UNITED STATES OF AMERICA
BEFORE
THE FEDERAL ENERGY REGULATORY COMMISSION

Petition for Declaratory Order of the New England Ratepayers Association	Docket No. EL20-42-000

RESTATED MOTION TO INTERVENE, AND OPPOSITION AND COMMENTS OF THE ATTORNEY GENERAL OF THE STATE OF CONNECTICUT AND THE CONNECTICUT OFFICE OF CONSUMER COUNSEL TO THE PETITION FOR DECLARATORY ORDER OF THE NEW ENGLAND RATEPAYERS ASSOCIATION

Pursuant to Rules 211, 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or the "Commission"), 18 C.F.R. §§ 385.211, 385.212 and 385.214, William Tong, Attorney General for the State of Connecticut ("CTAG" or "Attorney General") and the Connecticut Office of Consumer Counsel (CT-OCC") (collectively, the Connecticut Parties") hereby files the CTAG's restated motion to intervene and the Connecticut Parties' opposition and comments in the proceeding docketed by the Commission as EL20-42-000, *Petition for Declaratory Order of the New England Ratepayers Association*, (the "Proceeding") in response to the petition for a declaratory order of the New England Ratepayers Association ("NERA"), dated April 14, 2020 ("Petition"). The Attorney General previously filed with the Commission a "doc-less" motion to intervene in the Proceeding, dated April 29, 2020.[1]

[1] The Commission previously granted an extension for the filing of comments on the Petition to June 15, 2020, by order of the Commission, dated May 4, 2020.

I. MOTION TO INTERVENE

The Attorney General hereby restates his motion to intervene, in confirmation of the motion previously filed with the Commission. The Attorney General is an elected Constitutional official and the chief legal officer of the State of Connecticut. The CTAG's responsibilities include intervening in various judicial and administrative proceedings to protect the interest of the citizens and natural resources of the State of Connecticut and in ensuring the enforcement of a variety of laws of the State of Connecticut, including Connecticut's Unfair Trade Practices Act and Antitrust Act, so as to promote the benefits of competition and to assure the protection of Connecticut's consumers from anti-competitive abuses. The CTAG's request for leave to intervene in these proceedings is in furtherance of these overall responsibilities. [2]

As the public official charged with responsibility to represent the State, the public interest and the people of the State of Connecticut with respect to these matters, the CTAG's interests in this proceeding are direct and substantial, and no other party can represent adequately those interests. For these reasons, the CTAG should be granted leave to intervene in this proceeding with full rights as a party.

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[2] The CTAG has previously initiated or intervened in numerous FERC proceedings addressing important policy issues affecting the electric industry and electric ratepayers in Connecticut and New England. These proceedings include FERC Docket Nos: AD18-7, *Grid Resilience in Regional Transmission Organizations and Independent System Operators*; RM18-1, *Grid Reliability and Resiliency Pricing*; RP16-301, *Iroquois Gas Transmission System, LP*; ER16-1023, *ISO New England, Inc., et al*; EL16-19, *ISO New England, Inc*.; CP16-21, *Tennessee Gas Pipeline Company, L.L.C.*; ER-13-185, *ISO New England, Inc.*; EL-13-033; *Environment Northeast, et al. v. Bangor Hydro-Electric Company, et al.*; ER12-1455, *ISO New England, Inc.*; ER12-953, *ISO New England, Inc.*; EL11-66, *Martha Coakley, Massachusetts Attorney General, et al. v. Bangor Hydro-Electric Company, et al*.; IN12-007, *Constellation Energy Commodities Group, Inc.*; ER11-1943, *ISO New England, Inc*.; RM11- 026, *Promoting Transmission Investment Through Pricing Reform*; EL11-20, *PJM Power Providers Group v. PJM Interconnection LLC*; ER10-902, *ISO New England Inc. and New England Power Pool*; ER10-787, *ISO New England Inc. and New England Power Pool Participants Committee*; EL10-50, *New England Power Generators Association v. ISO New England Inc.*; EL09-47, *Richard Blumenthal v. ISO New England, Inc*.; ER09-1051, *ISO New England Inc. and New England Power Pool*; ER09-197*, ISO New England, Inc.*

II. PLEADINGS AND OTHER COMMUNICATIONS.

Service of all documents should be addressed to the following persons whose names and addresses should be placed on the official service list compiled by the Secretary of the Commission for this Proceeding:

