



Ari Peskoe, Director of the Electricity Law Initiative, on Comments Filed in Opposition to Net Metering Petition, June 10, 2020

To return to our website [click here](#).

Ari Peskoe:

Thanks everyone for joining. My goal this afternoon is to provide information on the proceeding, currently before FERC, about net metering. My remarks are all on the record here. I'm going to start with an overview of FERC's net metering policy, then I'll summarize the April 14th petition filed by New England Ratepayers Association. I'll give you some of the arguments that I expect we'll see next Monday when filings are due, and finally, I'll discuss potential ramifications of a hypothetical FERC order granting the petition. And I look forward to answering your questions.

So as I see it, NERA's trying to enlist FERC in its campaign against rooftop solar, by using an administrative proceeding to trigger a nationwide wave of state level repeals of net metering. Before I get to that, let me start with a lot of background on how I get there. So very briefly, let me set the stage with the legal framework. The Federal Power Act passed by Congress in 1935 provides FERC with authority over sales of electric energy for resale in interstate commerce. The other sale is subject to state regulation.

So the petition asserts that energy generated behind a retail meter may not be accounted for on retail bill through net metering because it's a wholesale sale in interstate commerce, and therefore must be priced pursuant to federal law. There are two statutes that govern that pricing under the Federal Power Act. FERC determines whether a rate is just and reasonable, but PURPA, passed in 1978, provides an exception for what are called qualifying facilities, which includes nearly all net meter generators. And under purpose, states price energy sales pursuant to FERC rules.

So states have been requiring utilities to provide net metering service since the early 1980s. Net metering service allows retail rate payers to install small-scale generation, typically renewable without the need for expensive metering or any additional administrative burden on the utility. A single meter measured the retail rate payers consumption and production simultaneously. The meter would actually spin backwards when the rate payer is producing more than she was consuming. Meters now are more sophisticated than that, most don't actually spin backwards anymore, but the billing convention is still the same. Customers are billed for the net consumption minus production, and typically that calculation is done on a monthly basis.

To put this in FERC terms, "netting interval" by the state is typically set at the one month billing cycle. Today, not every state offers a one to one exchange rate between consumption and production and states handle the crediting of excess production



differently. As far as I can tell net metering didn't generate any controversy at FERC until 1998, that's when Mid-American an Iowa Utility filed a petition for enforcement and declaratory order at FERC. At issue were Iowa regulators orders and rules that require the utility to provide net energy billing to a customer that had a 20 kilowatt wind generator. So things can start rather small.

Mid-American argued that this billing arrangement, which offset consumption with production on a one to one basis, violated PURPA because the utility had to effectively compensate the resource owner at the retail rate, rather than at the avoided cost rate that the utility argued was required under PURPA. A few months later, FERC issued a notice of its intent not to initiate a new corporate enforcement action, which is how FERC typically handles those petitions. Meanwhile, the issue is moving its way through Iowa courts, and as it was going to be heard by the Iowa Supreme Court, FERC issues a declaratory order that sides with the state.

FERC rejects the premise that, quote, "When an individual, homeowners or farmers install small generation facilities to reduce purchases from a utility, that state is preempted from allowing the individual homeowners or farm owners ... purchase or sale of power from being measured on a net basis." In other words, FERC takes a hands-off approach to state net metering. It's a very short order, particularly in comparison to today's FERC orders and FERC provides two very quick rationales for why it's taking its hands-off approach to net metering.

One, FERC says the first rationale for why it's hands-off here on net metering, the petition, quote, "Presents an issue similar to that in our recent decision addressing the netting of station power used at generating stations against certain wholesale sales from the generating station." In 2001, this was the beginning of industry restructuring and wholesale power markets were starting to be developed. And one issue that these markets faced was how to bill independent generators for the power that they were consuming. And FERC determined that when a generator self supplies its station power and accounts for that power by netting its consumption against its output, there is no sale of power for FERC to regulate

FERC analogized that situation to net metering, the net metering customer is self supplying, just like that large scale power plant, it's netting its consumption against its output, just like that power plant. And in both scenarios, there was no sale for FERC to regulate. The second rationale for FERC's hands-off approach, it pointed to its initial PURPA rules, which said that net metering, quote, "May be an appropriate way of approximating avoided costs in some circumstances." But those were the two reasons that FERC gave in this 2001 order.

The bottom line is that in 2001 FERC determined it had no jurisdiction over energy transfers between a retail customer and her utility so long as the consumption was greater than production over the course of the state determined netting period. And this



has been FERC's consistent policy since then. FERC has only ever had one net metering policy. They reiterated it as recently as 2018 and 2019 in its landmark storage orders that require RTOs to provide participation models for energy storage.

That brings us to this petition filed in April by New England Ratepayers Association, or NERA. This is the organization's second petition for declaratory order. In 2018 it asked FERC to find that a New Hampshire law that effectively set a price for purchases by New Hampshire utilities from biomass plants set a wholesale rate, and it was therefore preempted by the Federal Power Act. FERC granted that petition last September, so it's one for one in these declaratory order requests. This petition is written by the same legal team that wrote that first petition. One member of the team was a long time EI lawyer, more recently represented New England utilities in federal court in a case decided in 2017.

