UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Comment of the Electricity Regulation Scholars[1]

Summary

The Commission should deny the petition filed by the New England Ratepayers Association (NERA). Nearly twenty years ago, the Commission rejected NERA's premise that "every flow of power constitutes a sale, and, in particular that every flow of power from a homeowner or farmer to [a local utility] must be priced consistent with" federal law.[2] While the influx of customer-sited generation is changing the industry, the Commission's longstanding position on net metering remains legally sound. It honors the jurisdictional boundaries established by Congress and is consistent with judicial precedent.

The Commission need not re-visit its net metering policy to deny NERA's petition. The petition fails under Rule 207 because, unlike a proper declaratory order request, NERA's filing does not seek to "terminate a controversy or remove uncertainty."[3] The Commission should not allow NERA to manufacture uncertainty by claiming that settled Commission policy, relied on within the past year,[4] "was never correct."[5] Reaching the merits of this petition would open the floodgates to academic petitions that are not grounded in any actual dispute or concrete proposal.

If the Commission does address the merits, it should simply reiterate its longstanding and correct interpretation of two decade-old D.C. Circuit decisions addressing orders on station power. As the Commission aptly summarized in its orders on remand, "the application of differing federal and state netting periods does not permit [the Commission] to exercise [its] jurisdiction in a manner that defines when a retail sale occurs."[6] Put simply, the Commission has no statutory

[1] The Electricity Regulation Scholars have expertise in the interplay between state utility law and the Commission's regulation of interstate electricity markets under the Federal Power Act. Please see the Appendix for a list of participants.
[2] *MidAmerican Energy*, 94 FERC ¶ 61,340, 62,263 (2001).
[3] 5 U.S.C. § 554(e); 18 CFR § 385.207(a).
[4] Order No. 841, 162 FERC ¶ 61,127 at P 30, n. 49 (2018); Order No. 841-A, 167 FERC ¶ 61,154 at PP 6, 55 (2019).
[5] Petition at 7.
[6] *Duke Energy Moss Landing v. CAISO*, 134 FERC ¶ 61,151 at P 27 (2011).

authority to categorically "reject" state net metering laws, as NERA requests.[7] In the station power cases, the court held the Commission could not use its transmission authority to preempt the state's determination of retail sales. The cases do not compel the Commission to abandon its current practice of deferring to the state-set netting interval to measure wholesale sales. Because the Commission cannot rely on its wholesale sales jurisdiction to preempt state net metering programs, deferring to reasonable state-set netting intervals to avoid double-counting energy flows as both wholesale sales and retail offsets is a sensible and permissible approach.

We also discuss two bases for concluding that net-metered excess energy that flows to the grid is not a jurisdictional sale. Under either rationale, the Commission must deny the petition and can articulate an easy-to-administer, bright-line rule: utility programs that credit a retail customer for excess energy generated behind a retail meter are not capped by federal rate regulation.

First, the Commission should find that state net metering programs are a form of retail service or retail rate design — reserved by statute to state regulators. This conclusion is consistent with widespread industry understanding. In a recent filing with the Commission, the Edison Electric Institute (EEI) characterized net metering as "part of [ ] bundled retail service."[8] Alternatively, the Commission could recognize that net metering is a utility billing convention used to assign costs of retail service to retail ratepayers. Either factual finding would lead to the same conclusion: net-metered retail customer excess energy is "any other sale" of electric energy under section 201(b), and the statutorily limited scope of federal rate regulation does not apply. While the Commission did not reach this conclusion when it formalized its net metering policy in 2001, Congress subsequently confirmed in 2005 that net metering is a "*retail* regulatory polic[y]."[9]

Second, if the Commission finds that customer net metering is not strictly a retail matter, it must nevertheless conclude that net metering does not involve any jurisdictional sale. The Commission's jurisdiction is strictly limited to sales-for-resale that are "in interstate commerce." The Commission is not compelled to find that excess energy from behind a retail meter meets either of these pre-requisites. Nowadays, the Commission is rarely faced with a question of whether a wholesale sale is "in interstate commerce." We provide a comprehensive review of how the Commission and courts understand this jurisdictional requirement. For a wholesale sale to be "in interstate commerce" the Commission must make some affirmative finding that a

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[7] Petition at 45.

[8] Comments of the Edison Electric Institute, Docket No. RM16-23, Feb. 13, 2017, at pgs. 23–26.

[9] Public Utility Regulatory Policies Act, 92 Stat. 3117, 3137 ("Title I – Retail Regulatory Policies for Electric Utilities") (emphasis added); *See* Yates v. United States, 574 U.S. 528 (2017) (defining a term in the U.S. Code in part by considering the term's placement in the U.S. Code, the "caption" or title of the relevant statutory provision, and the function of the surrounding provisions).

transaction involves interstate movement of energy. In past exercises of jurisdiction, relevant evidence has included so-called "energy tracing" studies or proof that the utility's sales are supplied through a coordinated, integrated interstate network.[10] Petitioner provides no evidence whatsoever and instead misapplies the Supreme Court's "commingling" test. Without any evidence or a coherent theory of jurisdiction, the Commission must find that excess energy from behind a retail meter is "any other sale" under section 201(b).[11]

I. The Petition is Improper under Rule 207

The petitioner filed under Commission Rule 207, which provides that "a person must file a petition when seeking . . . (2) A declaratory order or rule to terminate a controversy or remove uncertainty."[12] There is neither a live controversy nor uncertainty surrounding the Commission's regulation of retail customer net metering. The Commission adopted its current approach in 2001, reiterated it in a 2004 rule,[13] expanded it in 2009,[14] and reaffirmed it in its landmark storage orders, which it issued in 2018 and 2019.[15] Petitioner's novel interpretation of a pair of decade-old D.C. Circuit decisions does not create uncertainty under Rule 207 that warrants a response from the Commission.

The lack of controversy or uncertainty under Rule 207 highlights another deficiency related to petitioner's proposed remedy. In effect, NERA asks the Commission to invalidate dozens of state and utility programs that the petitioner neither participates in nor administers. NERA does not claim it is harmed by any net metering program or explain how a Commission order will remedy any injury or provide any relief.[16] While a petitioner to an agency need not demonstrate that it

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[10] *Re Cincinnati Gas & Electric Co.*, 35 FPC 99, 101 (1966).
[11] 16 U.S.C. § 824(b).
[12] 18 CFR § 385.207(a).
[13] Order No. 2003-A, 106 FERC ¶ 61,220 at PP 743–747 (2004) ("under most circumstances the Commission does not exert jurisdiction over a net energy metering arrangement when the owner of the generator receives a credit against its retail power purchases from the selling utility. Only if the Generating Facility produces more energy than it needs and makes a net sale of energy to a utility over the applicable billing period would the Commission assert jurisdiction.").
[14] *SunEdison*, 129 FERC ¶ 61,146 (2009) (determining that there is no sale where the owner of the behind-the-meter resource is not the utility ratepayer).
[15] Order No. 841, 162 FERC ¶ 61,127 at P 30, n. 49 (2018) (noting that "injections of electric energy back to the grid do not necessarily trigger the Commission's jurisdiction" and citing to *MidAmerican* and *SunEdison*); Order No. 841-A, 167 FERC ¶ 61,154 at PP 6, 55 (2019). Commissioner McNamee's partial dissent was rooted in his concern that the order "fail[ed] to recognize the states' interests in ESRs located behind a retail meter."
[16] *Southern Maryland Electric Cooperative, Inc.*, 162 FERC ¶ 61,048 at P 18 (2018) (denying a petition for declaratory order in part because petitioner did not "explain how it is harmed by a program in which it is not required to participate").

has Article III standing, the complete lack of connection between the petitioner, the subject matter of the petition, and an effective remedy is striking and is grounds for dismissal.

Under the Administrative Procedure Act,[17] which provides the basis for Commission Rule 207, declaratory orders should provide guidance on "concrete and narrow questions of law, the resolutions of which would have an immediate and determinable impact on specific factual scenarios."[18] Indeed, the Commission's previous orders on net metering demonstrate how properly issued declaratory orders respond to petitions that describe specific facts and request well-defined relief that the Commission has the authority to provide, and are targeted at a controversy or uncertainty that directly affects the petitioner.