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III. COMMENTS TO PETITION

A. INTRODUCTION

On April 14, 2020, NERA filed its Petition with the Commission seeking a determination that the FERC has exclusive jurisdiction over the terms, conditions and compensation for the excess electric energy production of rooftop solar facilities (or other distributed generation) whenever the output of such generation exceeds the customer's electric energy demand. The Commission should deny the Petition. First, the exercise of Commission jurisdiction is inconsistent with the clear delineation set forth in the Federal Power Act (the "FPA" or the "Act") between the scope of federal and state jurisdiction in the wholesale and retail electric markets, as well as controlling United States Supreme Court precedent defining the boundaries of that authority. Second, the Commission itself has repeatedly determined over nearly twenty years that the practice NERA challenges here are state jurisdictional and not FERC jurisdictional. *See Sun Edison LLC*, 129 FERC ¶ 61,146 (2009), *reh'g granted on other grounds*, 131 FERC ¶ 61,213 (2010) ("*Sun Edison*"); *MidAmerican Energy Co.,* 94 FERC ¶ 61,340 (2001) ("*MidAmerican*"). In this regard, any new and sudden assertion of federal jurisdiction over a

practice that has been regulated exclusively by the states would undermine the contract expectations and investment decisions of retail customers who have relied upon state specific compensation regimes that were enacted to promote specific state public policy initiatives.

Finally, the Commission should reject NERA's petition because it represents poor public policy. Asserting FERC jurisdiction over one aspect of Connecticut's public policy initiatives would necessarily affect multiple other associated public policy initiatives the State and its regulators are currently examining in a comprehensive holistic fashion to balance various public goods, including energy affordability, reliability, distributed resources and environmental concerns.

1. Net Metering

In its Petition, NERA targets a variety of state specific practices generally known as "net metering," principally used by the retail customers of state regulated electric distribution companies ("EDCs") who have installed behind the meter ("BTM") rooftop solar generation facilities. Net metering is a mechanism whereby owners or rooftop solar facilities receive credits for every kilowatt hour ("kWh") of electricity generated, and those credits can be "banked" when electricity production exceeds the customer's consumption to be "used" or applied at a different time when electricity consumption exceeds production to reduce the measure of electric consumption employed to determine the customer's electric bill. This mechanism facilitates the integration of intermittent renewable generation facilities in a manner that offers benefits not only to the owner of the renewable facilities, but also serves to reduce demand on the regional electric system, reduce peak system load, and therefore benefits all customers in general. For example, during peak production time (daylight hours, longer summer days), solar facilities can produce more energy than is needed by the owner. This excess production reduces or displaces

other generation resources needed to support the overall system load, providing benefits in displacing the need for these other resources, particularly when that excess production coincides with peak system demand. Through net metering, the owner of the solar facilities can benefit from its "banked" excess production during other periods when production is lower than demand, such as nighttime or during wintertime. Net metering results in a customer's electricity bill reflecting only the customer's "net" electricity usage over a period of time.

Connecticut's general net metering program applicable to retail electric customers of its state regulated EDCs has been in place, in more or less its current form, since 2000. *See* Conn. Gen. Stat. Secs. 16-243h. The scope of Connecticut's existing program includes targeted parameters, including maximum size, resource type, minimum participation term and other EDC retail customer eligibility requirements and anchoring of the crediting mechanism to a maximum annual period, with settlement of any balances remaining at the end of the year to a measure of the wholesale cost of energy.[3][4]

2. The Petition

In its Petition, NERA asks the Commission to declare its exclusive jurisdiction over the terms, conditions and compensation for the excess production of rooftop solar facilities (or other distributed generation) whenever the output of such generation exceeds the customer's demand. Implicit in this request is the elimination of State regulation of net metering, notwithstanding that such State regulation, in varying forms, is occurring in 45 States. Moreover, any such assertion

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[3] The legislature enacted minor modifications to the net metering policies in 2001 (e.g., including "virtual" net metering) that are not relevant to the analysis here.

[4] The most recent Energy Information Agency data for Connecticut residential customers shows an average price for a kilowatt hour is $0.233. https://www.eia.gov/electricity/data.php#sales. March 2020. This includes the cost of energy as well as the cost of transmission and distribution of that energy. As a result, under net metering, the value to the customer of every kilowatt hour produced is $0.233. Net metering is therefore a mechanism to promote state public policy initiatives by encouraging private investment in renewables.

of Commission jurisdiction would mark a full reversal of nearly twenty years of Commission decisions disclaiming FERC's jurisdiction over the practice.