The other lawyer has represented Southern California Edison in its longstanding California energy crisis litigation. He's represented other utilities as well. The newest petition asked FERC to declare its jurisdiction over energy sales from distributed generation that's located on the retail side of the meter. One, whenever the output exceeds the customer's demand, as measured on an hourly basis. And two where energy from such generators is designed to bypass the customer's load and is not really serving any customer demand.

In these cases, NERA argues energy is delivered to the utility for resale and is a wholesale sale in interstate commerce and therefore must be priced according to federal law and states cannot use net metering billing to account for those energy transfers. They basically have two arguments, two legal arguments, in their petition. Both of these arguments start with the premise, which will be hotly contested next week, that energy generated by a rate payer is a wholesale sale in interstate commerce. So the first thing that NERA says is that ... First reasoning in that 2001 Mid-American order was, quote, "Never correct."

They argue that FERC should not have been netting separate services. They have different cost structures and characteristics to determine whether a wholesale sale has occurred. They argue that power flowing over retail meter from the utility to the customer is what's called Firm Requirement Service, it's consistent service. It's always reliable. They argue that power flowing in the opposite direction, from typically rooftop solar facility back to the utility, is non-firm energy. It's not consistent energy. It's considered a different class of service.

According to NERA, these services have different costs, different market values, different service characteristics. And in general, FERC doesn't allow sellers to simply negate transactions when they're involved in simultaneous purchase and sale transactions. And NERA argues that there's no reason for FERC to be allowing that practice here. Secondly, their second argument is that, well, to the extent that FERC was allowing this practice in



its Mid- American order, it did so because of its analogy to station power. And there were two DC Circuit cases about FERC station power orders. They were decided in 2010 and in 2012, and the 2010 case overruled FERC's decision and NERA has said that because of that DC Circuit decision that it invalidated FERC's initial station power policies. They have the effect of invalidating FERC's net metering policy as well.

According to NERA, these cases stand for the proposition that netting is not a valid method for negating a jurisdictional sale. NERA basically concludes from that, that way that energy transfers from behind the meter resource have to be measured is on an hourly basis, which they derived that principal from various commission orders, where they conclude that netting has to happen on no more than an hourly basis. So that's the gist of their argument. They say the principal effect of granting their petition would be to compel states to abide by PURPA's pricing rules. In other words, these energy transfers can't be valued based on net metering, but instead have to be valued based on PURPA, a law that allows states to set prices for renewable energy transfers from certain types of qualifying facility. Which would result in, probably, a much lower value for these energy flows than are currently under net metering.

NERA's petition also includes a 40 page report by Ashley Brown, a longtime critic of net metering. Who has provided testimony in numerous utility commission proceedings on behalf of utilities and behalf of himself as well. If you've been following these debates, you're familiar with his arguments; net metering is a regressive, inefficient and unfair cross subsidy. And none of the arguments put forward by the proponents of net metering, such as as value of solar, hold any water.

The petition tries to frame some of these objections in terms of effects on wholesale markets, but Brown's report has very little to say about wholesale markets. He filed nearly identical testimony in a Maine public utility commission proceeding in 2016. So let me now turn to the arguments that I think we'll see common across filings Monday, when response to the filings are due at FERC. I think basically we will see opponents be making three arguments. One, the petition is procedurally improper and should be dismissed without any discussion of its substance. Two, net metering is a strictly retail matter and therefore completely beyond FERC's authority, which is limited to wholesale matters. And three near NERA misreads the DC Circuit cases about station power and ignores what FERC has already said about these cases.

So let me quickly summarize these arguments, the simplest path for FERC to deny this petition is to find the improper under the commission's rules. NERA filed this petition under rule 207, which states, quote, "A person must file a petition when seeking a declaratory order or rule, to terminate a controversy, or remove uncertainty." So there's simply no controversy or uncertainty here. FERC issued its Mid-American orders, as I said, as there was a pending case before the Iowa Supreme Court. But that's a controversy under rule 207 and it was appropriate for FERC to address that.



For 40 years, FERC has had the same policy about net metering. There's nothing uncertain about it under 207. Moreover NERA doesn't draw any connection between itself and any net metering policy, it's highly unusual for a petitioner to simply ask the commission to revisit settled policy when it doesn't allege any harm from that policy. There's usually a concrete connection between the petitioner and the subject matter, not merely a dislike of commission precedent, which is really all that NERA presents here. Another procedure angle we might see is, despite the fact that the petition says it's a filing under rule 207, FERC could interpret it as a PURPA enforcement petition.

As I mentioned, the petition says that the primary effect of granting the petition would be to compel states to price energy transfers under PURPA and not under net metering rules. FERC routinely dismisses PURPA enforcement petitions, and it could do the same here. And in fact it would have to do so here because PURPA only allows electric utilities and qualifying facilities to file these sorts of enforcement petitions, and NERA obviously is neither a utility nor a qualifying facility owner.

