy Services Inc.

**Comments Only**

- |                                     |   |
|-------------------------------------|---|
| 1. Alex Pouliot                     | Power Ventures Holdings, LLC;           |
| 2. Alice Lentz                      | Cogentrix Energy Power                  |
| 3. Alice Trexler                    | Management, LLC                         |
| 4. Amanda Levesque                  | 37. Carl A. Querfurth                   |
| 5. American Biogas Council          | 38. Carolyn Appen                       |
| 6. Americans for Tax Reform         | 39. Carolyn Lewellen                    |
| 7. Amicus Solar Cooperative         | 40. Carrie Blair                        |
| 8. Amy Allen                        | 41. Catherine Koning                    |
| 9. Amy Gortler                      | 42. Center for Rural Affairs            |
| 10. Andrea Sreiber                  | 43. Chad Forcey, Pennsylvania           |
| 11. Andreas Glatz                   | Conservative Energy Forum               |
| 12. Andrew Bossi                    | Executive Director                      |
| 13. Ann Boland                      | 44. Charles J. Cicchetti, Ph.D. and Jon |
| 14. Ann W. Woll                     | Wellinghoff                             |
| 15. Anne E. Huberman                | (Cicchetti/Wellinghoff)                 |
| 16. Art Mandler                     | 45. Charlotte Watson                    |
| 17. Artem Treyger                   | 46. Cheryl D. Rose                      |
| 18. Arthur Fovargue                 | 47. Chris Tiedeman                      |
| 19. Ashwani Vasishth                | 48. Christina Wolfe                     |
| 20. Becky Brown                     | 49. Christine Cournoyer                 |
| 21. Belle Gironda                   | 50. Christine Enochs                    |
| 22. Benjamin Hollifield             | 51. Christopher and Lynne Gilbert       |
| 23. Berkshire Environmental Action  | 52. Christopher Lish                    |
| Team and No Fracked Gas in Mass     | 53. Cindy Callaway                      |
| 24. Bernard Jones                   | 54. Citizens Against Government         |
| 25. Bill Thunberg                   | Waste                                   |
| 26. Bob Steinburg                   | 55. City of Keene, NH                   |
| 27. Bradley Pischea, Land & Liberty | 56. Clean Coalition                     |
| Coalition                           | 57. Competitive Enterprise Institute    |
| 28. Brent Whelan                    | 58. Conservative Energy Network         |
| 29. Bridget J. Dunford              | 59. Conservative Energy Network's       |
| 30. Brittany Zwierzchowski Tisler   | Southeast Regional Director             |
| 31. Broward, Miami-Dade, and Palm   | 60. Conservative Texans for Energy      |
| Beach Counties, Florida             | Innovation                              |
| 32. Bruce Davis                     | 61. Conservatives for a Clean Energy    |
| 33. Bryan J. Siever                 | Future                                  |
| 34. Caleb Pusey                     | 62. Conservatives for Responsible       |
| 35. CALifornians for Renewable      | Stewardship                             |
| Energy, Inc. and Michael Boyd       | 63. Curt Newton                         |
| 36. Calpine Corporation; Eastern    | 64. Cynthia L. Bainton                  |
| Generation, LLC; Competitive        | 65. Daniel Glidden                      |

66. Danny van Leeuwen
67. Dave Newbold
68. David Curtis
69. David Gordon
70. David Greenberg
71. David Kroop
72. David Oman
73. David R. Miera
74. David Voorhees
75. Devon Hutton
76. Diane Martin
77. Dianne Brown
78. Distributed Energy Coalition
79. Donald W. Harrod, Village Administrator
80. Dorothy Barnett
81. Ed Haser
82. Edward Loechler
83. Edward Rivet II, Michigan Conservative Energy Forum
84. Edwin Morris
85. Elise D. Matz
86. Emily Pallarito
87. Environment America
88. Eric M. Crane
89. Fuel Cell and Hydrogen Energy Association
90. George Riley
91. Gerald Beck
92. Geri Conley
93. Giff Carpenter, Conservatives for Clean Energy South Carolina State Director
94. Gina DeBreto
95. Ginger Ryan
96. Glenn R. Davis, Jr.
97. Governor Kim Reynolds, State of Iowa
98. Governor Mills, State of Maine
99. Green America
100. Greg Brophy
101. Greg Dotson, Assistant Professor of Law
102. Gregg Ferry
103. H. Scott Rosenbush and Cindy Zimmerman
104. Handy Law, LLC
105. Hannah Stuart
106. Hathaway Strategies
107. Heidi Swann
108. Henry J. Rose
109. Indiana Conservative Alliance for Energy
110. Indiana Utility Regulatory Commission and the Indiana Office of Energy Development
111. Institute for Energy Research
112. Jack Grup
113. Jackson G. Keith
114. Jacob Winslow
115. Jacqueline Callas
116. Jake Ketzner
117. James and Mary Powell
118. James Schall
119. James Schwarber
120. James Seidel, Minnesota Conservative Energy Forum
121. Jan Onan
122. Jane Cook
123. Jason D. Yust
124. Jason Shaw, Georgia Public Service Commissioner
125. Jay Marlow
126. Jayne Abbot
127. Jean Cummings
128. Jeffrey C. Dickler
129. Jim Richardson
130. Jim Rossi
131. Joan B. Panek
132. Joan Ellersick
133. Joanna Lewis, Conservative Energy Network
134. Joanne Osborne, Arizona State Representative
135. Joel A. Huberman
136. John Bromer