NERA argues that the production of electric energy at locations "behind the meter" in excess of the customer's consumption of electric energy results in a delivery or export of electric energy back to the EDC's electric distribution facilities. NERA contends these exports constitute a "sale of electric energy in interstate commerce" within the meaning of the FPA and, therefore, come within the exclusive jurisdiction of the Commission. NERA further contends that the Commission is constrained to set the price for the sale of each kilowatt hour at: (1) the utility's avoided cost of energy if the sale is being made pursuant to the Public Utility Regulatory Policies Act ("PURPA"); or (2) pursuant to a just and reasonable wholesale rate if the sale is pursuant to Section 205 of the FPA. In either case, the value to the consumer would be capped at or near the clearing price as determined by the wholesale spot markets for electric energy administered by the applicable Independent System Operator / Regional Transmission Organization. Connecticut's regional independent system operator, ISO-New England, reported April 2020 regional clearing prices averaged $0.01836 per kWh,[5] or approximately eight percent (8%) of the value a solar customer would receive under Connecticut's net metering program.[6] The reduction of this incentive would significantly undermine the value of the compensation scheme necessary to support state public policy determinations.

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[5] http://isonewswire.com/updates/2020/5/29/monthly-wholesale-electricity-prices-and-demand-in-new-engla.html

[6] Power prices were 33% lower this April than one year ago, and April is a shoulder month with typically lower electricity prices. Even doubling the $0.018 price, however, would represent only about 16 percent the per kWh value as compared to net metering.

The Commission should reject NERA's Petition. The practice of net metering has long been a matter regulated by the states, not FERC and subject, in Connecticut, to the policy determinations of the State of Connecticut's regulatory officials. The persons and organizations engaged in net metering do so as part of their retail customer relationship with the State-regulated EDCs falling within the sphere of intrastate, retail electric energy transactions outside FERC's jurisdiction. FERC has previously found Connecticut's retail customer net metering program to be non-jurisdictional for the Commission. *Sun Edison LLC*, 129 FERC ¶ 61,146 (2009), *rehearing granted on other grounds,* 131 FERC ¶ 61,213 (2010) ("*Sun Edison*").[7]

The Commission should further reject NERA's Petition because any FERC interference in one aspect of Connecticut's public policy initiatives would necessarily affect multiple other associated public policy initiatives that the State and its regulators are currently examining. For example, Connecticut is currently undergoing no fewer than eleven dockets to consider the most effective means of achieving electric grid modernization while at the same time ensuring energy affordability. *See* Dockets Nos. 17-12-03RE01 through RE11, *PURA Investigation into Distribution System Planning of the Electric Distribution Companies*. These dockets are a part of a dynamic approach to furthering many of the State's various competing and complementary public policy goals, including the deployment of electric vehicles ("EVs"), distributed charging stations, and bi-directional power exchanges (i.e., using EVs as storage and a distributed

[7] As explained further below, Sun Edison petitioned the Commission for a declaratory ruling that the net metering arrangements in the various states in which it had installed residential customer solar power facilities did not entail "sales of electric energy at wholesale in interstate commerce" within the meaning of the FPA. Connecticut's net metering regime was specifically described in Exhibit B to Sun Edison's petition and included within its request for a disclaimer of FERC jurisdiction. The Commission concluded Connecticut's arrangement did not involve a FERC jurisdictional sale. *Id. See, Sun Edison LLC's Petition for Declaratory Order,* Docket EL 09-31-000 (dated, January 30, 2009), p. B-1 (detailing the specifics of Connecticut's net metering arrangement). The Connecticut net metering program "blessed" in *SunEdison* was amended subsequently by statute – e.g., adding the virtual net metering arrangement, but also imposing a cut-off and grandfathering of the general program as of Dec. 31, 2021. These amendments are not relevant to this proceeding.

resource to flow power vehicle-to-grid and vehicle-to-home to balance local, regional and national energy needs), among other initiatives. Asserting exclusive FERC jurisdiction over one element of the State's distributed resources like BTM solar facilities would create uncertainty in the planning to integrate that resource, or any other modern grid resource, in a comprehensive and dynamic fashion to support the State's overall policy goals to promote the most clean, reliable and cost effective power delivery systems.

Moreover, asserting Commission jurisdiction over current state net metering designs would move tens of thousands of Connecticut (and millions nationally) retail electric customers into FERC jurisdiction for the first time. These customers have made investment decisions in reliance of state net metering policies and FERC precedent disavowing Commission jurisdiction over BTM solar facilities. Asserting Commission jurisdiction would undercut and undermine those investment decisions potentially creating unintended and problematic consequences for state efforts to modernize their electric grids in a reliable and cost-effective manner.