In 1998, MidAmerican sought to "terminate a controversy" and filed a "petition for enforcement and declaratory order" that asked the Commission to enjoin Iowa regulators from enforcing a recently issued order and state regulations that the utility claimed were inconsistent with a 1997 Commission order.[19] The utility's filing summarized extensive state-level proceedings and noted that the utility had also filed a complaint in state court. Three months later, the Commission declined to initiate a PURPA enforcement action.[20] After a state court ruled in favor of MidAmerican and the matter was on appeal before the Iowa Supreme Court, the Commission issued a declaratory order that endorsed the legal position advanced by Iowa regulators.[21]

SunEdison is an example of the Commission "removing uncertainty" about a specific proposal, project, or business model. The company's petition described its operations and explained that it petitioned the Commission because its "lenders and investors ha[d] raised the concern that FERC's pronouncements in this area . . . do not directly address" the company's business model.[22] The guidance and regulatory certainty provided by the Commission's order enabled rapid growth of the financing model pioneered by SunEdison.[23]

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[17] 5 U.S.C. 554(e) ("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] City of Arlington v. FCC, 668 F.3d 229, 243 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).
[19] MidAmerican Petition, Docket No. EL99-3 (Oct. 8, 1998).
[20] *MidAmerican Energy*, 85 FERC ¶ 61,470 (1998).
[21] *MidAmerican Energy*, 94 FERC ¶ 61,340, 62,261 at n. 2 (2001) (noting pending court case).
[22] SunEdison Petition for Declaratory Order, Docket No. EL09-31, pg. 7 (Jan. 30, 2009). The company also requested waivers because it was "drowning in FERC-related paperwork." *Id.* at 4.
[23] Just 8% of residential photovoltaic (PV) systems installed in 2009 were owned by a third-party developer such as SunEdison. From 2012 to 2016, more than half of all new residential PV systems were owned by a third-party developer, and total annual installations were ten times the total in 2009. Galen Barbose and Naim Darghouth, Lawrence Berkeley National Lab, Tracking the Sun, Oct. 2019 at 17 and underlying data.

By comparison, NERA's petition is speculative and purely academic, and the Commission should deny it on that basis.[24] It does not request Commission guidance on any proposal or project.[25] Nor does it identify ongoing state-level proceedings that are the subject of controversy or uncertainty. Rather, it invokes a declaratory order process as a means of circumventing PURPA's explicit requirements for filing an enforcement petition and inviting the Commission to reverse course on longstanding legal interpretations.[26] Because the petition addresses net metering only in generalities and does not target any particular state law, granting the petition may even "exacerbate uncertainty by placing matters in a 'peculiar, uncertain limbo.'"[27] In the absence of a factual record, the Commission's high-level guidance (which is all it can provide in response to this petition) cannot resolve any uncertainty, and would instead unleash chaos at the state level as state regulators and utilities grapple with whether and how the Commission's guidance ought to be implemented. Retail customers and homeowners with settled expectations under existing tariffs and service contracts that FERC has never regulated would face new forms of uncertainty about their retail bills as well as other contractual rights and obligations.

If the Commission were to decide NERA's petition on the merits, it would create chaos on another front — by inviting petitions that seek nothing more than to question entrenched Commission precedent. Rather than write law journal articles or book chapters, Energy Bar attorneys and energy law professors might turn their focus to drafting petitions that, like NERA's,

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[24] *See, e.g., Northwestern Corp.*, 170 FERC ¶ 61,266 (2020) (denying a declaratory order petition because petitioner "has not presented sufficient information to make [ ] a determination"); *Alternative Transmission Inc.*, 168 FERC ¶ 61,106 (2019) (denying petition because it contained insufficient information for the Commission to make a reasoned decision).

[25] *See, e.g., California Independent System Operator Corp.*, 119 FERC ¶ 61,061 (2007) (granting a petition that sought "conceptual approval" of a transmission financing mechanism); *Western Electricity Coordinating Council*, 143 FERC ¶ 61,239 (2013) (conditionally accepting plan to fund regional reliability coordinator).

[26] Although styled as petition for a declaratory order, the Commission could read NERA's filing as a petition for PURPA enforcement. Petition at 8 (claiming that net-metered generators are "virtually always" Qualifying Facilities and requesting that the Commission require such generators to sell at PURPA avoided cost rates). The Commission may disregard the caption on a filing. *See*, e.g., *Electric Energy, Inc., GridLiance Heartland, LLC*, 171 FERC ¶ 61,197 at P 17 ("We evaluate a pleading based on its substance, rather than its style or form") (citing *Stowers Oil & Gas Co., et al.*, 27 FERC ¶ 61,001, 61,002 n.3 (1984) ("Nor does the style in which a petitioner frames a document necessarily dictate how the Commission must treat it.")). PURPA precludes NERA from filing an enforcement petition, and the Commission must therefore reject its effort to subvert the statute by styling its PURPA enforcement petition as a petition for a declaratory order. 16 U.S.C. §824c-3(h)(2)(b) (allowing only a utility or Qualifying Facility to file a petition); *Vote Solar Initiative, et al., v. Montana PSC,* 157 FERC ¶ 61,080 at PP 10–11 (2016) (dismissing enforcement petition because filer was neither a utility nor a QF).

[27] Hollister Ranch Owners' Ass'n v. FERC, 759 F.2d 898, 903 (D.C. Cir. 1985) (quoting Tennessee Gas Pipeline Co. v. FPC, 606 F.2d 1373, 1380 (D.C. Cir. 1979)) (vacating a declaratory order that neither resolved a controversy nor removed uncertainty).

are abstract and unrelated to any actual controversy or "concrete proposal."[28] Numerous unregulated parties, such as financial institutions, advocacy organizations, or industry front groups might sponsor such efforts.

While we would applaud the Commission for opening up a new forum for academic writing, making significant policy changes through these proceedings would be inconsistent with the Commission's historic commitment to deliberative decision making. The Commission has been particularly cautious about distributed energy resources (DERs), recognizing the value of new forms of experimentation in retail customer arrangements, such as demand response, that work as a "program of cooperative federalism."[29] In such a context, it is especially important for the Commission to "weigh[] competing views"[30] of states, utilities, consumers, and market participants, and make major policy changes, if it chooses to do so, through more transparent, inclusive, and deliberative processes, such as notice and comment rulemaking.[31]

II. The Station Power Cases Reinforce the Validity of the Commission's Current Net Metering Policy

The D.C. Circuit's station power cases do not "reject" *MidAmerican and SunEdison*, as NERA claims,[32] and they do not compel the Commission to ignore a state's netting period. If the Commission reaches the merits of NERA's petition, it should find that the station power cases reinforce the Commission's approach to net metering.

At issue in the station power cases were orders that established a methodology for setting the amount of jurisdictional transmission service associated with a generator's use of power. In *Southern California Edison*, the D.C. Circuit held that the Commission "exceeded its authority by insisting that the same method used for calculating transmission charges for station power [in

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[28] *Advanced Energy Economy and Sustainable FERC Project*, 167 FERC ¶ 61,032 at P 18 (2019) (dismissing petition as premature because alleged harm was "speculative" and the Commission did not have a "concrete proposal" to evaluate); *Nevada Hydro Co.*, 164 FERC ¶ 61,197 at P 24 (2018) (finding proposal is "too general" and lacks specific information).
[29] FERC v. Electric Power Supply Assoc., 136 S.Ct. 760, 780 (2016).
[30] *Id*. at 784.
[31] With regard to jurisdictional rates, the Commission typically makes policy changes in section 205/206 proceedings and with a record built through related technical inquiries. For example, before issuing Order No. 841 under section 206 the Commission sent data requests to each RTO/ISO, requested comments prior to issuing a NOPR, and then conducted a notice-and-comment process. *See* Docket No. AD16-20, Order No. 841 at Appendix A. The Commission also directed staff to issue a report, solicited additional comments on DER aggregations, and hosted a technical conference. *See* Dockets Nos. RM18-9 and AD18-10.
[32] Petition at 15–18.

the California ISO tariff] be used to calculate retail charges."[33] Because the Commission had "failed to demonstrate any real connection between transmission and the netting intervals governing retail sales for use of station power,"[34] the panel rejected the Commission's assertion that its transmission authority allowed it to determine that "no retail sale had taken place."[35]

NERA's petition insists that in the station power cases the D.C. Circuit "rejected the principle that the existence of a sale, for jurisdictional purposes, may be determined based on the length of a netting interval."[36] But importantly in that case the court's focus was on the Commission's attempt to use its jurisdiction over interstate transmission to *preempt* a state's determination of retail sales.[37] The cases do not compel a broader holding that would restrict how both the states and the Commission may measure jurisdictional service or sales.