137. John Feltenberger
138. John Gage
139. John K. Hansen
140. Jonathan Appelbaum
141. Jonathan Grucci
142. Jonathan Kopp
143. Jordan Ohler
144. JR Miller, Michigan Conservative Energy Forum
145. Judith Durand
146. Julie Lehman
147. Julie Taberman
148. Karen Crutchfield
149. Kate O'Connor
150. Katharine K. DuVivier
151. Katherine Bowditch
152. Katherine Early
153. Kathy McGhee
154. Kathy Pearson
155. Kayla A. Ventura
156. Kentucky Solar Industries Association
157. Kevin Priola, Colorado State Senator
158. Kurt Dieringer, Ecohouse Solar (Ohio)
159. Land & Liberty Coalition
160. Landon Stevens
161. Larry A. Etkin
162. Larry J. Ward
163. Larry Lambert
164. Laura Boggess
165. Laura Byrch
166. Lenore Madeleine
167. Lewis W. Weatherspoon
168. Linda Shaffer
169. Linda Terwilliger
170. Lois Clement
171. Longroad Energy Management, LLC
172. Louise J. Bowditch
173. Lynda Armona
174. Marcianna Caplis
175. Margery M. Hamlen
176. Margery W. Davies
177. Marjorie Shepardson
178. Mark Byington
179. Mark H. Follansbee
180. Martha Spencer
181. Mary Goodkind
182. Mary Summers
183. Mary Worrell
184. Massachusetts Executive Office of Energy and Environmental Affairs
185. Matthew D. Johnson, Land & Liberty Coalition
186. Max Hunter
187. Medical Society Consortium on Climate and Health
188. Meline Price
189. Melody Pajak
190. Michael Boyd
191. Michael E. Loos
192. Michael Fleming
193. Michael Franklin
194. Michael Hartley
195. Michael Tousey
196. Michele Hathcock
197. Mississippi Public Service Commission
198. Montana Department of Environmental Quality
199. NAACP North San Diego County Branch
200. NAACP San Diego Branch
201. Nancy Kelley-Gillard
202. Nancy Pellegrini
203. Nathan Wheeland
204. National Caucus of Environmental Legislators
205. National Fuel Cell Research Center
206. Neva R. Goodwin
207. Nevada Governor's Office of Energy

208. New Hampshire House of Representatives - Science, Technology & Energy Committee
209. New Mexico Public Regulation Commission
210. NH State Rep. Kat McGhee
211. Nick Boeyink
212. Norm Hill
213. Norman P. Olson
214. Northeast Clean Energy Council
215. PACENation
216. Pat Momich
217. Patricia A. Martin
218. Pavel Balga
219. Peninsula Clean Energy Authority, Marin Clean Energy, California Joint Powers Authority, Sonoma Clean Power Authority
220. Pennsylvania Conservative Energy Forum
221. Pete Jeffries, Iowa Conservative Energy Forum
222. Peter F. Somssich
223. Peter Sinclair
224. Pravin Lewis
225. Randy Bernard
226. Ray Gaesser of Gaesser Farms and Chairman of Iowa Conservative Energy Forum
227. Rebecca Morris
228. Representative Nathan Ballentine
229. Richard Bobb
230. Richard Hybil
231. Richard L. Cohen
232. Rick Donohoe
233. Robert K. Triest
234. Robert M. Spiller, Jr.
235. Robert W. Bussewitz
236. Roger T. Panek
237. Ruck Julien
238. Ruth M. Amundsen
239. Ryan Negro
240. S. Hatch & Sons Landscaping
241. S. Nam
242. Sally Wright
243. San Diego Unified School District
244. Sarah Thorne
245. School Energy Coalition
246. Senator Margaret Wood Hassan
247. Senator Wiley R. Robertson
248. Solar Energy Business Association of New England
249. South Carolina Small Business Chamber of Commerce
250. Southern Environmental Law Center, on behalf of the Southeast Public Interest Organizations
251. Stephen Handy, Utah State Representative
252. Stephen Schmeiser
253. Sue Jenkins
254. Sue Stafford
255. Susan Bean
256. Susan Purser
257. Susan Richman
258. Suzanne Butcher
259. Suzanne M. Humer for CleanEarth4Kids.org
260. Taylor J. Christian, Land & Liberty Coalition
261. Terry M. Clark
262. Tex Fischer
263. The Heartland Institute, James Madison Institute, Leadership Institute, Mississippi Center for Public Policy, Nevada Policy Research Institute, Rio Grande Foundation, Roughrider Policy Center, Science & Environment Policy Project, Caesar Rodney Institute, Center of the American Experiment, Center for Independent Thought, CO2 Coalition, Committee for a Constructive Tomorrow, the Cornwall Alliance, and Energy &

