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June 15, 2020

VIA ELECTRONIC FILING

Hon. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE, Room 1-A
Washington, DC 20426

RE: New England Ratepayers Association
Docket No. EL20-42-000

Dear Secretary Bose:

Please accept for filing in the above-referenced matter an electronically filed Motion to Intervene and Protest of the Virginia Office of the Attorney General. This filing is made pursuant to Rules 211 and 214 of the Commission's Rules of Practice and Procedure and the Commission's April 15, 2020 Notice of Petition for Declaratory Order and May 4, 2020 Notice of Extension of Time.

Thank you for your attention to this matter.

Very truly yours,

/s/ Katherine Claflin Creef

Katherine Claflin Creef
Assistant Attorney General

Enclosure

cc: Service List

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Ratepayers Association EL20-42-000

MOTION TO INTERVENE AND PROTEST OF THE OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA

The Office of the Attorney General of Virginia ("Virginia OAG"), hereby moves to intervene in the above-captioned docket and protests the New England Ratepayers Association's ("NERA's") Petition for Declaratory Order filed on April 14, 2020, pursuant to Rules 211 and 214 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, 385.214, and the Commission's April 15, 2020 Notice of Petition for Declaratory Order and May 4, 2020 Notice of Extension of Time.

MOTION TO INTERVENE

Virginia law delegates authority and responsibility for representing the State's interests in civil litigation to the Attorney General of Virginia.[1] In this capacity, Virginia OAG is authorized to appear before governmental commissions, agencies and departments in proceedings that may invalidate duly enacted state laws.

NERA's Petition asks the Commission to assert authority over state-jurisdictional net metering services. Virginia OAG is concerned by this because any determination by the Commission consistent with NERA's Petition will upset Virginia's net metering

[1] Va. Code Ann. § 2.2-507(A) (2017). ("All legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge . . . shall be rendered and performed by the Attorney General, except as provided in this chapter and except for [certain judicial misconduct proceedings]."). *Virginia v. Bethune-Hill*, 587 U. S. __, 139 S. Ct. 1945, 1951-1952 (2019) (citing Va. Code Ann. § 2.2-507(A) (2017)).

programs, as established by state law,[2] and would be contrary to both the Public Utility Regulatory Policy Act's ("PURPA's")[3] and the Federal Power Act's ("FPA's")[4] recognition of state subject matter jurisdiction over net metering service. Accordingly, pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, Virginia OAG represents an interest that will be directly affected by the outcome of this proceeding and granting its intervention is in the public interest. Virginia OAG requests the Commission permit its intervention in this proceeding.

COMMUNICATIONS

Virginia OAG designates the following persons to be placed on the official list and receive all communications in this docket:

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[2] Va. Code § 56-594.

[3] 16 U.S.C.S. § 2621.

[4] 16 U.S.C.S. § 824(a).

PROTEST

Introduction

Net metering programs[5] have become increasingly popular over the last two decades. As they have evolved, so too have the myriad issues associated with their implementation. At its heart, the NERA Petition takes issue with how net metering participants are compensated.[6] But, rather than address this issue directly, NERA constructs a strawman jurisdictional question.[7] Congress has made clear that states have jurisdiction over net metering services and Virginia has established a statutory framework for net metering programs.[8] Granting NERA's unfounded request would upend Virginia's twenty-one year old program, in which an expanding number of Virginians participate.

For these reason, NERA's Petition should be denied.

A. Congress has confirmed state authority over net metering service.

Congress includes within the Commission's exclusive jurisdiction "the sale of electric energy at wholesale in interstate commerce."[9] It excludes, however, federal

[5] Broadly, these programs allow electricity customers with their own generation capabilities to be financially compensated for the energy they produce. For more information on these programs, *see, e.g.,* Congressional Research Service, Net Metering: In Brief (Nov. 14, 2019), https://crsreports.congress.gov/product/pdf/R/R46010.

[6] For example, NERA describes state net metering program prices as "discriminatory pricing" (Petition at 9) and as "overcompensating" (Petition at 10).

