

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New England Ratepayers Association

Docket No. EL20-42-000

PROTEST OF THE SOLAR ENERGY INDUSTRIES ASSOCIATION

Pursuant to Rule 211 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 (2020), the Solar Energy Industries Association (“SEIA”)¹ submits this Protest to the Petition for Declaratory Order filed by the New England Ratepayers Association (“NERA” or “Petitioners”) on April 14, 2020 (the “Petition”).² As explained further below, issuing the declarations requested by Petitioner would be contrary to the Administrative Procedures Act (“APA”),³ an unwarranted departure from Commission precedent, inconsistent with Congressional intent, and an unjustified intrusion into a State’s sovereign authority.⁴ The Commission should exercise its discretion to dismiss the Petition.⁵

¹ The comments contained in this filing represent the position of SEIA as a trade organization on behalf of the solar industry, but do not necessarily reflect the views of any particular member with respect to any issue.

² See Petition for Declaratory Order, Docket No. EL20-42 (Apr. 14, 2020) (“Petition”).

³ See 5 U.S.C. § 554(e) (2012).

⁴ The term States is used herein to refer broadly to relevant electric retail regulatory authorities, which include state public utility commissions; not-for profit, State, municipal, and other locally owned electric utilities; some electric cooperatives; as well as the applicable legislative bodies.

⁵ See, e.g., *ITC Grid Development*, 154 FERC ¶ 61,206, P 45 (2016) (explaining that the Commission does not issue declaratory orders on “broad issues” and Petitions for Declaratory Order should be limited to issues “arising from specific facts”).

The Petitioners have not offered any legitimate justification for the request. While Petitioners broadly generalize all net metering programs as “Full Net Metering” or “FNM,” States have acted on their legitimate authority to create bespoke net metering programs which include a wide range of accounting for exports and crediting of such.⁶ Just because the Petitioners do not agree with the value some states have ascribed to export credits does not mean the Commission should set aside decades of its own precedent providing that States are the proper administrators of the rates, terms, and conditions of net metering programs with retail customers.⁷ As the Supreme Court explained in *FERC v. Electric Power Supply Association*, “the Commission may not regulate either within-state wholesale sales or, more pertinent here, retail sales of electricity (*i.e.*, sales directly to users). . . . State utility commissions continue to oversee those transactions.”⁸

⁶ See, e.g., Brief of the California Public Utilities Commission, *Californians for Renewable Energy Inc. v. Cal. Pub. Util. Comm’n*, Case No. 17-55297 (9th Cir. June 1, 2018) (explaining that in California the export credit rate is based on the value of Renewable Energy Credits (“RECs”) and blended with the “excess electricity delivered to its interconnecting utility is compensated at a PURPA avoided-cost rate that is market-based”) (“CPUC CARE Brief”); see also Slip Opinion at 22, *Californians for Renewable Energy Inc. v. Cal. Pub. Util. Comm’n*, Case No. 17-5597 (9th Cir. 2019) (explaining that when “customers are compensated in the form of a credit on their utility bill, PURPA does not apply. But if the utility is making a separate payment to customers, PURPA applies and the payment must be the full avoided cost”) (“*CARE v. CPUC*”); see also Nevada Assembly Bill 405 Section 28.3 (providing that, by State law, net metering credit would step-down beginning with a value of ninety-five percent of the retail rate, stepping down to eight-five percent, and then resting at seventy-five percent of the retail rate).

⁷ CPUC CARE Brief at 26 (explaining that the California “NEM program is specifically designed to enable a customer to generate enough electricity to meet its *own* customer consumption needs, not to generate excess electricity to offer as a wholesale sale to the interconnecting utility”) (emphasis in original).

⁸ 577 U.S. ____ (2016), Slip Op. at 3 (“*EPSA*”); accord *New York v. FERC*, 535 U.S. 1, 17 (2002).

The Petition presents a “purely academic” question and is not grounded in reality.⁹ In reality, State legislatures and commissions have authorized, established, and administered all rates, terms, and conditions of net metering programs with end-use retail customers for over forty years.¹⁰ In reality, these bespoke programs are uniquely tailored to the needs and demands of the local utility, the local community, and the local infrastructure. Petitioners’ request for this Commission to, *sua sponte*, contort the FPA and reach into the local community to regulate net metering transactions at businesses, residences, schools, and hospitals is absurd. The Commission should decline Petitioners’ invitation to trespass into the retail domain. If the Commission does not dismiss the Petition, the Commission should affirm that all rates, terms, and conditions of net metering programs for retail end-users are subject to the exclusive jurisdiction of the States.

I. PETITIONERS SEEK TO DISRUPT AND OVERTURN STATES’ RIGHTS OVER RETAIL BILLING AND CREDITING PROGRAMS

Net metering is a practice where the utility measures the difference between the electricity supplied by the load-serving entity and the electricity generated by the retail customer over a defined period and bills the customer taking retail service accordingly. Under these accounting programs, customers earn bill credits that reduce the customer’s charges for retail electric service in accordance with the terms and conditions set forth by the relevant electric retail regulatory authority.¹¹ By

⁹ See, e.g., *Phillips Petroleum Co.*, 58 FERC ¶ 61,290, at 61,932 (1992) (dismissing petition for review where “the petition presents a question which is purely academic” and “a declaratory order would likely generate controversy, not remove it”).