As NERA points out, the Commission has ordered that wholesale energy injections be measured, scheduled, and valued at various intervals.[38] The Commission has required or approved different interval periods for Qualifying Facility sales (hourly),[39] transmission provider scheduling (fifteen minutes),[40] and RTO/ISO dispatch and settlement (as short as five minutes).[41] Despite these variations, NERA divines from these orders the rule that all energy sales must be measured on an hourly basis or shorter, claiming that it would be "arbitrary and capricious" for the Commission to defer to states' netting intervals for purposes of measuring sales by net-metered resources.[42]

While it is possible that netting periods could be used in unreasonable ways to subvert the Commission's jurisdiction, NERA has presented no evidence that retail customer net metering is targeted at the Commission's exclusive regulation of wholesale sales. The Commission's practice of deferring to state-set netting intervals is hardly without reason, as it prevents double-counting

[33] Southern California Edison v. FERC, 603 F.3d 996, 997 (D.C. Cir. 2010).
[34] Calpine v. FERC, 702 F.3d 41, 49 (D.C. Cir. 2012) (recapping its *So. Cal. Edison* decision).
[35] *Southern California Edison*, 603 F.3d at 1000.
[36] Petition at 15.
[37] *Southern California Edison*, 603 F.3d at 1000–01 (finding that it "begs the jurisdictional question" for the Commission to select a netting interval for a *retail sale*).
[38] Petition at 26–29.
[39] *Conn. Valley Elec. Co., v. Wheelabrator Claremont Co., L.P*, 82 FERC ¶ 61,116 (1998).
[40] Order No. 764, *Integration of Variable Energy Resources*, 139 FERC ¶ 61,246 (2012).
[41] *Settlement Intervals and Shortage Pricing in Markets Operated by RTO/ISOs*, 152 FERC ¶ 61,218 (2015); *PJM Interconnection, LLC*, 167 FERC ¶ 61,058 (2019) (finding that PJM's fast-start pricing practices may be unjust and unreasonable).
[42] Petition at 26, 29. Petitioner's entire legal argument is premised on the notion that the Commission must measure all jurisdictional sales on an hourly or more frequent basis. Yet, NERA also suggests that the Commission could adopt a "light-handed regulatory approach" to net-metered sales under the FPA. Assuming that is within the Commission's authority, it begs the question of whether under a light-handed approach the Commission could simply defer to the state-set netting period to determine whether there has been any jurisdictional sale.

excess energy from a retail customer as both a wholesale sale and an offset to retail consumption on the customer's bill. The Commission has acknowledged that "differing federal and state netting periods do[] not permit [the Commission] to exercise [its] jurisdiction in a manner that defines when a retail sale occurs."[43] Even if the Commission did conclude that the hourly *net* output from a net-metered resource would ordinarily be a sale that must be priced pursuant to federal law (as NERA requests), it could not compel a state to change its *monthly* netting practice to measure retail sales. The practical effect of this jurisdictional limit is that excess customer energy would be counted for different purposes under federal and state law. Deferring to state-set netting intervals avoids this result in a way that allows federal and state programs to work in a predictable and complementary manner, demonstrating that there is a "real connection"[44] between assertions of the Commission's exclusive wholesale sales authority and uses of state-set netting periods that would justify the Commission's choice.[45]

The Commission has similarly deferred to state retail rate regulation in other contexts. For example, in Order No. 888, the Commission imposed its open-access requirement on retail transmission only *when a state chooses* to unbundle retail service.[46] Similarly, when *a state chooses* to allow retail access, the Commission defers to "recommendations by state regulatory authorities concerning where to draw the jurisdictional line under the Commission's technical test for local distribution facilities and how to allocate costs for such facilities, provided such recommendations are consistent with" the Commission's rules.[47] The Commission may likewise defer to the state's choice of netting interval to determine whether there is any sale by a net-metered resource.

NERA's characterization of the D.C. Circuit station power cases is hard to reconcile with what the Commission itself has consistently said about those cases. If the Commission disagrees with its

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[43] *Duke Energy Moss Landing v. CAISO*, 134 FERC ¶ 61,151 at P 27 (2011); *Duke Energy Moss Landing v. CAISO*, 132 FERC ¶ 61,183 at P 16 (2010) ("the Commission and the states can use different methodologies when the Commission determines the amount of station power that is transmitted on the Commission-jurisdictional transmission grid and the states determine the amount of station power that is sold in state-jurisdictional retail sales"); *Calpine*, 702 F.3d at 48 (Commission "lacks jurisdiction to set netting intervals for retail charges").

[44] *Calpine*, 702 F. 3d at 49.

[45] As discussed in the next section, the connections between net metering and retail service provide other bases for deferring to the state-set netting interval.

[46] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540, 21,625 (May 10, 1996), *aff'd in relevant part* Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd*, New York v. FERC, 535 U.S. 1 (2002).

[47] *Id.* at 21,627.

own orders on remand following *Southern California Edison*[48] and concludes that the D.C. Circuit's decisions invalidate *MidAmerican* and *SunEdison*, the Commission should still deny NERA's petition. As we discuss in the following sections, excess energy that flows to the distribution grid from a net-metered retail-customer resource are not automatically jurisdictional, and would certainly be beyond the Commission's authority based on NERA's filing.

III. Net Metering Is Beyond the Commission's Jurisdiction Because It Is a "Retail Regulatory Policy"

It is widely recognized that customer net metering is a retail service provided by distribution utilities pursuant to state-regulated tariffs. Under "net metering service," as the Congress called it in the Energy Policy Act of 2005,[49] a distribution utility takes energy available from a customer-generator while ensuring that retail service to that customer is reliable, regardless of the output from the behind-the-meter generation. Because it is a retail service, the Commission has no authority to regulate it directly or dictate any terms and conditions to states and nonregulated utilities. The Supreme Court reiterated in *EPSA* that the Commission "cannot take an action transgressing that [jurisdictional] limit no matter how direct or dramatic [the] impact on wholesale rates."[50]

Within the industry too, net metering is widely understood to be a component of retail service. In 2017, the Edison Electric Institute (EEI) told FERC that it considers net metering a "retail compensation program," that allows distributed energy resources to provide "energy within the distribution system [as] part and parcel of its bundled retail service with its EDU."[51] Utilities have been providing net metering service to their retail ratepayers for forty years.[52] Under initial programs, net metering was physically tethered to retail service. Ratepayer-generated energy was measured by the ratepayer's retail meter, which spun backwards when there was an outflow.[53] Net metering obviated the need for an expensive second meter and simplified the accounting and administration of small-scale renewable generation located on ratepayers' premises.

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[48] *See* note 43.

[49] 16 U.S.C. § 2621(d)(11).

[50] *Electric Power Supply Ass'n*., 136 S.Ct. at 775.

[51] Comments of the Edison Electric Institute, Docket No. RM16-23, Feb. 13, 2017, at pgs. 23–26

[52] H. James Green and Yih-huei Wan, National Renewable Energy Laboratory, Current Experience with Net Metering Programs, Apr. 1998 (listing the year in which states first required utilities to offer net metering).