B. ARGUMENT

1. The Exercise of Commission Jurisdiction is Inconsistent with the FPA's Demarcation of the Boundaries between Federal and State Jurisdiction

The exercise of Commission authority of state level net metering programs exceeds the plain jurisdictional boundaries set forth under the FPA and subsequently refined by Supreme Court precedent. The practice of net metering is a retail billing practice subject exclusively to state regulatory jurisdiction. NERA's petition broadly interprets the Commission's jurisdiction to cover and displace net metering practices of EDC electric retail customers currently regulated by the States. The FPA, however, is careful to preserve state jurisdiction over retail sales, and courts have been careful to preserve that balance for 85 years. The Act provides, in relevant part:

> [t]he provisions of this subchapter [conferring jurisdiction on the Commission] shall apply to **the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce,** but except as provided in paragraph (2**) shall not apply to any other sale of electric energy** or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. **The Commission** shall have jurisdiction over all facilities for such transmission or sale of electric energy, but **shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.**
> 16 U.S.C. §824(b)(1).

(Emphasis added).

The Act did not become law in a pre-existing vacuum. Rather, it followed: (i) the creation by most States of public utility regulatory commissions with comprehensive authority to regulate the rates and operations of electric utilities; and (ii) a decision of the Supreme Court in *Public Utility Commission of Rhode Island v. Attleboro Steam and Electric Co*., 273 U.S. 83 (1927). In *Attleboro*, the Supreme Court determined that States could not permissibly regulate a sale of electric energy generated in one State, if delivered for sale into another State.[8] The FPA was intended to fill the resulting "*Attleboro* gap" by establishing a federal agency (the Commission's predecessor – the Federal Power Commission), to regulate such interstate sales which entailed physical delivery across state lines.[9]

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[8] In *Attleboro*, the Narragansett Electric Lighting Company, a Rhode Island company regulated by the Rhode Island Public Utilities Commission ("RIPUC"), sold electric energy to its retail customer base located in Rhode Island. In addition, Narragansett, sold electric energy generated in Rhode Island to the Attleboro Steam & Electric Company ("Attleboro"), a Massachusetts corporation engaged in supplying electricity for use in the city of Attleboro, Massachusetts. Alleging operating losses arising from its performance of the Attleboro contract, Narragansett secured an order from the RIPUC to revise the contract. Attleboro successfully brought suit to the Supreme Court challenging the RIPUC's order to revise the supply contract as an undue burden on interstate commerce. Justice Brandeis, in dissent, concluded that, although the transaction was in interstate commerce, the RIPUC was properly acting within its police powers under the Commerce Clause to provide for non-discriminatory cost recovery from Narragansett's customer base and Congress had not acted to regulate the field or impliedly preempt Rhode Island's regulation.

[9] *U.S. v. Public Utilities Commission*, 345 U.S. 295, 307-08 (1953) (citing Congress' intent through passage of the FPA, to "fill the gap" created by the *Attleboro* decision); *FERC v. EPSA*, 136 S.Ct. 760 (2016).

The Act carved out an area for federal regulatory jurisdiction over "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce," 16 U.S.C. § 824(b)(1) (cited above),[10] but also expressly preserved an area for the continuation of State regulation. The Act provided that Commission jurisdiction does "not apply to any other sale of electric energy" nor "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1).[11]

The Supreme Court decided a number of disputes over the respective scope of State and Federal regulation of electricity, centering around the question whether and how electric utilities were selling power in "interstate commerce." Among the requirements for triggering federal jurisdiction was a required showing that the electric energy to be sold crossed state borders from the point of generation to consumption. As the industry developed, including the growth of vertically integrated utilities and the construction of massive interstate transmission grids, the required showing of the "interstate" nature of the transfers of electric energy was relaxed. This relaxation recognized the increasing geographic scope and integration of the industry and was an

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[10] The FPA further defines "sale of electric energy at wholesale" as follows: "The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale." 16 U.S.C. § 824(d). The jurisdictional grant in § 824(b)(1) couples this definition with the additional requirement that the sale be "in interstate commerce."