¹⁰ See, e.g., Minn. Stat. § 216B 164 (1983) (requiring net metering be made available to facilities under 40 kW); *In the Matter of the Complaint of Ann Lanners*, Minnesota Docket No. 95-1085 (Mar. 1997) (holding that the State’s net metering statute was not preempted by federal law and explaining that, in any case, the rate mandated by statute was a reasonable proxy for avoided cost).

¹¹ See, e.g., “Compensation for Distributed Solar: A Survey of Options to Preserve Stakeholder Value”, National Renewable Energy Laboratory Technical Report (Sept. 2015) (explaining that “typically, each kilowatt hour (kWh) exported to the grid is credited as a kWh that can be used at a

failing to provide a detailed state-by-state analysis, and instead artificially aggregating net metering programs into a single class of “FNM,” Petitioners attempt to bait this Commission into initiating a preemption war with the States.¹² The Commission should dismiss such efforts.

As discussed further below, Congress intended for States to administer net metering programs. Through EAct 2005, Congress amended Title I of the Public Utility Regulatory Policies Act (“PURPA”) and instructed the states to consider offering net metering service to retail ratepayers.¹³ As of April 2019, there are over 40 states that administer net metering programs and, in the remaining states, utilities voluntarily offer net metering service to customers.¹⁴ Petitioners’ arguments that Congress intended for FERC to regulate net metering transactions is contrary to legislative history, statutory text, and the States’ widespread adoption.¹⁵

A. State Net Metering Laws Have Existed for Nearly Four Decades

Net metering programs have three sources of implementation authority: state law, state or local utility commission orders, and individual utility tariffs. In 1981, the Arizona Corporation Commission approved net metering below 100 kW, the first among U.S. public utility commissions

later time in the same billing cycle. NEM policies may also have a carryover provision that allows the use of credits in a subsequent billing cycle. At the end of the net metering cycle, typically one year, net excess generation may be credited at wholesale rates, rolled over, or forfeited.”).

¹² Compare Brown, Ashley, “Response to Cicchetti/Wellinghoff Re: Net-Metering,” PUB. UTIL. FORTNIGHTLY (Feb. 2016) (advocating in support of the Nevada commission decision that was overturned by state legislative action) *with* Nevada Assembly Bill 405 (overturning the decision of the State’s utility commission).

¹³ See Energy Policy Act of 2005, 119 Stat. 595 (2005) (“EAct 2005”).

¹⁴ See Energy Information Administration, Form EIA-861(M), *available at*: <https://www.eia.gov/electricity/data/eia861m/> (providing detailed data breakdowns on net metering and reporting that as of March 2020 there are 2.3 million customers enrolled in the United States, including the District of Columbia but excluding other territories) (“EIA NEM Data”).

¹⁵ See Net Metering: In Brief, CONGRESSIONAL RESEARCH SERVICE (Nov. 2019) (“CRS NEM Briefing”), *available at*: <https://fas.org/sgp/crs/misc/R46010.pdf>.

to do so. The next year, Massachusetts followed suit. In 1983, Minnesota became the first U.S. state to enact a net metering law in which the state legislature mandated the establishment of net metering programs by all investor-owned utilities, municipal utilities, and electric cooperatives and directed that that compensation be provided the “average retail utility energy rate.” Around the country, state utility commissions and legislatures followed suit.

States, consistent with their right to regulate sovereign matters including both economic and noneconomic factors, have deployed these programs for more than four decades. As a recent report of the National Regulatory Research Institute explains, “many states have engaged in studies of the long-term benefits and costs of distributed solar. A majority of these studies find that NEM results in a net benefit, at least at the levels of participation in the present time and near future.”¹⁶ States differ in the way net metering customers are compensated and individual programs are tailored to the unique circumstances of the locality, including the penetration of net metering customers amongst any one customer class, average and marginal electricity costs, congestion in transmission and distribution systems, and other factors.¹⁷ States have weighed the costs and benefits within their localities and have made determinations about whether net metering furthers the public interest and, if so, what rates, terms, and conditions are necessary to ensure that the program is lawful.¹⁸ To the extent higher penetrations of distributed resources are changing the costs and benefits, states are developing innovative rate design approaches in response. At their core, net metering programs are tailored to serve the local public interest and the Commission should reject Petitioners’ request to

¹⁶ See Review of State Net Energy Metering and Successor Rate Designs at 12, NATIONAL REGULATORY RESEARCH INSTITUTE (2019), available at <https://pubs.naruc.org/pub/A107102C-92E5-776D-4114-9148841DE66B>.

¹⁷ CRS NEM Briefing at 2.

¹⁸ *Id.* at 6-11 (explaining the variety of factors considered, and valued, by States).

federalize this local process. Issuing the declarations requested by Petitioners would be an intrusion on a State's sovereign power and would essentially "conscript state utility commissions into the national bureaucratic army."¹⁹

B. A Declaratory Order Must Resolve, Not Create, Controversy

While the Commission has substantial discretion in the administration of its dockets, the APA provides that the Commission may issue a declaratory order only to "to terminate a controversy or remove uncertainty."²⁰ This statutory limitation is reflected in the Commission's rules, which similarly provide that a declaratory order will only be issued if "the Order will terminate an actual controversy or remove uncertainty with respect to a specific matter capable of resolution through the declaratory order procedure."²¹ The Commission must act within the bounds of the statute.²² Here, state net metering and regulations have been in place for over forty years and there has not been any identified "uncertainty" about their validity. Further, prior to the submission of the Petition, there was not an "actual controversy," and it is notable that the Petition does not identify, or suggest, that any of the Commission's existing regulations be revised and further does not request the Commission exercise its enforcement rights provided in PURPA 210(h).²³ Petitioners present a

¹⁹ See *FERC v. Mississippi*, 456 U.S. at 742, 775 (1982) (O'Connor concurring and dissenting).