[53] *Id.* ("Most utilities will simply use the existing meter when net metering is required."); Maine Public Utilities Commission, Petition Requesting Commission Intervention, Docket No. 97-513, Oct. 27, 1997 (stating that net metering was "explicitly designed as a retail billing and metering practice adopted for the purpose of avoiding the cost of a second meter . . . . The use of a single meter that runs backwards was authorized on the premise that requiring two meters . . . would be unnecessarily costly.").

A review of modern utility net metering tariffs illustrates that, even with new metering technologies, retail customer net metering is still closely intertwined with retail service. Net metering is only available to a utility's retail ratepayers,[54] and net metering tariffs may incorporate the terms of retail service associated with that customer's retail rate class.[55] Net-metered systems are typically constrained by two standard limits: 1) they must be intended primarily to offset retail consumption;[56] and 2) their size is often capped based on an individual ratepayer's annual consumption.[57] Utilities account for net metered energy transfers on ratepayers' retail bills, and tariffs may specify that customer-generators must pay for certain retail charges, such as system benefits charges and stranded cost recovery, regardless of a particular month's net bill.[58]

To the extent that net metering is not a retail service, then it is nothing more than an accounting method used by utilities to measure retail sales. Distribution utilities are already subject to comprehensive state regulation that specifies how they can charge retail customers for service. These rules vary by state, and even by utility. State regulators may require utilities to charge consumers on a volumetric basis, and can demand that in measuring a ratepayer's consumption they account for that ratepayer's electricity production. NERA raises several points about the potential policy implications of retail net metering, such as its fairness and distributional impacts.[59] We do not take any positions on those matters here, but we do contend that these kinds of arguments, much like deeply-contested positions between retail customer classes on rate design, have no place before the Commission. NERA itself clearly recognizes this, both in its

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[54] *See, e.g.,* Duke Energy Progress, Rider NM-4B ("This Rider is available in conjunction with Company's residential and general service schedules"); Consolidated Edison Co. of New York, Schedule for Electricity Service, Rider R (listing various customer classes that are eligible for net metering).
[55] *See, e.g.,* Ohio Power Co., Schedule NEMS ("This schedule is subject to the Company's terms and Conditions of Service and all provisions of the standard service schedule under which the customer takes service.").
[56] *See, e.g.,* Consumers Energy, Ratebook for Electric Service, Original Sheet C-62.00 ("The Eligible Electric Generator(s) must be located on the customer's premises, serving only the customer's premises and must be intended primarily to offset a portion or all of the customer's requirement for electricity.").
[57] *See, e.g.,* Public Service Electric & Gas Co., Tariff for Electric Service, Sheet 38 ("capacity of the customer's generating system cannot exceed the amount of electricity supplied by the electric power supplier or basic generation service provider to the customer's residence or facility, as applicable, over an annualized period"); The Narragansett Electric Co., Net Metering Provision (defining an Eligible Net Metering System as "reasonably designed and sized to annually produce electricity in an amount that is equal to or less than the Net Metering Customer's usage . . . measured by the three-year average annual consumption . . .").
[58] *See, e.g.,* Public Service Co. of New Hampshire, Tariff for Electric Delivery Service, pg. 24A (stating that "small customer generators" will be assessed the Stranded Cost Recovery and Systems Benefits Charge without consideration of netting).
[59] *See* Petition Appendix A, Report of Ashley C. Brown.

petition and in the policy positions it has taken before state regulators.[60] The Commission has no authority to require states to adopt a particular methodology for calculating retail sales or allocating costs of retail service among retail ratepayers. Policy arguments about net metering tariff terms aim at matters reserved by Congress to states.

Lest there be any doubt that net metering is a retail matter, Congress confirmed in 2005 that net metering is a "retail regulatory polic[y]."[61] In the Energy Policy Act, Congress added net metering to its list of electric utility ratemaking standards that must be considered by state regulators and nonregulated retail utilities. NERA claims that the precise wording Congress used to describe net metering indicates that Congress specified an operational formula for accounting for customer-generator production that "allows states to consider . . . only [] the energy component of electric service."[62] NERA's claim that Congress restricted both the Commission and states in their approaches to customer net metering cannot be squared with the statute's plain text or the Supreme Court's understanding. In listing ratemaking standards, Congress did "not set a mandatory agenda"[63] and explicitly allowed states to decline to adopt any standard and to adopt *different* standards.[64] NERA's claim that Congress limited states to one single implementation of net metering and tasked the Commission with enforcing that policy is simply not "compatible with the surrounding body of law into which the [net metering] provision must be integrated."[65]

Petitioner's claim is also inconsistent with the contemporaneous understanding of the provision among both the industry and regulators. Shortly after the 2005 law was enacted, EEI, the American Public Power Association (APPA), the National Rural Electric Cooperative Association

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[60] *See* Report of Ashley Brown at 13 (explaining how some states have reformed retail tariffs in response to arguments about net metering); New England Ratepayers Association Closing Statement, NHPUC Docket No. DE 16-576, Apr. 13, 2017 (making similar arguments about the implications of net metering on retail rates). Mr. Brown's report, filed by NERA in this proceeding, is very similar to a report he filed at the Maine Public Utility Commission in 2016. *See* Comments of Ashley C. Brown, MEPUC Docket No. 2016-00222, Oct. 31, 2016.

[61] Public Utility Regulatory Policies Act, 92 Stat. 3117, 3137 ("Title I – Retail Regulatory Policies for Electric Utilities"). "[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998); Yates v. United States, 574 U.S. 528 (2017) (defining a term in the U.S. Code in part by considering the term's placement in the U.S. Code, the "caption" or title of the relevant statutory provision, and the function of the surrounding provisions).

[62] Petition at 35.

[63] FERC v. Mississippi, 456 U.S. 742, 769 (1982).

[64] 16 U.S.C. §§ 2621(a), 2623(a), 2627(b).

[65] Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1989) (J. Scalia, concurring); United Sav. v. Timbers of Inwood Forest, 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (citations omitted).

(NRECA), and the National Association of Regulatory Utility Commissioners (NARUC) developed a "reference manual" for implementing the new ratemaking standards. That manual says that under net metering "kWh provided by the utility [ ] are necessarily valued at the same level as kWh provided by the consumer."[66] NERA cannot rewrite history. At the time that Congress was requiring consideration of what NERA calls Full Net Metering the institutions most directly affected by net metering understood it to be a retail ratemaking standard that complements federal regulation of interstate sales of energy — not a wholesale sale that is completely subsumed by it.

Finally, NERA's argument about the provision rests on an incomplete understanding of the term "electric energy." NERA claims that in using the term "electric energy" to describe net metering Congress referred only to energy supply, therefore capping the customer-utility exchange rate at a PURPA avoided cost rate. But it turns congressional intent into a game of obfuscation to suggest that Congress would use this undefined term to adopt an industry-wide price cap that extends the reach of the FPA's preemption of state law. Both the Commission and the D.C. Circuit have used the term "electric energy" to refer to bundled retail service, not just the energy supply portion of a retail bill as NERA claims.[67] Congress may have adopted the Commission's understanding of the term. This possibility is reinforced by a subsequent provision in the 2005 amendments to the ratemaking standards where Congress used the word "electricity" to specifically refer to power sold at wholesale.[68] Again, NERA wants to read the net metering provision in isolation, as having broad implications for existing Commission and state approaches. But at best, Congress's use of the term "electric energy" in the Energy Policy Act is ambiguous: Congress simply was not proscribing any particular net metering implementation.[69] And when read in context, it is clear that Congress did not intend to limit state net metering, especially where a customer does not choose to directly participate in a Commission-regulated interstate wholesale transaction.

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[66] Kenneth Rose and Karl Meeusen, Reference Manual and Procedures for Implementation of the 'PURPA Standards' in the Energy Policy Act of 2005, March 22, 2006.

[67] Order No. 888, *supra* note 46, at 21,625 (". . . we believe that when transmission is sold at retail as part and parcel of the delivered product called electric energy . . ."); *PJM Interconnection*, 94 FERC 61,251, 61,884 (2001) (repeating same); Transmission Access Policy Study Group v. F.E.R.C., 225 F.3d 667, 691 (D.C. Cir. 2000) (repeating same).