[11] Further indication of Congressional intent to preserve State regulation is the "preamble" to FPA, Title II, providing as follows:

> It is 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 subchapter and subchapter III of this chapter 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.** 16 U.S.C. 824(a) (emphasis supplied).

effort to establish a "bright-line" for resolving state-federal jurisdictional disputes so as to avoid the need for lengthy, detailed engineering studies of power flows to support (or contradict) the interstate nature of the electric energy transactions.[12]

In recent years, the electric industry has further matured, through "restructuring" and increasingly rapid changes in technology entailing: (i) market-based competition in electric generation; (ii) the creation of sophisticated wholesale power markets administered by Independent System Operators or Regional Transmission Organizations, with multiple participants, including independent generators, demand response providers, power supply aggregators, among others; and (iii) a vast expansion in the deployment of devices or equipment, enabled by technological advances, for the generation, storage and management of electric energy at the locations of electric retail customers of the EDCs. Electric distribution networks, connecting to their retail customers at their points of consumption, are still largely owned and operated by the State regulated EDCs. The advances in technology allow these retail customers

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[12] *See, Jersey Central Power and Light Co. v. FPC*, 319 U.S. 61 (1943) (JCP&L sells power it generates in New Jersey to PSE&G; PSE&G, in turn, sells the power to an electric utility on Staten Island in New York for ultimate delivery to retail customers; the FPC concludes it has jurisdiction over the sale, even if made through an intermediary company, because of evidence that power flows physically across the three systems simultaneously so as to cross state lines at times when there is no contribution from the intermediary utility); *FPC v. Florida Power and Light Co.*, 404 U.S. 453 (1972) (FPC staff presented evidence of large simultaneous transfers of electricity from FP&L over the systems of interconnecting utilities and ultimately across state borders. The Court rejected the need for a precise showing of the tracing of electricity, such as employed in *Jersey Central*, to establish FERC jurisdiction but also did not endorse the view that any incremental inflow or outflow of electricity because of the cascading physical operation of the AC transmission grid across the entire electric grid, if *de minimis*, was sufficient to establish a jurisdictional sale); and *FPC v. Southern California Edison*, 376 U.S. 205 (1964) (the FPC finds jurisdictional the sale at wholesale of power by *Southern California Edison* to the Colton public power utility (each operating wholly within California) but served through transmission interconnections delivering electric energy from electric generation resources located in other states, adopting the "bright line" test for establishing jurisdiction over wholesale or "sales for resale" of electric energy but in the context of transactions between electric utility companies, entailing substantial, interstate supplies of bulk power. Not addressed were the FERC jurisdictional consequences, in part because not deployed at the time at any scale, of individual actions by retail electric customers generating their own power largely to meet their own consumption requirements as is implicated by the net metering arrangements addressed in this proceeding).

increasingly to generate their own electric consumption on site and manage variations between their consumption and generation by feeding power back to the EDCs.

In its two most recent decisions over state-federal disputes over jurisdiction under the FPA, the Supreme Court applied the FPA's jurisdictional provisions to specific circumstances emanating from the ongoing evolution of the electric industry.[13] While upholding FERC jurisdiction in both cases, the Court was careful to recognize and confirm the scope of State regulation. Specifically, the court stated:

> [a]longside those grants of power [conferring FERC jurisdiction over wholesale sales of electric energy in interstate commerce], 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). See New York, 535 U. S., at 17, 23. State utility commissions continue to oversee those transactions**."

(Emphasis added)).

FERC v. Electric Power Supply Association et al., 136 S.Ct. 760, 767 (2016).

In summary, the Court has evolved general principles for adjudicating federal-state jurisdictional disputes in the context of a changing electric industry. FERC's jurisdiction has clear boundaries. FERC's regulation may **not** impinge upon "retail sales" of electricity and "within state wholesale sales" (confirming the continuing validity of the requirement that FERC jurisdiction also is limited to sales "in interstate commerce").

[13] *FERC v. EPSA*, 136 S.Ct. 760 (2016) (upholding FERC regulation of eligibility rules and compensation paid to demand response resources bidding into FERC regulated wholesale markets); *Hughes, et al. v. Talen Energy Marketing LLC et al.*, 136 S.Ct. 1288 (2016) (finding invalid State regulatory retail rate cost recovery support of generating resources conditioned on participation of the resources in FERC regulated wholesale generation capacity markets).

Net metering represents the paradigm of a retail sale subject to exclusive state jurisdiction. Net metering customers are not generating power for the purpose of providing electric energy to the grid or for resale. Rather, they are generating electric energy to self-supply. The practice of net metering is simply a mechanism for balancing the variations in production and consumption, due to the inherent nature of the intermittency of the resource (i.e., for solar power, the sun) and fluctuations in the customer's electric consumption, over a period of time – a netting period -- and the Commission should not transform self-supply into a sales transaction simply by asserting that only the Commission can determine whether the appropriate netting interval should be hourly, daily, monthly or annually. That is, the Commission should not transform what is a plainly a state jurisdictional retail transaction into a federal jurisdictional wholesale transaction simply by redefining the appropriate balancing interval from a year to an hour. Such an argument elevates form over substance and would frustrate both state public policy and the FPA's careful attempt to preserve both state and federal jurisdiction in the sale of electricity.