²⁰ 5 USC § 554(e).

²¹ 18 C.F.R. § 385.207(a); see also *Interstate Natural Gas Association of America*, 18 FERC ¶ 61,170 (1982) (explaining that the Commission's role is to adjudicate based on concrete facts and circumstances, not on principles formulated in advance which are based on the assumption of hypothetical facts); *ITC Grid Development, LLC*, 154 FERC 61,206 (2016) (same).

²² See, e.g., *California Independent System Operator Corporation v. FERC*, 372 F.3d 395, 398-99 (D.C. Cir. 2004).

²³ Compare Petition for Enforcement of MidAmerican Energy Co., Docket No. EL99-3 (Oct. 1998) (requesting the Commission to undertake enforcement action pursuant to PURPA Section 210(h)).

“purely academic”²⁴ question and the Commission should decline to issue what would be, in effect, an advisory opinion.²⁵

This is not a case where Commission guidance will aid an efficient outcome. Issuing the requested declarations will generate controversy and uncertainty, not resolve it. Since the issuance of EAct 2005, more than forty states administer net metering programs and there are more than 2.3 million retail customers enrolled in such programs.²⁶ States, public power, and electric cooperatives regularly adopt, reconsider, and modify the rates, terms, and conditions of their net metering programs based on a State’s particular circumstances. Issuing the requested declarations would undermine state legislative actions and void years of work by local regulators, utilities, and stakeholders.²⁷ Issuing the declarations requested by Petitioners could generate years of controversy and litigation across jurisdictions, for no identified value and at considerable expense. In essence, Petitioners are asking this Commission to issue an advisory opinion on a hypothetical dispute that may never come to pass. The Commission should decline to do so.

II. THE LAW OF THE CASE: FEDERAL LAW DOES NOT PREEMPT STATE NET METERING PROGRAMS

The Commission should not reconsider, and reverse, well-settled precedent that has framed the creation and administration of state net metering programs across the country. These issues were

²⁴ *Phillips Petroleum Co.*, 58 FERC ¶ 61,290, at 61,932 (1992) (dismissing petition because petition presents a question which is “purely academic” and “a declaratory order would likely generate controversy, not remove it”).

²⁵ A declaratory order only binds the agency and the named party based on the facts assumed in the order. Notably, a declaratory order would not bind any State or utility that administers a net metering program.

²⁶ See EIM NEM Data, available at: <https://www.eia.gov/electricity/data/eia861m/>.

²⁷ See, e.g., Letter to Chairman Chatterjee of Tom Barrett et al., Docket No. EL20-42 (June 12, 2020).

previously litigated and decided and this is the “law of the case.” As the Supreme Court has explained, the law of the case doctrine “is based on the sound policy that when an issue is litigated and decided, that should be the end of the matter.”²⁸ While the law of the case doctrine does not insulate previous errors from later revision, Petitioners have not offered any colorable case to justify the Commission departing from settled practice.²⁹ As the Commission has explained, departing from the law of the case is justified only when “substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.”³⁰ Revisiting the Commission’s holdings in *MidAmerican* and *Sun Edison*, at this juncture, would be contrary to sound administrative practice and a waste of resources.³¹

A. *Southern California Edison and Calpine Reaffirm Commission’s Jurisdictional Precedent, Contrary to Petitioner’s Claim*

In an attempt to overcome decades of FERC precedent, Petitioners point to the *Calpine v. FERC*³² decision and claim this decision “removes the foundation upon which the Commission rested its disclaimer of [net metering] jurisdiction in *Sun Edison*.”³³ This is wholly inaccurate.³⁴

²⁸ *United States v. U.S. Smelting Co.*, 339 U.S. 186, 198 (1950).

²⁹ See, e.g., *Pub. Serv. Comm’n of N.Y. v. FERC*, 642 F.2d 1335, 1346 (D.C. Cir. 1980) (providing that the Commission must provide substantial evidence to support a departure from long-standing precedent).

³⁰ See, e.g., *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988); *Florida Gas Transmission*, 41 FERC ¶ 61,122 at 61,302 (1987).

³¹ *Alamito Co.*, 41 FERC ¶ 61,312 at 61,829 (1987); *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312 at 61,643 (1980); see also *Delmarva Power & Light Co.*, 23 FERC ¶ 63,130 at 65,357 (1983); *Central Kansas Power Co., Inc.*, 3 FERC ¶ 61,291 at 61,763 (1978), *reh’g denied*, 4 FERC ¶ 62,023 (1978).

³² See *Calpine Corp. v. FERC*, 702 F.3d 41 (D.C. Cir. 2012) (“*Calpine*”).

³³ Petition at 12-13.

Petitioners misread *Calpine* and neither *Calpine*, nor its predecessor cases *Southern California Edison*³⁵ and *Niagara Mohawk*,³⁶ require the Commission to reach a different conclusion here.