[68] 16 U.S.C. § 2621(d)(14)(B)(i) (". . . based on the utility's cost of generating and/or purchasing such electricity at the wholesale level for the benefit of the consumer . . .").

[69] For example, 16 U.S.C. §§ 2621(d)(14)(D) refers to third-party marketers selling "electric energy." In general, marketers procure energy, capacity, and other products at wholesale. On a per-kWh basis, those products typically cost more than the PURPA avoided cost rate for energy but less than the retail rate.

IV. A Net-Metered Energy Transfer Is Not a "Sale of Electric Energy at Wholesale in Interstate Commerce" Under Section 201(b)

If the Commission overlooks Congress' intent and finds that net metering is not a retail matter, it must nonetheless conclude that regulation of net-metered excess energy flows is reserved to the states because it does not involve any jurisdictional sale. Section 201 distinguishes between "the sale of electric energy at wholesale in interstate commerce" and "any other sale," a capacious term that includes "intrastate wholesale sales"[70] and can capture the movement of energy from behind a retail meter to other retail ratepayers that is accounted for pursuant to a retail tariff. Whatever label the Commission attaches to this energy movement is inconsequential. "Unless a transaction falls within FERC's wholesale or transmission authority, it doesn't matter how FERC characterizes it."[71] The salient characteristic of retail customer net metering is that it does not include "the sale of electric energy at wholesale in interstate commerce."

NERA ignores the plain text of the FPA when it claims that whenever "a customer *delivers* energy to the interconnected utility," the customer is making a jurisdictional sale.[72] The Commission is a "creature of statute"[73] that regulate rates charged only for "sale[s] of electric energy to any person for resale"[74] that are "in interstate commerce."[75] NERA incorrectly equates instantaneous movement of energy with a wholesale transaction and then presumes that any such movement is "in interstate commerce." To reach this result, the Commission would have to ignore the terms agreed to by the parties to this supposed transaction in order to transform it from a retail accounting method or service into a sale-for-resale. Even if the Commission did find that it has legal authority to regulate a state-approved tariff as a wholesale sale, it would still need to articulate a reasoned basis to find that the transaction is "in interstate commerce."

In using the term "in interstate commerce," Congress clearly intended to cabin FERC's exclusive jurisdiction over wholesale transactions, and it certainly did not intend to make the Commission's authority coextensive with Congress' power to regulate interstate commerce under the Constitution.[76] Petitioner nevertheless asserts that whenever an individual retail utility ratepayer

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[70] *Electric Power Supply Ass'n*, 136 S.Ct. at 775 (citing New York v. FERC, 535 U.S. 1, 17).
[71] *Southern California Edison*, 603 F.3d at 1001.
[72] Petition at 24 (emphasis added).
[73] California Independent System Operator Corp. v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004).
[74] 16 U.S.C. § 824(d).
[75] 16 U.S.C. § 824(b)(1).
[76] *See* Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 529–531 (1945) (explaining that Congress' power under the Commerce Clause is broader than the scope of Commission jurisdiction under 201(b)); FERC v. Mississippi, 456 U.S. 742, 757 (1982). The gap between Congress' Commerce Clause powers and the Commission's jurisdiction under section 201(b) is evident from other sections of the FPA and Commission practice. Under sections 201 and 205/206, the Commission does not regulate wholesale sales

generates more than she consumes, as measured on an hourly basis, she is making a wholesale sale in interstate commerce.[77] In essence, petitioner argues for an exceptionally sweeping form of exclusive FERC jurisdiction that reads any meaningful limit on Commission jurisdiction out of the FPA and cannot be squared with Supreme Court and Commission precedents.

In this section, we provide historical background on the Commission's understanding of the FPA's often-ignored jurisdictional phrase "in interstate commerce." For a sale to be jurisdictional there "[t]here must be proof of interstate movement of energy."[78] The Commission has accepted and federal courts have upheld two forms of factual evidence as constituting such proof: 1) so-called "energy tracing" studies that measure the flow of energy at various points in an interconnected electric system[79] and 2) evidence that the utility is "part of an electrically integrated interstate network [and] makes sales for resale from the network."[80] For the latter type of proof, the Commission has "consider[ed] the physical characteristics of integrated system operation as well as the administrative and contractual aspects."[81] While the Commission need not make any generic conclusions about behind-the-meter resources in this proceeding, we believe that this broad range of relevant evidence would allow the Commission to distinguish between net-metered energy transfers and energy transfers that are coordinated with an operator of an "electrically integrated interstate network," such as an RTO.

For the typical transmission-connected generator — i.e., a wholesale seller who opts to participate in the interstate wholesale market — specific proof is not necessary because (as the Commission and courts have long recognized as a jurisdictional fact under the FPA) energy necessarily flows across state lines due to the "unpredictable and free-flow of energy in the

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in ERCOT, but the Commission does have authority under section 211 to order ERCOT utilities to wheel power. *See, e.g., City of College Station, Texas,* 76 FERC 61,138, 61,742–43 (1996). Section 211 allows "any electric utility . . . or any other person generating electric energy for sale for resale" to apply to the Commission for an order "requiring a transmitting utility to provide transmission services." 16 U.S.C. § 824j. That Congress chose different terminology in 201(b) and 211 (and 212, 16 U.S.C. § 824k) is conclusive proof that the Commission's jurisdiction under section 201(b) is not coextensive with Congress' authority under the Commerce Clause. *See also* note 127–129 and accompanying text.

[77] Petition at 19–21.

[78] *Texas Power and Light Co.*, 9 FERC ¶ 61,044, 61,115 (1979); *id.* ("Jurisdiction over the sale or transmission of electrical energy exists only if there is a showing that power moved from one state to any point outside the state."); *People's Electric Cooperative*, 84 FERC ¶ 61,229, 62,113 (1998) (finding jurisdiction over wholesale sales where "[t]he evidence in this proceeding is overwhelming that some of the electric energy that People's supplies . . . comes from outside the State of Oklahoma").

[79] *See, e.g.*, FPC v. Southern Cal. Edison. Co., 376 U.S. 205, 209 n. 5 (1964).

[80] *Re Cincinnati Gas & Electric Co.*, 35 FPC 99, 101 (1966).

[81] *Indiana & Michigan Electric Co.*, 33 FPC 739, 745 (1965).

[interstate] system in response to any number of constantly changing occurrences."[82] However, this kind of general claim cannot be made about behind-the-meter customer resources, particularly where they are not coordinating their output across state lines. In fact, the Commission's well-established understanding rejects the conclusion that retail customer net metering is in interstate commerce, to the extent that the Commission has recognized that power on the distribution system is "consumed in a comparatively restricted geographical area," "rarely, if ever, flows out," and is not transported to other markets.[83]

The connection between interstate energy and the Commission's jurisdiction follows from the text of the statute. Both the FPA and the parallel Natural Gas Act (NGA) suggest that Congress only provided the Commission with authority over sales of energy that cross state lines. The FPA states explicitly that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof."[84] The NGA similarly defines "interstate commerce" literally, as transactions involving gas that traverses state borders.[85]

Courts have likewise understood the word "interstate" as applied to wholesale sales. In 1942, the D.C. Circuit found that "[i]n using the phrase 'sale in interstate commerce' [in the NGA] to include sale for interstate shipment, Congress followed established usage."[86] The panel quoted from late-1930s Supreme Court cases that define sales in interstate commerce as "sales are for shipment to other States" or that involve "commodities [ ] bought for use beyond state lines."[87] In its first major FPA decision, the Supreme Court similarly understood that "[t]he primary