- Environment Legal Institute  
(Heartland Institute)
264. The Western Way
  265. Thomas B. Tutor
  266. Thomas G. McLaughlin, Jr.
  267. Thomas Karvonen
  268. Thomas Tanton
  269. Tim Andrews, Taxpayers  
Protection Alliance
  270. Tim Echols, Georgia Public  
Service Commissioner
  271. Todd Johnson
  272. Tom Barrett and the undersigned  
Michigan legislators
  273. Tom Chapin
  274. Tom Roberts, Nevada State  
Assemblyman
  275. Tomas J. Kloc
  276. Tracie Burns
  277. Tyler M. Duvelius, Ohio  
Conservative Energy Forum
  278. US House of Representatives  
Pingree, Pocan, Tonko, Kuster,  
Haaland, Gohmert, Biggs, Roy,  
Gosar, Schweikert, Quigley,  
Golden, Pappas, and Welch
  279. Virginia Department of Mines,  
Minerals and Energy
  280. Virginia Distributed Solar Alliance
  281. Virginia Marcotte
  282. Walker L. Wright
  283. Western Colorado Alliance
  284. Western Organization of Resource  
Councils
  285. William Everett
  286. William Goldsmith
  287. Wisconsin Conservative Energy  
Forum
  288. Zachary R. Upton

**Intervention and Comments**

1. 31 State Attorneys General
2. Achim Ginsberg-Klemmt
3. Advanced Energy Economy (AEE)
4. Allco Renewable Energy Limited
5. American Green Bank Consortium
6. American Municipal Power, Inc.
7. American Public Power Association (APPA)
8. Ares EIF Management LLC; Heelstone Renewable Energy, LLC; Navisun LLC; Nexamp, Inc.; True Green Capital Management LLC; The Wunder Company; Dimension Energy LLC (Solar Generation Investors)
9. Arizona Corporation Commission
10. Californians for Green Nuclear Power, Inc.
11. Center for Biological Diversity
12. Coalition for Community Solar Access
13. Colorado Energy Office
14. Colorado Public Utilities Commission
15. Delaware Division of the Public Advocate
16. Delaware Public Service Commission
17. Dirigo Community Solar Group, Inc.; Crystal Spring Farm Community Solar Association; Solar Energy Association of Maine
18. Eastern New England Consumer-Owned Systems
19. Electricity Consumers Resource Council
20. Electricity Regulation Scholars
21. Florida Public Service Commission
22. Institute for Policy Integrity, New York University School of Law
23. Kansas Corporation Commission
24. Large Public Power Council
25. Lee Oxenham and Evan Oxenham (Oxenhams)
26. Maine Office of the Public Advocate
27. Maryland Energy Administration
28. Maryland Public Service Commission
29. Maura Healey, the Attorney General of the Commonwealth of Massachusetts, together with the state attorneys general of California, Connecticut, Delaware, the District of Columbia, Illinois, Maryland, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Rhode Island, Washington, and Wisconsin, the California Energy Commission, the California Public Utilities Commission, and the Rhode Island Division of Public Utilities and Carriers
30. MD-DC-VA Solar Energy Industry Association
31. National Association of Regulatory Utility Commissioners (NARUC)