1. FERC Cannot Set the Netting Period for Retail Transactions

In *Southern California Edison* the Court overturned its earlier order, *Niagara Mohawk*, and held that FERC does not have the jurisdiction to determine if a retail sale has occurred; rather, the Commission may only assert jurisdiction if the transaction which it seeks to regulate is a wholesale sale in interstate commerce or a transmission of electric energy in interstate commerce.³⁷ As the court explained in *Southern California Edison*, the prior *Niagara Mohawk* decision was based on the parties' concessions that FERC had jurisdiction to set the netting period, whether hourly or monthly.³⁸ In *Southern California Edison* the Petitioners did not make the same concession and the court confronted the jurisdictional question, holding that FERC may only set the netting period for wholesale power and transmission transactions, not retail transactions.³⁹

In *Calpine*, the court explained that the Commission only has jurisdiction to establish the netting period for wholesale power and transmission transactions in interstate commerce and does

³⁴ Contrary to Petitioner's assertions, the D.C. Circuit has not "recently" acted; the *Calpine* case was issued eight years ago in 2012.

³⁵ *Southern California Edison v. FERC*, 603 F.3d 996 (D.C. Cir. 2010) ("*Southern California Edison*").

³⁶ *Niagara Mohawk Power Corp.*, 452 F.3d 822 (D.C. Cir. 2006) ("*Niagara Mohawk*").

³⁷ *Southern California Edison*, 603 F.3d at 1000-1001.

³⁸ *Id.*

³⁹ See e.g., *Southern California Edison*, 603 F.3d at 999-1001 (explaining "that troubling case [*Niagara Mohawk*] was resolved based on a concession petitioner made – not made by petitioners here.").

not have the jurisdiction to establish a netting period applicable to retail sales.⁴⁰ Yet, despite this clear holding, Petitioners’ request that FERC establish “time intervals of one hour or less” that will be used in “measuring and billing.”⁴¹ In doing so, Petitioners are falling into the same trap as the *Niagara Mohawk* petitioners. There, the petitioners conceded that “FERC [has] the authority to set an hourly netting interval” and this concession was fatal to their case because there is “no principled basis” in netting periods, whether hourly, monthly, or otherwise.⁴² Here, Petitioners ask FERC to set a netting period for retail transactions, pointing to the Commission’s accounting rules which provide that where sales and purchases do not occur in the same hour they should not be netted.⁴³ Petitioners’ concession, that sales and purchases that *do* occur in the same hour have to be “netted” confirms that some netting is required in order to be able to measure whether a consumer is producing power. Given Petitioners concession that there must be some form of netting to measure when a customer is producing power, *Calpine* instructs that the Commission must defer to the States’ netting period.⁴⁴ Petitioners’ request that the Commission establish a netting period is directly contrary to the court’s finding in *Calpine* where it explained “FERC lacks jurisdiction to set netting intervals for retail charges.”⁴⁵

⁴⁰ *Calpine*, 702 F.3d at 50 (holding that “[w]hile the regulation of transmission charges is undoubtedly within FERC’s jurisdiction, retail charges are not.”).

⁴¹ Petition at 26.

⁴² *Niagara Mohawk*, 452 U.S. at 1000.

⁴³ See Petition at n.58 (citing Accounting and Financial Reporting for Public Utilities Including RTOs, 115 FERC ¶ 61,080 at P 16 (2006) and noting that “sales and purchases *did not occur in the same hour and so would not be netted.*”) (emphasis added).

⁴⁴ *Calpine*, 702 F.3d at 48 (“But suppose (as is the case) that FERC lacks jurisdiction to set netting intervals for retail charges . . .”).

⁴⁵ *Id.* at 48.

2. Net Metering Transactions Do Not “Affect” FERC-Jurisdictional Rates

In an effort to convince the Commission that it *must* regulate net metering transactions, Petitioners assert that net metering transactions “directly affect FERC-jurisdictional wholesale power markets.”⁴⁶ Yet, Petitioners do not demonstrate any causal relationship, where retail energy rates drive wholesale energy prices, nor could they. As the Supreme Court has recently explained, FERC may regulate practices and rules that directly affect wholesale prices “so long as, in doing so, it does not trespass on the States’ authority to regulate retail sales of electric power.”⁴⁷

In *Calpine*, which pre-dated the Court’s decision in *EPSA*, the court upheld the Commission’s decision to not rely on its wholesale power jurisdiction to attempt to regulate the retail component of the station power transaction.⁴⁸ The *Calpine* court affirmed that the Commission was reasonable in considering and rejecting arguments that station power affects wholesale rates or is otherwise analogous to other wholesale services.⁴⁹ Neither *Southern California Edison* nor *Calpine* calls into question the Commission’s sound conclusion that the regulation of net metering transactions is outside of the bounds of the FPA.⁵⁰ Petitioner’s claims that *Calpine* or

⁴⁶ Petition, Attachment A at 14:4-5.

⁴⁷ See *EPSA*, Slip Op. at 18, n.7.

⁴⁸ See, e.g., *Calpine*, 702 F.3d 48 (“In *Calpine*’s view, the amount of consumed energy that may be netted against gross power directly determines how much energy is deemed available for sale at wholesale, so a netting interval is really just a regulation of the wholesale market”).

⁴⁹ *Id.* at 47 (explaining that “The Commission concluded on remand, however, that its own prior decisions had already rejected its wholesale jurisdiction as a basis for regulating station power” and upholding such a determination); *Duke Energy Moss Landing LLC*, 134 FERC ¶ 61,151, P 20 (2011).