[7] The NERA Petition asks the Commission to assert federal jurisdiction over state-jurisdictional net metering programs, specifically requesting that "the Commission (i) 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 Public Utility Regulatory Policies Act of 1978 ("PURPA") or the Federal Power Act ("FPA"), as applicable." NERA Petition at 1.

[8] Va. Code § 56-594.

[9] 16 U.S.C.S. § 824.

jurisdiction over matters subject to regulation by the states.[10] Directly on point with NERA's petition, Congress has explicitly recognized, through its enactment of PURPA § 111(d),[11] that states maintain jurisdiction over net metering services.

PURPA § 111(d) applies to "*retail* regulatory policies for electric utilities."[12] PURPA 111(d) does not apply to *wholesale* regulatory policies for electric utilities. In this way, PURPA clearly recognizes that net energy metering services are a matter of state regulatory authority. Otherwise Congress would not have directed that "state regulatory authorit[ies]"[13] – as opposed to this Commission – consider requiring jurisdictional electric utilities to offer net energy metering services to retail customers.[14]

As this Commission has stated:

> Congress revised PURPA to require state regulatory authorities and nonregulated utilities to consider adopting net metering. Section 1251 of EPAct 2005, which amended PURPA, provides that each state regulatory authority and each nonregulated utility shall consider "mak[ing] available upon request net metering service to any electric consumer that the electric utility serves" within two years of enactment of EPAct 2005 and shall complete consideration of this new standard within three years of enactment. Congress thus provided a specific process for states and nonregulated utilities to consider whether to make available net metering.[15]

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[10] *E.g.*, 16 U.S.C.S. § 824 (declaring that "such Federal regulation, however, [] extend[s] only to those matters which are not subject to regulation by the States"); 16 U.S.C.S. § 824(b)(1) (recognizing state authority over facilities used in the generation of electric energy).

[11] 16 U.S.C.S. § 2621.

[12] The title for the subchapter containing 16 U.S.C.S. §§ 2611-2613 is "Retail Regulatory Policies for Electric Utilities."

[13] 16 U.S.C.S. § 2602 defines the term "State regulatory authority" as "any State agency which has ratemaking authority with respect to the sale of electric energy by any electric utility."

[14] 16 U.S.C.S. § 2621 (Directing that "each state regulatory authority . . . shall consider" whether to require jurisdictional "electric utility [to] make available upon request net metering service to any electric consumer that the electric utility serves.").

[15] *Gregory Swecker v. Midland Power Cooperative*, 114 FERC ¶ 61,205 at P 27 (2006) , *reconsideration denied*, 115 FERC ¶ 61,084 (2006).

The U.S. Supreme Court has explained:

> Congress could have pre-empted the field, at least insofar as private rather than state activity is concerned; PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards.[16]

Congress defines "net metering service" as "service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period."[17] In recognizing the clear jurisdiction of state regulatory authorities over net energy metering, the Commission has previously concluded that Congress, through PURPA, "provided a specific process for states and nonregulated utilities to consider whether to make net metering available" and correctly concluded that it is a subject matter over which the Commission "should not intrude further[.]"[18]

In cases such as this, where the law is clear, "[t]he plain meaning of the statute decides the issue."[19] In interpreting statutes, the language must be construed to give

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[16] *FERC v. Mississippi*, 456 U.S. 742, 765 (1982) (addressing a prior version of PURPA § 111(d)).

[17] 16 U.S.C.S. § 2621(d)(11). Virginia OAG notes that the "applicable billing period" likely varies by state. Virginia's program, as explained below, is based on a 12 month balancing standard. Va. Code § 56-594. In discussing what a reasonable billing period is, the Commission has noted, for example, that "the Commission measures compliance with the technical standards for QF status on an annual basis." *MidAmerican Energy Company,* 94 FERC ¶ 61,340, at 62,263 (2001). Therefore NERA's argument that "FERC consistently requires that wholesale sales be measured on an hourly or shorter-term basis" is irrelevant. Petition at 22, 26.