3. FERC Has Consistently Held That the Practice of Net Metering Is a State Jurisdictional Function.

FERC has repeatedly rejected taking federal jurisdiction over State regulated "net metering" arrangements offered by EDCs to their retail customers. *Sun Edison LLC*, 129 FERC ¶ 61,146 (2009), *reh'g granted on other grounds*, 131 FERC ¶ 61,213 (2010) ("*Sun Edison*"); *MidAmerican Energy Co.,* 94 FERC ¶ 61,340 (2001) ("*MidAmerican*"). In these orders, FERC narrowly premised the disclaimer of federal jurisdiction on the absence of any "net sale" from the retail customer (or the owner/operator of the generation facility at the retail customer's location) to the EDC as determined by the metering and billing procedures established by the

State regulated EDC's tariff arrangements. This is precisely the precedent the NERA Petition seeks to reverse. FERC should refuse this request.

The Commission's earlier decisions specifically addressed the offset of power flows to and from the EDC's facilities measured over a "reasonable" billing period, as defined by the State's particular net metering program. Many of these state programs, including Connecticut's, define a netting period of up to an annual period, with a close-out at the end of the period of any unused credits by the retail customer settled at an average of wholesale energy costs for any unused credits. In fact, the Commission specifically considered Connecticut's annual netting period when it determined that there was no FERC jurisdiction over the Connecticut net metering design in its *Sun Edison* decision. In its petition, Sun Edison included a detailed discussion of the various state net metering programs under which it operated and were included in its Petition (including Connecticut's). *See, Sun Edison LLC's Petition for Declaratory Order,* Docket EL09-31-000 (dated, January 30, 2009), p. B-1 (detailing the specifics of Connecticut's net metering arrangement, including the 12-month billing period used under the Connecticut arrangement). Sun Edison's petition, in relevant part (repeated in the FERC order) makes this linkage explicit, by requesting the following:

> Provided that no "net sale" occurs under the applicable state net metering program, and the Host Customer [the EDC retail customer] otherwise complies with the requirements of the state net metering program, then neither the Host Customer nor the owner, financial lessee or operator of the solar facilities [Sun Edison or its affiliates] will be deemed to have engaged in a sale for resale of any electric energy produced by the solar facilities and purchased by the Host Customer.

The Commission agreed.

> Where there is no net sale over the billing period, the Commission has not viewed its jurisdiction as being implicated; that is, the Commission does not assert jurisdiction when the end-use customer that is also the owner of the generator receives a credit against its retail power purchases from the selling utility.

129 F.E.R.C. ¶ 61,146 at P 18. FERC's more recent Order 841 and Order 841-A confirm the continuing endorsement by the Commission of its prior orders in *Sun Edison* and *MidAmerican*.[14]

Connecticut's net metering program (available to the retail customers of Connecticut's EDCs), is an integral, unbundled part of the "retail sales" relationship between State regulated EDCs and their retail customers. The arrangements are "other sales of energy" over which FERC lacks jurisdiction. The generation facilities covered by the program are necessarily smaller scale, proportioned to individual retail customer locations, each affecting the local electrical distribution grid and installed and constructed in accordance with the EDCs' policies for interconnection with its local distribution grid; primarily serving EDC retail customers directly: any excess generation from the retail customer locations results from variations in on-site consumption over the year with likely *de minimis* impact, at best, from operation alone on the interstate operation of the electric industry at scale; and the end of year close-out (such as that conducted under the Connecticut program) settled at a measure of wholesale "avoided cost" of electric energy similar to that advocated for by NESA. The FPA's limitations on FERC's jurisdiction, acknowledged by FERC in the *Sun Edison* and *MidAmerican* as bounded by the netting of power flows extends to the full net metering program adopted by Connecticut.