⁵⁰ See *Sun Edison*, 129 FERC ¶ 61,146, P 2 (2009) (holding that net metering transactions do not constitute the sale of electric energy at wholesale in interstate commerce or the transmission of electric energy in interstate commerce under the FPA.); see also *E. & J. Gallo Winery v. EnCana*

Southern California Edison weaken the Commission’s holding in *MidAmerican* or *Sun Edison* or otherwise justify a different result should be rejected.⁵¹

B. Maintaining the “Law of the Case” Serves and Protects the Public Interest

The legal arguments made by Petitioners are substantially similar, in all respects, to the arguments and claims previously adjudicated by the Commission and the courts.⁵² As the Commission then-explained, no wholesale sale occurs “when an individual homeowner or farmer (or similar entity such as a business) installs generation and accounts for its dealings with the utility through the practice of netting.”⁵³ The Commission has consistently applied the *MidAmerican* precedent and Petitioners have failed to offer any circumstances that warrant departure at this juncture. Maintaining this precedent serves and protects the public interest.

When the Commission issued Order No. 2003 it relied on *MidAmerican* to explain that FERC will only assert jurisdiction over a net metering customer’s interconnection request when: (1) the facility to which the customer requests to interconnect is subject to a Commission-approved Open Access Transmission Tariff (“OATT”) and (2) the owner has expressed an intent to make net

Corp., 503 F.3d 1027, 1048 (9th Cir. 2007) (explaining that “FERC’s authority is limited to the jurisdiction specifically set by Congress.”).

⁵¹ *See, e.g., Calpine* at 50 (distinguishing *Entergy* and explaining “That situation — where utilities were treating wholesale transactions as retail sales — is worlds apart from the present case, which deals with FERC’s authority to regulate truly local charges.”); *see also id.* (holding that the Commission was not required to address parties’ request to rely on its wholesale power jurisdiction in an attempt to regulate the retail component of the retail power transaction).

⁵² As the Commission summarized in the *MidAmerican Rehearing* Order, “MidAmerican argues that every flow of power constitutes a sale, and, in particular, that every flow of power from a homeowner or farmer to MidAmerican must be priced consistent with the requirements of either PURPA or the FPA. We find no such requirement.” *See MidAmerican Energy Company*, 94 FERC ¶ 61,340, 62,263 (2001)

⁵³ *Id.*

sales of energy to a utility.”⁵⁴ The D.C. Circuit affirmed the Commission’s decision in *NARUC*.⁵⁵ States have since published interconnection rules and tariffs to govern the interconnection of customers participating in net metering programs while allowing those who meet the Commission’s criteria to proceed through the FERC-jurisdictional processes. Following the issuance of *NARUC*, the Commission issued *Sun Edison* in which it reaffirmed that retail net metering transactions do not fall within the scope of the FPA.⁵⁶ Recently, in Order No. 841, the Commission again affirmed that its *Sun Edison* and *MidAmerican* precedents govern when retail customers are participating in retail net metering programs.⁵⁷ Nothing in either *Southern California Edison* or *Calpine* calls into question the lawfulness or validity of these applicable precedents.

SEIA respectfully requests that the Commission act expeditiously to dismiss the Petition and deny the Petitioners’ request to revisit the long-standing holdings from *MidAmerican* and *Sun Edison*, eight years after the issuance of an unrelated case by the D.C. Circuit. Retail customers rely heavily on financing, and the availability of multiple financing options, to install the assets. In turn, financiers rely on a stable regulatory framework in making their investments. The Commission has recognized that attracting, and retaining, private investment in energy infrastructure requires

⁵⁴ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003) (“Order 2003”), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at P 747 (“Order 2003-A”), *order on reh’g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008) (“*NARUC*”).

⁵⁵ 475 F.3d 1277.

⁵⁶ *Sun Edison, LLC*, 129 FERC ¶ 61,146 (2009), *order on reh’g*, 131 FERC ¶ 61,213 (2010).

⁵⁷ *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127, P 30 (2018) (“Order 841”).

regulatory certainty.⁵⁸ The most recently published EIA data indicates that over 2.3 million end-users are operating under retail net metering programs in 49 states.⁵⁹ These are individuals, companies, hospitals, schools, and government and non-profit entities broadly dispersed across all states and territories of the United States. Petitioners fail to acknowledge the burden that will be foisted on these end-use customers if the Commission were to invalidate existing state programs. Further, Petitioners fail to address whether, or how, such customers would be eligible for grandfathering. These retail customers have made substantial investment decisions to utilize local generation to offset their retail electric bill based on the presumed stability of the regulatory framework. Asserting federal jurisdiction over a very large number of retail customers who inject relatively little electricity – and do so in direct response to supportive state policy – would create unnecessary administrative costs and burden for millions of individuals and small entities across the country. The Commission should expeditiously to dismiss the Petition without delay to remove any controversy that has been generated by the Petition.

III. THE AUTHORITY TO ESTABLISH AND ADMINISTER NET METERING PROGRAMS LIES WITH INDIVIDUAL STATES

Consistently, over the past decade and as affirmed in *Calpine*, FERC has not used its wholesale power jurisdiction to attempt to assert authority over retail transactions by end-users.⁶⁰ This is consistent with the Supreme Court’s holding in *EPSA* where the Court explained that FERC “may not regulate either within-state wholesale sales or, more pertinent here, retail sales of

⁵⁸ See, e.g., *Nev. Power C*, 99 FERC ¶ 61,047, at 61,190 (2002).

⁵⁹ EIA NEM Data, March 2020 (reporting 2,272,427 NEM customers).