[18] *Wahl v. Allamakee-Clayton Electric Cooperative*, 115 FERC ¶ 61,318, at P 9, *Notice of Intent Not to Act* (June 15, 2006). This recognition of state jurisdictional authority over net metering service is consistent with the Commission's decisions in *MidAmerican Energy Company,* 94 FERC ¶ 61,340 (2001), which pre-dates the EPAct 2005, and *Sun Edison*, 129 FERC ¶ 61,146 (2009).

[19] *FERC v. Martin Exploration Mgmt. Co.*, 486 U.S. 204, 209 (1988).

effect to the intent of Congress.[20] Additionally, a statute should be interpreted consistent with the clear purpose of the statute, and "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."[21] Here, there is no question that authority over net metering service is reserved to the states.

The Commission can dispose of NERA's petition in short order. NERA fails to explain away the clear confirmation of state authority over net metering services. NERA relies fatally on the incorrect argument that PURPA § 111(d) only pertains to the *energy component* of electric service.[22] This interpretation of PURPA § 111(d) and its jurisdictional implications is too narrow.

Both federal and Virginia law recognize that the term "electric energy" consists of a bundle of services including the production (i.e., generation), distribution, and transmission of electricity. At the time that Virginia was on schedule to transition to retail competition for the generation of electric energy, the Virginia legislature provided for a "capped rate" period. After the termination of "capped rates" the Virginia State Corporation Commission was to "regulate the rates of investor-owned incumbent electric utilities for the transmission of electric energy, to the extent not prohibited by federal law, and for the generation of electric energy and the distribution of electric energy to retail customers . . . ."[23] The key here is to understand that each time the Virginia General

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[20] *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940).

[21] *Am. Trucking*, 310 U.S. at 542.

[22] Petition at 36 (stating: "By specifying that the energy the consumer delivered to the local distribution facilities may be used to offset energy provided by the electric utility, Congress appears to be saying that the supplier should receive an offset equal to the avoided cost of energy consistent with the other relevant provisions of PURPA.").

[23] Va. Code § 56-577.

Assembly speaks to a particular service, it refers to that service as being "the transmission of electric energy," "the generation of electric energy and" "the distribution of electric energy[.]" This is because the Virginia legislature understands and intends for the term "electric energy" to comprise a bundle of services – not just the generation component. When an end-use customer in Virginia buys "electric energy" from its supplier it is not buying one component of electric energy – it is rather paying for the full bundle of services. This understanding is shared by the Supreme Court of Virginia.[24]

An examination of the FPA and PURPA reveals that Congress shares the same common sense understanding of "electric energy." Among other examples:

- "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."[25]

- "The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine *the cost of the production or transmission of electric energy* by means of facilities under the jurisdiction of the Commission in cases there the Commission has no authority to establish a rate governing the sale of such energy."[26]

- "The Commission is directed to facilitate price transparency in markets for *the sale and transmission of electric energy* in interstate commerce, having due

[24] *See Piedmont Envtl. Council v. Va. Elec. & Power Co.*, 278 Va. 553, 558 n.3, 684 S.E.2d 805, 808 (2009) ("The terms generation, transmission, and distribution have specific meanings within the electric utility industry, and the definitions of these terms have been adopted within the statutes and regulations that govern that industry. Generation is the production of electric power, usually on a large scale for wholesale delivery; transmission is the transfer of electric energy from its sources of generation across high voltage lines to either a local distributor or a large-scale industrial consumer; distribution is the transfer of electric energy through a retail delivery system to industrial, commercial, and residential consumers.").

[25] 16 U.S.C.S. § 824a (emphasis added).

[26] 16 U.S.C.S. § 824e (emphasis added).

regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers."[27]

- PURPA recognizes that the term "rate" includes "any price, rate, charge, or classification made, demanded, observed, or received with respect to sale of electric energy by an electric utility to an electric consumer."[28] It is obvious that the "rate" for "electric energy" sold to electric consumers includes transmission, distribution, and generation services.