32. National Association of State Energy Officials
33. National Association of State Utility Consumer Advocates
34. National Rural Electric Cooperative Association
35. New Energy Equity LLC
36. New England Small Hydro Coalition
37. New England States Committee on Electricity (NESCOE)
38. New Jersey Board of Public Utilities
39. New York State Public Service Commission, New York State Energy Research and Development Authority, Connecticut Department of Energy and Environmental Protection, Connecticut Public Utilities Regulatory Authority (State Intervenors)
40. Ohio Environmental Council
41. One Energy Enterprises LLC
42. Oregon Solar Energy Industries Association
43. Organization of MISO States, Inc. and Organization of PJM States, Inc.
44. Organization of PJM States, Inc.
45. Pennsylvania Office of Attorney General and Pennsylvania Department of Environmental Protection
46. Pennsylvania Office of Consumer Advocate, New Jersey Division of Rate Counsel, Office of People's Counsel for the District of Columbia, Maryland Office of People's Counsel, and Iowa Office of Consumer Advocate
47. Pennsylvania Public Utility Commission
48. Public Citizen, Inc
49. Public Service Commission of the District of Columbia
50. Public Service Commission of West Virginia
51. Public Utility Commission of Oregon
52. Public Utility Commission of Texas
53. R Street Institute
54. Sierra Club
55. Sierra Club, Vote Solar, Acadia Center, Clean Wisconsin Climate + Energy Project, Conservation Law Foundation, Environmental Defense Fund, Environmental Law & Policy Center, Idaho Conservation League, National Audubon Society, Natural Resources Defense Council, Western Grid Group, Sustainable FERC Project, Solar United Neighbors, Renew Wisconsin, Renewable Northwest, Public Citizen, North Carolina Sustainable Energy Association (Public Interest Organizations)
56. Solar Energy Industries Association
57. Solar United Neighbors and Vote Solar
58. SunPower Corporation
59. Virginia Office of the Attorney General

60. Virginia State Corporation Commission
61. Vote Solar
62. William Tong, Attorney General for the State of Connecticut, and the Connecticut Office of Consumer Counsel
63. WWALS Watershed Coalition, Inc.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New England Ratepayers Association

Docket No. EL20-42-000

(Issued July 16, 2020)

McNAMEE, Commissioner, *concurring*:

1. Though I support the Commission's Order dismissing, on procedural grounds, New England Rate Payers Association's (NERA) Petition for Declaratory Order (Petition) concerning net metering, I write separately to make clear that today's Order does not address any of the important, substantive issues underlying the Petition.

2. To that end, the Commission's Order is not a decision on whether the Commission lacks jurisdiction over the energy sales made through net metering;<sup>1</sup> nor is it a decision on the merits of the issues raised by and contained in the Petition. I also note, that as a general proposition, I think it is best to decide important legal and jurisdictional

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<sup>1</sup> Since the Petition was filed, the U.S. Court of Appeals for the District of Columbia issued its opinion on the petitions for review of Commission Order Nos. 841 and 841-A, regarding electric storage resources (ESR). *NARUC, et al. v. FERC*, --- F.3d ---, 2020 WL 3886199 (D.C. Cir. July 10, 2020). The Court affirmed the Commission's authority over the ESR practices at issue in those Commission orders, which practices the Court acknowledged directly affect wholesale rates regardless of whether they occur on the distribution system or behind-the-meter. *Id.* at \*5; *cf. Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 841-A, 167 FERC ¶ 61,154 (2019) (McNamee, Comm'r, *concurring in part and dissenting in part*), (arguing that the Commission exceeded its jurisdictional authority by requiring local utilities and the state entities that regulate them to allow ESRs connected to the distribution system or behind-the-meter to use those the distribution systems to sell power into wholesale electric markets).

questions, like the ones raised in in the Petition, when applying the law to a specific set of facts, such as in a Section 206 complaint, or through a rulemaking proceeding.

For these reasons, I respectfully concur.

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Bernard L. McNamee  
Commissioner

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New England Ratepayers Association

Docket No. EL20-42-000

(Issued July 16, 2020)

DANLY, Commissioner, *concurring*:

1. I vote for today's order for one reason—I believe that the Commission has discretion to dismiss this petition on procedural grounds.<sup>1</sup> I write separately because I have concerns about the consequences of this decision.
2. The petition for a declaratory order filed by New England Ratepayers Association (NERA) raises difficult legal questions regarding the regulatory treatment of facilities (like rooftop solar) used by retail customers primarily, but not exclusively, to serve their own electricity requirements. These questions not only include the rate treatment for excess generation but, more importantly, the boundary between federal and state jurisdiction to address such rate treatment.
3. I have yet to reach any conclusion regarding either rate treatment or jurisdictional boundaries, but I am certain that these are questions of profound importance and the Commission will eventually have to address them.
4. I am concerned that dismissing the petition on procedural grounds may well result in a patchwork quilt of conflicting decisions if the questions raised in the petition are instead presented to federal district courts across the country. While the federal courts are more than capable of adjudicating preemption claims, they are not steeped in the history of the Federal Power Act nor in matters of national energy policy. Confusion, delay and inconsistent rules—some of which will apply to individual states or parts of states—will be the inevitable result.

For these reasons, I respectfully concur.

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<sup>1</sup> See 5 U.S.C. § 554(e) (2018) (“The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”); 18 C.F.R. § 385.207(a)(2) (2019) (providing for the filing of a petition for “[a] declaratory order or rule to terminate a controversy or remove uncertainty”).

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James P. Danly  
Commissioner