⁶⁰ *Duke Energy Moss Landing, LLC*, 132 FERC at P 20; *Calpine*, 702 F.3d at 50.

electricity (i.e., sales directly to users).”⁶¹ As the Court explained, the FPA reserves “regulatory authority over retail sales (as well as intrastate wholesale sales) to the States.”⁶² “The FPA does not give the Commission jurisdiction over sales of electric energy at retail.”⁶³

A. Congress Vested States with Exclusive Authority to Establish, Administer, and Manage Net Metering Programs

Accepting the Petitioner’s arguments, and issuing the requested declarations, would be a violation of the Tenth Amendment and inconsistent with the Congressional delegation of authority to the states as granted by the FPA as well as EAct 2005.⁶⁴ Petitioner’s claim that Congress intended FERC to oversee and administer net metering programs should be rejected outright.

1. Section 111(d) Delegates Authority to States

When the Supreme Court upheld the lawfulness of Section 111(d) in *FERC v. Mississippi*, the statute set forth six mandatory standards.⁶⁵ Over the intervening years, Congress has amended Section 111(d) to add additional standards that states must consider and in Section 1251 of EAct 2005 Congress added an eleventh standard related to net metering.⁶⁶ As the Supreme Court

⁶¹ *EPISA*, Slip Op. at 3.

⁶² *Id.* at 17 (quoting *New York v. FERC*, 535 U.S. at 17); accord *Detroit Edison*, 334 F.3d 48, 53 (D.C. Cir. 2005) (explaining that Section 201(b)(1) of the FPA “denies FERC jurisdiction over local distribution facilities and any unbundled retail service occurring over those facilities”).

⁶³ *EPISA*, Slip Op. at 23.

⁶⁴ See, e.g., *FERC v. Mississippi*, 456 U.S. at 758-770 (finding that Titles I and III of PURPA were lawful under *Hodel v. Virginia Surface Mining*, 452 U.S. 264 (1981) because the titles of the statute “do not involve the compelled exercise” of a State’s sovereign powers and do not “set a mandatory agenda to be considered”); EAct 2005 at § 1251. See also *FCC v. NextWave Pers. Comms. Inc.*, 537 U.S. 293, 299 (2003) (explaining that “federal agencies must obey all federal laws, not just those they administer”).

⁶⁵ *FERC v. Mississippi*, 456 U.S. at 758-770 (explaining the Section 111(d) standards and procedures); 16 U.S.C. § 2621(d) (1978).

⁶⁶ EAct 2005 at § 1251.

explained in *FERC v. Mississippi*, Congress could have preempted the entire field, but instead chose to leave retail regulation to the States.⁶⁷ The Court explained that Section 111(d) was lawful and not a violation of the Tenth Amendment because Congress had not mandated what the States could do, but instead allowed for State decision making upon the consideration of the statutory standards.⁶⁸ As the Court explained, Section 111(d) is lawful because States are only obligated to “consider” the federal standards for retail ratemaking and retain their sovereign authority to enact and administer retail programs designed to meet their own needs.⁶⁹ The Court ultimately upheld the lawfulness of Section 111(d) because “[t]he procedural requirements obviously do not compel the exercise of the State’s sovereign powers, and do not purport to set standards to be followed in all areas of the state commission’s endeavors.”⁷⁰ Issuing the declarations requested by Petitioners would go beyond the Section 111(d) requirement to consider federal standards and would intrude onto a State’s sovereign authority in violation of the Tenth Amendment.

Legislative history leading to passage of Section 1251 reveals that Congress deliberately declined to establish a federal net metering program, instead choosing to implement net metering through Section 111(d) and allow States to maintain their regulation of retail transactions pursuant to FPA Section 201(b). From 1997 to March 2001, when FERC was considering the *MidAmerican* petition and issuing its Orders concluding that net metering transactions are not subject to FERC jurisdiction,⁷¹ at least seven bills were introduced by both parties in the U.S. House of

⁶⁷ *FERC v. Mississippi*, 456 U.S. at 785-87.

⁶⁸ *Id.* at 758-771.

⁶⁹ *Id.*

⁷⁰ *Id.* at 771.

⁷¹ *See MidAmerican*, 94 FERC ¶ 61,340 (2001).

Representatives and U.S. Senate that instructed utilities to implement net metering.⁷² Following FERC’s decision in *MidAmerican*, Congress abruptly changed directions and focused its attention almost solely on legislation that would add net metering into Section 111(d), thereby entrusting States to decide how and whether to adopt net metering. From March 2001 through passage of Section 1251 in EAct 2005, Congress considered seven more bills and an amendment that added net metering to Section 111(d), passing several versions before EAct 2005 was ultimately enacted.⁷³ After years of considering options to encourage customer access to net metering programs, Congress deliberately followed FERC’s approach of declining to exercise federal authority over such programs, and instead chose to encourage states to use their own authority to implement net metering. Petitioners’ statement that, in Section 1251, “Congress appears to be saying that the supplier should receive an offset equal to the avoided cost of energy consistent with the other relevant provisions of PURPA” has no support in legislative history and is a mischaracterization of congressional intent.⁷⁴ As the Department of Energy study conducted pursuant to Section 1817 of EAct 2005 explains, there are several approaches to net metering compensation and while Section 111(d) “includes a requirement that state regulatory authorities and nonregulated utilities consider net metering; however, it does not specify a metering mechanism or

⁷² See S. 2287 (Sen. Frank Murkowski, 7/10/1998); H.R. 1960 (6/19/1997, Rep. Ed Markey); H.R. 4798 (Rep. Denis Kucinich, 10/10/98); H.R. 2569 (Rep. Frank Pallone, 7/20/1999); H.R. 2947 (Rep. Jay Inslee, 9/24/1999); S. 597 (Sen. Jeff Bingaman, 3/22/01); S. 593 (Sen. Don Nickles, 3/22/01)