[82] Indiana & Michigan Elec. Co v. FPC, 365 F.2d 180, 184 (7th Cir. 1966) ("The unpredictable and free-flow of energy in the System in response to any number of constantly changing occurrences, makes it certain, in the view of the Federal Power Commission that out-of-state energy received by I&M at a number of points at or near its eastern, southern or western borders, at one time or another, reaches each of I&M's wholesale customers.").
[83] Order No. 888, *supra* note 46, at 21,620. The Commission's assumptions are backed by DOE technical analysis. *See, e.g.,* Klaehn Burkes, et al., U.S. Dep't of Energy, Office of Electricity Deliverability and Energy Reliability, "Solid State Power Substation Roadmap," Dec. 2017, at 2.2.1 (stating that "distribution substations are designed for unidirectional flow of power").
[84] 16 U.S.C. § 824(c).
[85] 15 U.S.C. § 717a(7).
[86] People Natural Gas Co. v. FPC, 127 F.2d 153, 158 (D.C. Cir. 1942). Other NGA cases include similar conclusions. In FPC v. Natural Gas Pipeline Co. of America, 315 U.S. 575, 582 (1942), the Court stated that "[t]he sale of natural gas originating in one state and its transportation and delivery to distributors in any other state constitutes interstate commerce."
[87] *People Natural Gas Co.*, 127 F.2d at 158 (quoting Currin v. Wallace, 306 U.S. 1, 10 (1939); United States v. Rock-Royal Co-operative Inc., 397 U.S. 533, 568 (1939)).

purpose of . . . the Federal Power Act . . . was to give a federal agency power to regulate *the sale of electric energy across state lines*."[88]

In 1949, the FPC nevertheless recognized that the FPA does not "define what constitutes a 'sale in interstate commerce,'" and Congress thus left that determination to the Commission and courts.[89] In that proceeding, the Commission found wholesale sales by Pennsylvania Water & Power Company (Penn Water) to in-state customers were jurisdictional. The "central fact," according to the Commission, was that the sales at issue were "sales of output of [an] integrated and coordinated interstate electric system."[90] The "very purpose" of a contract between Penn Water and Maryland generators, according to the FPC, was the creation of a "unified system enterprise . . . completely interstate in character."[91] Because Penn Water was "selling interstate system energy to purchasers outside the system," the FPC concluded that the company's sales were "in interstate commerce."[92]

Examining the "voluminous" record developed by the FPC, the D.C. Circuit upheld the Commission's order, finding "substantial evidence in the record to support the Commission's factual findings with regard to the interstate nature of Penn Water's sales. It is the nature of the operations underlying the sales which furnishes the basis for Commission action rather than legalistic niceties of title and place of sale."[93] The Supreme Court affirmed, concluding that the public utilities in two states operated a "coordinated system of production and distribution," and holding that when Penn Water sells in-state-generated energy combined with out-of-state-generated energy to its in-state wholesale customers the FPC has "complete authority to regulate all of this *commingled* power flow."[94]

Two weeks after the Court issued *Penn Water*, the Seventh Circuit reviewed a similar fact pattern and upheld the FPC's assertion of jurisdiction over wholesale sales to in-state purchasers. The panel found the two-state utility's operations were "coordinated"[95] across state lines and held

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[88] Jersey Central Power & Light Co. v. Fed. Power Comm'n., 319 U.S. 61, 67 (1943) (emphasis added); *see also* H.R. Rep. No. 1318, 74th Cong., 1st Sess. (1935) ("The percentage of electric generated in the United States that was transmitted *across State lines* increased from 10.7 in 1928 to 17.8 in 1933 . . . Under the decision of . . . [Attleboro], the rates charged in interstate transactions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates").
[89] *In the Matter of Pennsylvania Water & Power Co.*, 8 FPC 1, 12 (1949).
[90] *Id.*
[91] *Id.* at 15.
[92] *Id.*
[93] Penn. Water & Power Co. v. FPC, 193 F.2d 230, 246–247 (D.C. Cir. 1951).
[94] Penn. Water & Power Co. v. FPC, 343 U.S. 414, 420 (1952) (emphasis added).
[95] Wisconsin-Michigan Power Co. v. FPC, 197 F.2d 472, 474 (7th Cir. 1952) (upholding *In the Matter of Wisconsin-Michigan Power Co.*, 10 FPC 170 (1951)).

that sales of out-of-state energy maintain an "essential interstate character"[96] after the energy crosses into the destination state and "commingles"[97] with in-state energy. As in *Penn Water*, commingling of in-state and out-of-state energy to supply a wholesale customer rendered the sale "in interstate commerce" under section 201(b).[98]

A decade later, the Supreme Court issued *Southern California Edison v. FPC*, a landmark decision that clarified the scope of the Commission's wholesale sales jurisdiction while leaving unchanged the Court's understanding of "in interstate commerce." The Ninth Circuit had set aside the FPC's order, concluding that although an energy tracing study showed that a wholesale sale between two California entities included out-of-state energy,[99] the sale could be regulated by California because there was no "conceivable conflict of interest" among any states about the sale.[100] The panel held that section 201(a) preserves state authority to regulate wholesale sales in interstate commerce where such regulation is not prohibited by the Commerce Clause. These sales, according to the panel, are beyond the reach of the FPC because federal regulation is limited under section 201(a) "only to those matters which are not subject to regulation by the States."[101]

The Supreme Court reversed, rejecting the Ninth Circuit's conclusion that the FPC's jurisdiction turns on "the impact of state regulation of the sale upon the national interest in commerce."[102] Rather, Congress drew "a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis" of whether a state has authority to regulate the sale under the Commerce Clause.[103] The Court's holding that the FPA makes "FPC jurisdiction plenary and extending it to all wholesale sales *in interstate commerce*"[104] does not change the

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[96] *Id.* at 478.
[97] *Id.*
[98] *See also* State of Wisconsin v. FPC, 201 F.2d 183 (D.C. Cir. 1952) (dismissing petitioner's argument that in-state wholesale sales were not in interstate commerce primarily based on the *Wisconsin-Michigan*).
[99] *City of Colton v. Southern Cal. Edison Co.*, 26 FPC 223, 224 (1961) (finding jurisdiction "on the ground that the sale includes energy generated outside of California").
[100] Southern Cal. Edison Co. v. FPC, 310 F.2d 784, 789 (9th Cir. 1962).
[101] *Id.* at 794; *Southern Cal. Edison Co.*, 376 U.S. at 210 (noting that the Ninth Circuit "ruled that the concluding words of s 201(a) . . . confined FPC jurisdiction to those interstate wholesales constitutionally beyond the power of state regulation by force of the Commerce Clause").
[102] *Southern Cal. Edison Co.*, 376 U.S. at 211; *id.* at 215–16 ("the Court of Appeals' reading of the s 201(a) proviso as requiring an appraisal in each case of the impact of the particular sale, is inconsistent with these decisions. Section 201(b) embodies a clear grant of power, and we have held that s 201(a) was merely a 'policy declaration * * * of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.'").
[103] *Id.*
[104] *Id.* at 216 (emphasis added).

established understanding that federal regulation only attaches where the Commission's evidentiary standards are met.[105]

Following the Court's decision, the Commission moved to ensure that utilities filed rate schedules for their in-state wholesale sales, such as the sale at issue before the Court.[106] In four proceedings initiated that year, the FPC determined that a utility's wholesale sales to in-state purchasers were jurisdictional because they included energy from a "physically integrated and centrally controlled interstate system."[107] Eschewing the need for energy tracing studies to prove its jurisdiction,[108] the Commission examined evidence about the operations of interstate power systems[109] as well contracts and corporate relationships that facilitated centralized dispatch and emergency frequency response across state lines.[110] Federal appeals courts upheld all four orders, concluding that the FPC was "justified in holding that the important consideration in determining jurisdiction here is the integrated interstate pool character of the operation."[111]

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[105] *Id.* at 208 (stating that FPC's finding that out-of-state energy was sold to Colton was based on an "extensive record"); *id.* at 209 n. 5 ("[W]e hold that the engineering and scientific evidence received by the Commission on the subject from the Commission's own experts afforded substantial evidence upon which to rest the findings which trace out-of-state energy to the City of Colton."); *Indiana & Michigan Electric Company*, 33 FPC 739, 763 (1965) ("In *Colton* the Supreme Court reiterated what it had previously declared, namely, that federal jurisdiction follows the flow of the energy; the test under Part II of the Act being 'engineering and scientific . . .'"; *id.* at 742 ("In making our determination of jurisdiction over IM's wholesales, we shall, of course, employ an engineering and scientific test as is suggested by the *Connecticut* and *Colton cases*.").