Notwithstanding the foregoing, NERA in its petition seeks to narrow further or erase the jurisdictional line-drawing set out in the *Sun Edison* and *MidAmerican* orders, by citing to *Calpine Corp et al. v. FERC*, 702 F.3d 41 (D.C. Cir. 2012). In *Calpine*, the Court determined

[14] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators,* 162 FERC ¶ 61,127 (Feb. 15, 2018), Para. 30, Fn. 49 (Order 841); 167 FERC ¶ 61,154 (May 16, 2019), Para. 6, Fn. 12 (Order 841-A).

that FERC lacked jurisdiction to establish the netting period for offsetting "station service," charged to wholesale electric generators by the EDC supplying the service pursuant to a State-regulated retail rate, against power supplied by or to the generator to or from the wholesale generation grid. Wholesale generators had previously used a monthly netting period within which to net other power supply consumed at the generator's site against station service supplied by the EDC at retail, rather than the netting period established under the retail station service rate.

The ruling in *Calpine* simply does not support NERA's Petition. To the contrary, the practices struck down by the Court involved an attempt by generators to expand FERC jurisdiction and absorb or override the provisions of a State regulated retail tariff. *Calpine* involved a dispute of the payments for "station service" – that is, the energy a generator takes from the grid to run its facilities, delivered to it by the EDC over the EDC's facilities, even as it is simultaneously exporting power to the grid. Arguing the analogy to retail net metering, wholesale electric generators sought to offset their imports of power from the grid by their own exports to the grid at wholesale. The generators in that proceeding challenged the Commission's determination that it "lacked a jurisdictional basis to determine when the provision of station power constitutes a retail sale and . . . that the netting interval in the CAISO tariff could only govern Commission-jurisdictional transmission charges, not retail charges." *Calpine*, 702 F.3d at 45. The Court rejected the generators' argument that the Commission could set a netting interval for station service different than that imposed by the state regulatory authority, finding there were no Commission jurisdictional wholesale charges involved or implicated. "That situation—where utilities were treating wholesale transactions as retail sales—is worlds apart from the present case, which deals with FERC's authority to regulate truly local charges."

Calpine, 702 F.3d at 50. *Calpine*, therefore, stands for the principle that retail customer net metering arrangements, such as those challenged by NERA in its petition, set forth in State regulated retail tariffs are not otherwise superseded by FERC jurisdiction.

4. Asserting Commission Jurisdiction over Net Metering Would be Disruptive to State Jurisdictional Policy Determinations, and Represents Poor Public Policy.

State and Federal regulatory actions and their interaction can have very large, and unintended adverse consequences on the electric utility industry and its customers. The practice of net metering by electric retail customers is widespread. It has been deployed through State authorized programs open to the retail customers of State regulated EDCs by 45 of the 50 States, as recently reported.[15] The U.S. Energy Administration ("EIA"), estimates almost 2 million retail customers participate in net metering programs in 2018 in the United States (or about 1% of electricity customers overall). *Id.* Net metering participation is also significantly differentiated by state, region and by the comparative cost of retail electric rates across the country, and best tailored to meet local needs. *Id.*

As noted above, net metering is intended to provide financial incentives to encourage private investment to support state policy goals. All of this investment is in reliance on the financial incentives of State net metering programs, on the stability of the regulatory regime created by the individual States as well as the Commission's explicit disavowal of federal jurisdiction over net metering. The Commission must consider the equities and policy implications of any disruption of the reliance interests attaching to the current net metering arrangements.

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[15] Congressional Research Service, *Net Metering in Brief* (November 14, 2019), Report R46010, p. 2. *See also*, North Carolina Clean Energy Technology Center, *Net Metering*, April 2019. https://fas.org/sgp/crs/misc/R46010.pdf

The Connecticut Parties do not endorse for purposes of this proceeding the specific design of any particular net metering program. The Connecticut Parties do, however, believe that the current State authority over the practice must and should continue, consistent with the model of cooperative federalism implicit in the FPA. Moreover, given the country's size and diversity, states are simply better equipped to determine and prioritize local needs and employ proportionate, tailored and well-considered actions by regulators at the appropriate levels of government.

As noted above, the Connecticut Public Utilities Regulatory Authority ("PURA" or "Authority") has initiated eleven proceedings to promote state public policy goals for a clean, reliable and cost effective modern electric grid. In addition to those proceedings, Connecticut has implemented a comprehensive regulatory program for net metering and virtual net metering administered by the EDCs and overseen by the Authority. Net metering plays a central role in Connecticut's energy goals, including not only various docketed proceedings before PURA, but also in other Executive Branch policy directives, such as the Department of Energy and Environmental Protection's Comprehensive Energy Strategy and the Governor's goal for carbon-free energy by 2040, as outlined in a 2019 Executive Order. *See, e.g.*, Connecticut Department of Energy and Environmental Protection's *Comprehensive Energy Strategy: CT General Statutes Section 16a-3d* (Feb. 2018); Executive Order No. 3 (Sept. 3, 2019). Regarding Connecticut's regulatory actions, PURA oversees a wide range of net metering proceedings, including but not limited to: requests to approve net metering facilities, establishing and monitoring Shared Clean Energy Facility ("SCEF") programs, examining the value of Distributed Energy Resources