⁷³ See S. Amdt. 3003 to S. 517 (Sen. Craig Thomas, 3/13/02); H.R. 6 (Rep. Billy Tauzin, 4/7/03); H.R. 4503 (Rep. Joe Barton, 06/17/2004)

⁷⁴ The actual congressional history reveals that Congress considered net metering for many years and its addition to Section 1251 reflects a compromise reached as part and parcel of the entirety of EAct 2005.

buy-back rate or credit.”⁷⁵ Petitioners now ask FERC to step in and make declarations as to federalize metering mechanisms and buyback credits. The Commission should deny such a request as the legislative history reveals that Congress did not intend for FERC to have such authority.

With respect to the state-implementation of the Section 111(d) standards, in each state the mandatory procedural steps were undertaken and States were able to “complete the consideration” and “make the determination” as to whether to implement net metering⁷⁶ by the statutory deadline of August 2008.⁷⁷ Petitioners would have been afforded the right to participate in any such proceedings and the Act provides a mechanism by which Petitioners could have initiated an enforcement action in the appropriate court if the procedures mandated by Section 111(d) were not followed.⁷⁸ Ignoring these state proceedings, Petitioners now ask the Commission to do what has been forbidden and intrude on States sovereign rights to craft retail billing and crediting programs.⁷⁹ The Commission should find that such declarations are not consistent with the public interest and not just or reasonable. For example, in Nevada, the state lost more than 2,600 jobs when regulators eliminated

⁷⁵ See The Potential Benefits of Distributed Generation and Rate-Related Issues That May Impede Their Expansion, DEPARTMENT OF ENERGY (2007), available at <https://www.ferc.gov/legal/fed-sta/exp-study.pdf>.

⁷⁶ EPA Act 2005 § 1251.

⁷⁷ *Id.* Prior state actions were grandfathered, including states that “implemented for such utility the standard concerned (or a comparable standard)” and states where the “legislature has voted on the implementation of such standard (or a comparable standard).” *Id.*

⁷⁸ Under Section 111(d), the Secretary of Energy, any affected utility, and any consumer served by an affected utility be given the right to intervene and participate in any rate-related proceeding considering the Section 111(d) standards. See 16 U.S.C. § 2631.

⁷⁹ Petitioners had an opportunity to raise these issues. If Petitioners contend that their state did not open such a proceeding, Section 111(d) provides that “any person” may bring an action in state court to enforce the obligation to hold a hearing and make a determination on net metering. *Id.*

net metering in 2015.⁸⁰ The state commission’s decision sparked significant public opposition, spurred a ballot initiative, and produced lawsuits from existing customers who found that their existing investments had unexpectedly been made uneconomic.⁸¹ Responding to the citizen outcry, the state legislature passed Assembly Bill 405 to reinstate net metering and established a “Bill of Rights” that guarantees the right to self-generate electricity, to receive a fair credit, and to be protected from certain fees and charges.⁸² Issuing the declarations requested by Petitioners would be contrary to Congressional intent and would intrude on a State’s sovereign authority in violation of the Tenth Amendment.⁸³

2. Section 201(b) Affirms State Authority Over Retail Transactions

Net metering is a policy that allows retail customers to exchange exported electricity for credits that can be used to offset all or a portion of the customer’s retail electric bill.⁸⁴ These retail billing and crediting arrangements between a retail customer and the interconnected utility pursuant to a state-administered net metering program do not fall within FERC’s jurisdiction. Section 201(b) of the FPA prohibits FERC from regulating “any other sale” of energy, reserving to the states the

⁸⁰ *See, e.g.*, “In Solar Shuffle, Big Utilities Meet Their Match,” HIGH COUNTRY News (Aug. 21, 2017) (providing a thorough analysis of the events that unfolded in the State).

⁸¹ *Id.*

⁸² *Id.* *See also*, Net Metering in Nevada at http://puc.nv.gov/Renewable_Energy/Net_Metering/ (detailing Assembly Bill 405 and the Commission’s subsequent implementation, including the tiered rate structure that will step-down export credits over time).

⁸³ *Compare FERC v. Mississippi*, 456 U.S. at 781 (O’Connor, J., dissenting) (warning against “conscript[ing] state utility commissions into the national bureaucratic army).

⁸⁴ *Compare EPSA*, Slip Op. at 21 (explaining that a retail rate is involved when the matter concerns “the amount of money a consumer will hand over in exchange for power”); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016) (explaining that States may deploy “measures ‘untethered to a generator’s wholesale market participation’ to further an individual state’s sovereign interests).

regulatory authority over those “other sale[s].”⁸⁵ This reflects Congress’ intent to preserve for the states a significant role in the regulation of intrastate transactions and the local generation and distribution of electric energy.⁸⁶ The Commission can exercise its responsibility under the FPA to ensure just and reasonable prices in the wholesale markets subject to its jurisdiction and need not resort here to the extraordinary and blunt remedy of preemption. As the Supreme Court succinctly stated in *FPC v. Conway Corporation*, “the Commission has no power to prescribe the rates for retail sales of power companies.”⁸⁷

The Commission should recognize that similar to demand-response programs, state net metering programs have long-established rules that are deeply integrated into the retail rate structures at the state level.⁸⁸ States and utilities have devoted substantial time and resources over the past four decades to crafting net metering programs, and each state has implemented retail net metering in a programmatic manner that is consistent with the authority reserved for the States by the FPA. As the Supreme Court recently explained in *EPISA*, any regulation of the “terms of sale at retail” is “a job for the States alone.”⁸⁹

⁸⁵ 16 U.S.C. §824(b).