Each of these examples shows that Congress understands and intends for the term "electric energy" to comprise a bundle of services – not just the generation component. And when wanting to speak to a particular service component of providing electric energy, Congress knows to specify the particular component it intends to address. Federal courts have also shared this understanding that "electric energy" consists of various components.[29] Thus, because Congress uses the broad term "electric energy" in PURPA 111(d) without specifying the generation (i.e., production) component, there is no legitimate basis upon which to assume that Congress intended the term "electric energy" used in the definition of net energy metering to mean only the generation (i.e., production) component of electric energy.

Interpreting the term "electric energy" consistent with how it is used elsewhere in PURPA and the FPA is grounded in well-established principles of statutory construction. This is because statutory construction "is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning

[27] 16 U.S.C.S. § 824t (emphasis added).

[28] 16 U.S.C.S. § 2602.

[29] *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006) ("The provision of electric energy to end users traditionally involves three components: electricity generation; high voltage, long-distance power transmission (transmission services); and finally lower voltage, local distribution of electricity from the transmission facilities to end users (distribution services).").

clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[30]

B. The Federal Power Act does not bar state jurisdiction over net metering service.

Much of NERA's Petition focuses on the FPA's requirement that all wholesale sales of electricity must be regulated by the Commission to argue that the Commission should assert jurisdiction over net metering service. This argument must fail. The FPA specifically provides that "such Federal regulation, however, [] extend[s] only to those matters which are not subject to regulation by the States."[31] As discussed previously, state oversight of net metering service is confirmed by Congress through PURPA. Therefore, there is no conflict between the two statutes.

> The decisions of the Supreme Court . . . have recognized the exclusive jurisdiction of the Federal Energy Regulatory Commission over rates charged for the wholesale distribution of electric energy in interstate commerce, regardless of the source of production . . . The Court said that the Congress intended to clearly distinguish the authority of the state regulatory body and the federal one. The authority of the Federal Power Commission was intended to be plenary and extend to all sales in interstate commerce *except those which Congress had explicitly held to be subject to regulation by the states*.[32]

Accordingly, the authority provided to the Commission by the FPA cannot be used to usurp state regulatory authority over net energy metering services as delineated by Congress through PURPA.

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[30] *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citations omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

[31] 16 U.S.C.S. § 824(a).

[32] *Utah v. FERC*, 691 F.2d 444 at 447 (10th Cir. 1982) (emphasis added).

C. Virginia's twenty-one year old[33] net metering service program would be upended if NERA's request is granted.

Granting NERA's request would upend Virginia's net metering service program.[34] Take, for example, NERA's proposed balancing standard of an hour or less.[35] Virginia's regulatory framework is based on a 12 month balancing standard. Virginia defines "net energy metering" as "measuring the difference, over the net metering period [defined as 12 months], between (i) electricity supplied to an eligible customer-generator or eligible agricultural customer-generator from the electric grid and (ii) the electricity generated and fed back to the electric grid by the eligible customer-generator or eligible agricultural customer-generator."[36] As is clear, any attempt to shoehorn the Virginia program into an hourly balancing standard would undermine the very foundation Virginia has established for its net metering services and impermissibly "intrude" on state regulatory authority to establish the parameters of net metering services.[37]

CONCLUSION

NERA's Petition should be denied because state authority for oversight of net metering service has been clearly recognized by federal law and prior Commission decisions.

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[33] 1999 Va. Acts of the Assembly, Chp. 411.

[34] Va. Code § 56-594.

[35] NERA Petition at 7.

[36] Va. Code § 56-594(B).

[37] 16 U.S.C.S. § 2621 ("Net metering service" is defined as meaning "service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the *applicable billing period*." (emphasis added)). It is the state regulatory authority, and not the Commission, that has the authority to determine the "applicable billing period" for net metering services. In any event, VA OAG is generally aware that the vast majority of retail customers throughout the country, including Virginia, do not have an "hourly" applicable billing period, as NERA advocates.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
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Dated: June 15, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list in this proceeding in accordance with the provisions of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Richmond, Virginia, this 15th day of June, 2020.

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