("DER"), implementing net metering and clean energy related legislation, and developing administrative processes related to various aspects of net metering.[16]

Finally, NERA is wrong to assert that net metering involves unduly burdensome cost shifting, requiring the Commission's intervention to assure rates are just and reasonable. Net metering is but one of many dynamically changing policy interventions affecting the cost and delivery of electricity. As noted above, nationally about 1% of customers participate in net metering schemes, and the impacts of these customers on the cost of electricity are generally seen to be of limited systemic importance.[17] Net metering in practice varies by state with continuing adjustments made to calibrate costs and benefits and address the equity of cost allocation and efficiencies.

The problem of cost shifting is simply a matter best left to the local authorities. Moreover, any such cost shifting is not unique to net metering. CRS Report, p. 7 ("As noted in a

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[16] *See e.g.*, PURA Dockets No. 19-08-22, *Request of Aspinook Hydro, LLC for a Declaratory Ruling Approving of a Hydroelectric Generating Facility as a Virtual Net Metering Facility*; 19-07-01, *PURA Review of Statewide Shared Clean Energy Facility Program Requirements*; 19-07-01RE01, *PURA Review of Statewide Shared Clean Energy Facility Program Requirements – Customer Enrollment*; 19-06-29, *DEEP and PURA Joint Proceeding On the Value of Distributed Energy Resources*; 18-08-33, *PURA implementation of Section 7 of Pub. Act 18-50*; 18-06-15, *Pura Review Of The Implementation Requirements Of Section 7 Of Public Act 18-50*; 17-02-29, *Petition for Declaratory Ruling Regarding Net Metering Reservation of the Town of Plainville*; 13-08-14, *Pura Development Of The Administrative Processes And Program Specifications For Virtual Net Metering*; 13-08-14RE01, *Pura Development Of The Administrative Processes And Program Specifications For Virtual Net Metering - VNM Methodology*; 13-08-14RE02, *Pura Development Of The Administrative Processes And Program Specifications For Virtual Net Metering – Unassigned Credits*; 13-08-14RE03, *Pura Development Of The Administrative Processes And Program Specifications For Virtual Net Metering - Project Time Period And Agricultural Status*; 13-08-14RE04, *Pura Development Of The Administrative Processes And Program Specifications For Virtual Net Metering – Application Amendment*; 13-08-14RE05, *Pura Development Of The Administrative Processes And Program Specifications For Virtual Net Metering - Revisions To Administrative Processes And Program Specifications.*

[17] Galen Barbose, *Putting the Potential Rate Impacts of Distributed Solar into Context*, Lawrence Berkeley National Laboratory, January 2017. The study assessed the potential rate effects of a variety of factors, including net metering, energy efficiency, natural gas prices, state renewable portfolio standards, the federal Clean Power Plan (which was never implemented), and utility capital expenditures. That study found that the rate effects of distributed generation (inclusive of net metering incentives) would likely be increases between 0.03 cents/kWh and 0.2 cents/kWh, compared to increases up to 3.6 cents/kWh caused by other factors. See, CRS Report, p. 7.

guide for state regulators, "cost shifting, or subsidies, is unavoidable in practical rate design but regulators endeavor to mitigate these effects in the larger context of the many, often conflicting, rate design principles."[18]). Evaluation of the costs and benefits of net metering is also complex and conclusions can vary by location, regionally and within an EDC's grid, and the deployment rates of net metering.[19] These policies, their evaluation and their adjustment are on-going in the States, where they can be best tailored to the diverse nature of the deployment by individual retail electric customers, across the country, of their investments, consumption patterns and activities relating to their electric usage.

C. Conclusion.

The Commission lacks jurisdiction over State regulated net metering programs offered to retail customers of State-regulated EDCs. Most states currently regulate this practice, and many – like Connecticut – have done so for more than a decade. The Commission has consistently acknowledged State jurisdiction in this area for nearly two decades. The Commission should reject NERA's Petition.

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[18] Quoting from NARUC, *Distributed Energy Resources Rate Design and Compensation*, November 2016, p. 67.

[19] ICF, *Review of Recent Cost-Benefit Studies Related to Net Metering and Distributed Solar*, May 2018,

Respectfully Submitted,

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