[106] *Rate Schedules and Public Utilities*, Order No. 282, 31 FPC 972 (1964).

[107] *Indiana & Michigan Electric Co.*, 33 FPC 739, 743 (1965); *Re Arkansas Power & Light Co.*, 34 FPC 747, 749–750 (1965) (describing operations of the multi-state power pool used to effectuate the relevant sales); *Re Public Service Co. of Indiana,* 34 FPC 1513, 1517 (1965) (finding that the utility's sales are "made from an interstate pool"); *Re Cincinnati Gas & Electric Co.*, 35 FPC 99, 101 (1966) (concluding wholesale sales were from an "electrically integrated interstate power network").

[108] *See, e.g., Indiana & Michigan Electric Co.*, 33 FPC 739, 756 (1965) (finding that tracing studies are "out of place in modern large-scale integrated operations, [and] unnecessary"); *Re Cincinnati Gas & Electric Co.*, 35 FPC 99, 101 (1966) ("In an integrated power network it is not necessary to show by tracing techniques that specific units of interstate energy reach each wholesale customer where interstate power can and at times does permeate the company's transmission system lines leading to the wholesale purchasers.").

[109] *Indiana & Michigan Electric Co.*, 33 FPC 739, 745–746 (1965); *Re Arkansas Power & Light Co.*, 34 FPC 747, 749 (1965); *Re Public Service Co. of Indiana,* 34 FPC 1513, 1515 (1965).

[110] *Indiana & Michigan Electric Co.*, 33 FPC 739, 743–744 (1965); *Re Arkansas Power & Light Co.*, 34 FPC 747, 749–750 (1965); *Re Public Service Co. of Indiana,* 34 FPC 1513, 1514–1518 (1965); *Re Cincinnati Gas & Electric Co.*, 35 FPC 99, 101 (1966);

[111] Indiana & Michigan Elec. Co v. FPC, 365 F.2d 180, 184 (7th Cir. 1966); Arkansas Power and Light Co. v. FPC, 368 F.2d 376, 382 (8th Cir. 1966) (concluding that where the wholesale seller "is a member of a combination of utilities, and has continuous access to an integrated pool of interstate energy," the Commission has jurisdiction over the utility's wholesale sales); Public Service Co. of Indiana v. FPC, 375 F.2d 100, 103 (7th Cir. 1967) (finding that the utility's interconnections brought it into the same interstate system that "this court in [*Indiana & Michigan*] thought justified the Commission's finding that the

In each of these proceedings, from *Penn Water* to the post-*Southern California Edison* orders, the Commission developed a record to justify its assertion of authority over the wholesale sales, and a federal court upheld the FPC's assertion of jurisdiction based on the "substantial evidence"[112] before the Commission. Here, NERA offers no evidence whatsoever and instead asserts that energy generated behind the meter is "in interstate commerce" because energy "is delivered to a utility that merges and comingles the energy with other energy sources on the interstate electric grid."[113] This premise is not a valid basis for the Commission to assert jurisdiction.

As the Supreme Court held in *Penn Water*, where a wholesale sale includes both in-state and out-of-state-generated energy, the Commission has "complete authority to regulate all of this commingled power flow."[114] Under the Court's holding, when a utility draws from a "pool of interstate energy"[115] to supply a wholesale sale, that sale of "commingled" energy has an "essential interstate character" that brings it under the Commission's exclusive authority.[116] It is a top-down theory of jurisdiction that recognizes interconnected utilities necessarily provide out-of-state energy through their connections to the high-voltage interstate network, even when supplying in-state customers via lower voltage facilities.[117] Here, NERA argues that commingling of energy after a sale from a single resource that is not directly connected to an interstate network and does not draw from an interstate pool of energy to supply the sale renders the sale "in

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resulting 'pool sales' were in interstate commerce"); Cincinnati Gas & Electric Co. v. FPC, 376 F.2d 506, 508 (6th Cir. 1967) ("There can be no question but that interstate as well as intrastate generated electricity was commingled and was flowing through the CG&E system. This is enough to sustain the Commission's jurisdiction.").

[112] *Penn. Water & Power Co.*, 193 F.2d at 246 ("substantial evidence in the record" supported the FPC's conclusion); *Wisconsin-Michigan Power Co.*, 197 F.2d at 480 ("We can not say as a matter of law that the findings of the Commission in this respect are unsupported by substantial evidence."); *Southern Cal. Edison. Co.*, 376 U.S. at 209 n. 5 (FPC's finding was based on "substantial evidence"); *Indiana & Michigan Elec. Co.*, 365 F.2d at 183 ("proof before the Commission was sufficient"); *Arkansas Power & Light Co.*, 368 F.2d at 382 ("the record, as a whole, demonstrates substantial evidence" to support federal jurisdiction); *Public Service Co. of Indiana*, 375 F.2d at 103–104 (finding that "proof in the record before us is sufficient to support an inference, to a reasonable scientific certainty" of interstate power flows and noting additional "confirmatory evidence" from FPC expert of "necessary commingling"); *Cincinnati Gas & Electric Co.*, 376 F.2d at 509 ("the findings of fact of the Commission are supported by substantial evidence").

[113] Petition at 20 (emphasis added); *id.* at 21.

[114] *Penn. Water & Power Co.*, 343 U.S. at 420.

[115] *Indiana & Michigan Elec. Co.*, 365 F.2d at 184; *Arkansas Power & Light Co.*, 368 F.2d at 382.

[116] *Wisconsin-Michigan Power Co.*, 197 F.2d at 478.

[117] *See, e.g., Re Cincinnati Gas & Electric Co.*, 35 FPC 99, 101 (1966) ("In an integrated power network it is not necessary to show by tracing techniques that specific units of interstate energy reach each wholesale customer <u>where interstate power can and at times does permeate the company's transmission system lines leading to the wholesale purchasers</u>.") (emphasis added).

interstate commerce." NERA provides no basis for fundamentally altering the Court's holding and flipping the Commission's and courts' well-established understanding of the commingling test.[118]

NERA nonetheless urges the Commission to find the net-metered "sale" is 'in interstate commerce,' noting that "the insertion point of a wholesale sale to a utility . . . has no impact on whether the sale is made in interstate commerce."[119] Indeed, the FPC and courts consistently rejected arguments that in-state wholesale sales effectuated over low-voltage facilities were not "in interstate commerce," concluding that jurisdiction turned on the "essential interstate character" of the out-of-state energy included in the wholesale sale and not on the types of facilities used to deliver that energy.[120] Here, however, energy generated behind-the-meter used primarily to offset retail consumption does not include any out-of-state energy and lacks any interstate character that might bring it under the Commission's authority.

We do not suggest that a sale from a behind-the-meter resource can never be "in interstate commerce." Rather, "[i]t is the nature of the operations underlying the sales which furnishes the basis for Commission" jurisdiction.[121] Where a resource is operated as part of a "physically integrated and centrally controlled interstate system,"[122] and there is "mutual agreement" of the parties to coordinate across state lines, the "essential interstate nature of th[at] business" may bring it under the Commission's jurisdiction.[123] On that basis the Commission could distinguish between a net-metered resource that offsets retail consumption and a resource that opts to directly sell into the wholesale market by registering with an RTO/ISO and is either dispatched by the RTO/ISO or self-schedules its energy injections with that jurisdictional entity. Such a distinction would be consistent with Commission decisions that considered contracts and corporate relationships that facilitated interstate coordination.[124] The Commission need not come to any generic factual or legal conclusions about sales from behind-the-meter resources in this