⁸⁶ *Accord* FPA Section 201(b).

⁸⁷ 426 U.S. 271 (1976).

⁸⁸ Order 841-A at PP 50-52 (recognizing that it was not in the public interest to preempt long-standing state programs such as energy-efficiency and demand-response).

⁸⁹ *EPISA*, Slip Op 25

B. Net Metering Transactions Are Not Wholesale Sales in Interstate Commerce

FERC cannot expand its jurisdiction beyond what the Act provides.⁹⁰ As the Eighth Circuit held in *Northern States Power Company v. FERC*, the Commission is not permitted to “transgress[] its Congressional authority which limits its jurisdiction to interstate transactions.”⁹¹ States have exclusive jurisdiction to set the netting interval for net metering transactions with retail customers.⁹² Petitioners have failed to explain how net metering transactions, which the Commission’s *MidAmerican* and *Sun Edison* precedent have treated as retail for approximately two decades, have suddenly transformed into “wholesale” transactions.⁹³ The Commission should reject Petitioner’s urging to take the unprecedented step of reconsidering its earlier determination that net metering transactions are properly regulated by the States. As the court clarified in *Calpine*, FERC’s discretion to not pursue such preemption challenges has no real economic impact on a party, any injury “would almost certainly be the sort of conjectural or hypothetical injury insufficient to establish Article III standing.”⁹⁴

State laboratories are core features of a federalist system. The result of Congress’ decision to delegate net metering to the States is that there is not a uniform approach to designating excess or

⁹⁰ Order 841-A at P 32.

⁹¹ 176 F.3d 1090

⁹² See *Calpine*, 702 F.3d at 48 (“But suppose (as is the case) that FERC lacks jurisdiction to set netting intervals for retail charges . . .”).

⁹³ Compare 18 C.F.R. § 35.26 (providing the standards for stranded cost recovery, including retail stranded costs). As the Solar Generation Investors explain, if the NERA Petition were to be granted, every net metering participant that would then become regulated by the Commission would be entitled to seek a stranded cost determination. See Motion to Intervene and Protest of Solar Generation Investors at 6, Docket No. EL20-42 (June 15, 2020).

⁹⁴ *Id.* at 47 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

determining whether a retail net metering customer with designated excess is entitled to payment (*i.e.*, a “sale”), a credit, or forfeiture. Between 1996 and 2009, the number of states with a net metering policy went from six to more than forty, reflecting a willingness of states to test whether net metering was appropriate for their residents. States have considered a number of factors in establishing the value of net metering credits, including: wholesale prices for electricity, the utility’s avoided cost, capacity credits, demand reduction credits, credit for reducing transmission constraints, and credit for reducing losses on both the transmission and distribution system, amongst others. For example, the South Carolina Energy Freedom Act of 2019,⁹⁵ sets forth the process, method, and calculation that the state commission must utilize on a going-forward basis⁹⁶ and directs the state commission to assess the value of energy, the billing mechanism, the energy measurement and “the direct and indirect economic impact of the net energy metering program to the State.”⁹⁷

Billing and crediting arrangements between a retail customer and local utility, where all transactions are intrastate and performed in accordance with a state-administered net metering program, are not wholesale sales. The Commission has long held that wholesale sales do not occur when a retail customer receives a credit against its retail purchases from the selling utility and remains a net buyer over the relevant utility billing period.⁹⁸ Maintaining the law of the case, where

⁹⁵ South Carolina Governor McMaster signed H.3659, R.82 into law on May 16, 2019 as Act 62, available at <https://www.scstatehouse.gov/billsearch.php?billnumbers=3659&session=123&summary=B> (“Act 62”).

⁹⁶ Act 62, § 4.

⁹⁷ Act 62. Section 5(D)(4).

⁹⁸ See *MidAmerican*, 94 FERC ¶ 61,340 (2001); *Sun Edison*, 129 FERC at P 2.

States establish, administer, and manage retail net metering programs is entirely consistent with Commission precedent and the principles and aims of cooperative federalism.⁹⁹

IV. Conclusion

For the foregoing reasons, SEIA respectfully requests that the Commission exercise its discretion and dismiss the Petition. If the Commission does not dismiss the Petition, the Commission should affirm that all rates, terms, and conditions of net metering programs for retail end-users are subject to the exclusive jurisdiction of the States.

Respectfully submitted,

/s/ Heather Curlee

Heather Curlee

Wilson Sonsini Goodrich & Rosati, PC

701 Fifth Ave, Suite 5100

Seattle, WA 98104

(206) 883-2522

hcurlee@wsgr.com

*Counsel to the Solar Energy Industries
Association*

June 15, 2020

⁹⁹ *Florida Power & Light Co.*, 33 FERC 61,121 (2010) (“the presence of the right to sell any output to a third party determines Commission jurisdiction”); *Compare ISO-NE, Inc.*, 115 FERC ¶ 61,050 (2006) (concluding that interconnection customers that did not affirmatively state their intent to sell at wholesale are, therefore, subject to state-jurisdictional terms and conditions).

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this pleading has been served this day upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 15th day of June, 2020 in Washington, D.C.

/s/ Heather Curlee