If FERC does want to weigh in on the merits, FERC can simply state that it's powerless to tell states how to measure retail sales. The Federal Power Act doesn't instruct states how to bill retail customers, if states want to bill based on volumetric assumption they can do that. If states want to bill based solely on demand charges or fixed fees, say everyone pays simply \$100 a month for their electric service, FERC can't stop states from doing that. If states want utilities to provide free energy, everybody with a solar panel on their roof, FERC can't stop states from doing that either.

So net metering is just a retail rate design. It's a method of allocating costs among retail rate payers for retail service, and for those of you who follow retail rate cases, you know that retail rate design is hotly contested. NERA itself knows this, it's participated in net metering, at least one net metering proceeding before the New Hampshire Public Utility Commission, making exactly the same policy arguments about net metering that it's putting forward for FERC. And Congress all but confirmed that net metering is a retail policy subject to state jurisdiction in the Energy Policy Act of 2005. Congress added net metering Title I of PURPA, which is captioned, "Retail rate making policies."

That section of the federal code now lists about 20 retail rate making methods or practices that Congress has required states to consider. Net metering is among those practices, indicating Congress understands net metering is a matter for states and not FERC. Even if FERC were to issue an order finding that the energy transfers from a rate payer are wholesale sales under FERC's jurisdiction, as NERA requests, that still wouldn't require states to change anything about net metering rules.

The Federal Power Act does not prohibit an energy flow from being counted differently by FERC and by state. FERC has said as much in its orders following the station power DC Circuit decisions. And this is really a real flaw in NERA's petition, it simply ignores what FERC has already said about this to DC Circuit decision. And there FERC says very clearly



that FERC can measure jurisdictional transmission service one way and states can, for the same purpose, measure retail sales differently.

So in other words, FERC can have one netting period and a state can adopt a different netting period, and that's fine. And if people want to, I'm happy to send the precise quotes from FERC on this that NERA just overlooks in its petition. But the bottom line here is that for purposes of measuring wholesale sales FERC can adopt the hourly netting period that NERA wants, and that doesn't compel states to at all change their current practice of using the monthly netting period to measure retail sales.

Just to sum up, three main arguments I expect to see across numerous filings next Monday. One, it's procedurally improper. Two, this is a retail matter. And three, NERA just simply ignores what FERC has already said about these two DC Circuit cases. Opponents are going to have other arguments too, I'm filing on behalf of Electricity Regulation Scholars. It's a group of academics who teach at US law schools and it published articles on energy law. Many in particular on the interaction between FERC's regulation of wholesale markets and public utility laws. Jim Rossi, of Vanderbilt Law School, is my coauthor on this. We argue that FERC cannot ... And so, in addition to these three arguments I've already laid out, we argue FERC cannot find, based on NERA's filing, that the energy flow from a net metered resource is, quote, "In interstate commerce under the Federal Power Act."

NERA has about two sentences on this issue in its filing, and in those two sentences they misapply Supreme Court precedent and they don't provide any evidence of interstate power flows for control. NERA's federal court decisions conclude that for FERC to assert jurisdiction over a wholesale sale, it must find interstate movement of energy. Relevant evidence can include what are called energy tracing studies that measure the flow of energy in different parts of an interconnected power system, or evidence that the utility sources its wholesale sales from an integrated interstate system.

FERC has also found operational and contractual evidence relevant, which we argue would allow FERC to distinguish between sales by a distributed energy resource directly to an RTO and sales that are merely to the local utility through a net metering arrangement. Finally, last thing I'll talk about before opening this up, what if FERC actually does grant this petition, despite arguments that I've just laid out? One, so NERA asked FERC to, quote, "Reject state net metering programs."

I really don't know what they're asking for here. The FERC declaratory order is essentially FERC's legal opinion. It doesn't have the effect of preempting a state program. Literally no state has to do anything in response with declaratory order. So what I suspect would happen here if FERC did issue an order saying, "We find these energy transfers are wholesale sales subject to federal pricing rules," is that what I think would happen is that utilities that are interested in changing net metering rules will file applications with their state regulators to do so and urge state regulators to follow FERC's legal opinion.



So as I said, FERC's declaratory orders under its own rules are supposed to resolve uncertainty. Here, FERC order granting NERA's petition can only create uncertainty by leading utilities or other entities to urge state regulators to rewrite established state policies. There may be serious ramifications for other types of distributed energy resources. One hypothetical here is about electric vehicles. Obviously still a lot to see what happens with the development of electric vehicles, but one model is potentially that electric vehicles might themselves inject energy into the grid.

Under NERA's view, those electric vehicle owners would have to file with FERC for market based rate authority in order to inject any energy into the grid. So you could have a world where millions of new car owners, I guess when they buy a car from the dealer, would also have some sort of filing where they're filing for market based rate authority under the Federal Power Act so they can participate in utility programs. And the same thing goes with a homeowner who has a battery in their basement.

But what about, what's the next step after this? FERC's orders can generally be appealed to a federal court. There would likely be procedural hurdles here to a ruling on the merits. I think I'll just leave it at that for now, if people want to talk about that we can get to that. But this could be the end of the road, there very well might not be an appeal of this order.

To return to our website [click here](#).