[118] For consistent application of the commingling test see *Wisconsin-Michigan Power Co.*, 197 F.2d at 478; *Public Service Co. of Indiana*, 375 F.2d at 103; *Cincinnati Gas & Electric Co.*, 376 F.2d at 508–509; *In the Matter of Wisconsin-Michigan Power Co.*, 10 FPC 170, 175 (1951); *Indiana & Michigan Electric Co.*, 33 FPC 739, 756 (1965).
[119] Petition at 20.
[120] *See, e.g., Wisconsin-Michigan Power Co.*, 197 F.2d at 477; *Arkansas Power and Light Co.*, 368 F.2d at 383; *Public Service Co. of Indiana*, 375 F.2d at 104; *Cincinnati Gas & Electric Co.*, 376 F.2d at 508.
[121] *Penn. Water & Power Co.*, 193 F.2d at 246–247; *In the Matter of Pennsylvania Water & Power Co.*, 8 FPC 1, 12 (1949) (concluding that because the "operations of the unified system enterprise are completely interstate in character," the Commission has exclusive jurisdiction over all wholesale sales on the system).
[122] *Indiana & Michigan Electric Co.*, 33 FPC 739, 743 (1965)*; see also Re Arkansas Power & Light Co.*, 34 FPC 747, 750 (1965) (describing central dispatch of a multi-utility interstate power pool).
[123] Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 503 (1942); *Re Public Service Co. of Indiana*, 34 FPC 1513, 1517 (1965) (summarizing that in the *Indiana-Michigan* and *Arkansas* proceedings, the utilities were under out-of-state "corporate control and centralized operation").
[124] *See supra* notes 110–111.

proceeding in order to deny the petition on the grounds that excess energy from net-metered resources that do not themselves directly participate in a wholesale market that the Commission regulates are not in interstate commerce under section 201(b).

It's worth noting that the Commission has never determined that it has jurisdiction over a wholesale sale due solely to the "electromagnetic unity of response."[125] As the Commission has explained, generators are "locked together in electromagnetic unity, so that when one unit decreases generation, all other units in the system simultaneously increase generation to keep the power flow balanced."[126] The Commission has concluded that this general physical property of an electric system may be sufficient to meet the "broader"[127] jurisdictional test in FPA section 23(b) that the generator "affects" interstate commerce.[128] The Supreme Court has explained that that the language in 23(b) "strongly implies that Congress drew upon its full authority under the Commerce Clause."[129] By contrast, in granting the Commission authority only over wholesale sales that are "in interstate commerce," Congress imposed a limit that prevents the Commission from exercising the full scope of Congress' authority under the Commerce Clause. The physical effects of energy flows on other generators have never rendered them jurisdictional wholesale sales in interstate commerce under the FPA.

Finally, petitioner's citations to *Florida Light & Power (FPL)* are simply not persuasive. At issue in *FPL* was the Commission's determination that the company was a "public utility" under the FPA. Courts have recognized that establishing wholesale rate jurisdiction — which is the issue here — is "a different matter" from determining whether a company is a public utility based on its interstate transmission.[130] In *FPL*, the Supreme Court upheld the Commission's conclusion that because energy transmitted by the utility commingled with out-of-state energy at a particular connection point the utility transmitted energy in interstate commerce. Neither the Court's

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[125] *See* Florida Power & Light Co. v. FPC, 404 U.S. 453, 460 (1972) (declining to rule on whether electromagnetic unity of response is a sufficient basis for finding FP&L is a "public utility" under § 201).
[126] *City of Centralia, Washington*, Initial Decision of Administrative Law Judge, 2 FERC ¶ 63,044, 65,258 (1978).
[127] *See Florida Power & Light Co*., 404 U.S. at 462 n. 12;
[128] *Re City of Centralia,* 7 FERC ¶ 61,098 (1979), *vacated by* City of Centralia, Washington v. FERC, 661 F.2d 787, 792 (9th Cir. 1981) (holding that the record failed to show anything more than a "nontrivial" effect); Habersham Mills v. FERC, 976 F.2d 1381 (11th Cir. 1992) (upholding order finding jurisdiction over a dam in part due to the electromagnetic unity of response).
[129] FPC v. Union Elec. Co., 381 U.S. 90, 96 (1965).
[130] Florida Power & Light v. FPC, 430 F.2d 1377, 1386 (5th Cir. 1970) (reversed on other grounds) (citing *Arkansas Power & Light Co.*, 368 F.2d at 383 n. 8; *Southern Cal. Edison. Co.*, 376 U.S. at 208 n. 3 ("its status as a public utility does not decide the question whether the FPC may assert jurisdiction over the rates of the Edison-Colton sale").

holding nor the facts have any bearing on whether excess energy flows from behind a retail meter are jurisdictional.

But *FPL* further cuts against petitioner's argument, as it emphasizes the necessity of evidence to support the Commission's assertion of jurisdiction. In the underlying proceeding, the Commission reviewed FPL's contractual relationships with out-of-state utilities, highlighted a connection point that facilitated FPL's participation in an interstate emergency frequency response program, and developed technical studies showing interstate movement of power to support its assertion of jurisdiction.[131] The Fifth Circuit set aside the FPC's order, concluding that the evidence before the Commission was insufficient to prove that FPL's facilities "transmit energy actually moving in interstate commerce."[132] The Supreme Court reversed, holding where the Commission's legal conclusions are based on substantial evidence "courts should be most hesitant to substitute their judgment for that of the Commission."[133]

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[131] *Florida Power & Light Company.*, 37 FPC 544 (1967).
[132] *Florida Power & Light Co.*, 430 F.2d at 1380.
[133] *Florida Power & Light Co.*, 404 U.S. at 464–467.

Conclusion

The Commission should deny NERA's attempt to sow regulatory chaos through this declaratory order request. Congress did not intend to sever millions of consumers who self-generate from their existing retail arrangements and then subject them to federal rate regulation. Such a sweeping assertion of jurisdiction over end-users' arrangements with their utilities aggrandizes the Commission's jurisdiction far beyond what Congress has allowed, would disrupt retail customers' settled expectations and long-standing industry practices, and mark the most significant and direct intervention by the Commission into retail rate design.

The strident extension of federal regulation that NERA advocates is not authorized by statute and would be costly to administer and harmful as a matter of public policy. Subjecting millions of end users to federal price controls would lead to a massive surge in the volume of market-based rate applications and PURPA enforcement actions filed at the Commission and would have adverse consequences for new technologies, including storage and electric vehicles.

For the reasons described in this comment, the Commission should deny NERA's petition.

Respectfully Submitted,

/s/ Ari Peskoe

Ari Peskoe
Harvard Electricity Law Initiative
6 Everett St., Suite 4133
Cambridge, MA 02138
617.495.4425
apeskoe@law.harvard.edu

Jim Rossi
Vanderbilt University Law School
131 21st Avenue South
Nashville, TN
615.343.6620
j.rossi@vanderbilt.edu

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Appendix: Electricity Regulation Scholars*

Todd Aagaard
Villanova University Charles Widger School of Law

Donna Attanasio
George Washington University Law School

Danny Cullenward
Stanford Law School

John C. Dernbach
Widener University Commonwealth Law School

Michael Dworkin
Vermont Law School

Joel B. Eisen
University of Richmond School of Law

Victor B. Flatt
University of Houston Law Center

Sharon Jacobs
University of Colorado Law School

Sam Kalen
University of Wyoming College of Law

Alexandra Klass
University of Minnesota Law School

Daniel A. Lyons
Boston College Law School

Joshua C. Macey
Cornell Law School

* Institutions are listed for identification purposes only. This brief reflects the views of the individuals named here and not of their affiliated institutions.

Felix Mormann
Texas A&M University School of Law

Uma Outka
University of Kansas School of Law

Gabriel Pacyniak
University of New Mexico Law School

Heather Payne
Seton Hall University School of Law

Melissa Powers
Lewis & Clark Law School

Nathan Richardson
University of South Carolina School of Law

Troy Rule
Arizona State University Sandra Day O'Connor College of Law

Amy L. Stein
University of Florida Levin College of Law

Joe Tomain
University of Cincinnati College of Law

Michael Wara
Stanford University, Woods Institute for the Environment

Steven Weissman
University of California at Berkeley, Goldman School of Public Policy

Shelley Welton
University of South Carolina School of Law

Hannah Wiseman
Florida State University College of Law