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

New England Ratepayers Association)
)

Docket No. EL20-42-000

INTRODUCTION

Intervenor Center for Biological Diversity (“Center”), on behalf of its 1.4 million members and online activists, urges the Federal Energy Regulatory Commission (“FERC” or “Commission”) to reject the New England Ratepayers Association Petition for a Declaratory Order (hereafter “NERA Pet.”).¹ Seeking to hijack long-standing state control over net metering in a transparent effort to stifle distributed energy development, NERA imperiously claims that FERC *must* federalize net metering to carry out Congressional directives in the 1935 Federal Power Act and 2005 Energy Policy Act. As detailed below, the Commission should deny the Petition for numerous reasons. To summarize:

1. NERA is not entitled to resolution of its Petition. A declaratory order petition is only permissible where necessary “to terminate a controversy or remove uncertainty” on an issue of concrete interest to the petitioner. 5 U.S.C. § 554(e). Since NERA meets none of these criteria, FERC would be well within its “sound discretion,” *id.* to deny the Petition on that ground alone. *See infra* at 3-9.

2. NERA’s fundamental premise is that FERC has *no choice* but to adopt NERA’s interpretation of the Federal Power Act and Energy Policy Act. This not only defies the statutes’ plain language, it defies how these provisions have been consistently interpreted for decades, not

¹ More than 3,500 Center members and online activists have weighed in to specifically object to NERA’s Petition. *See* Attachment A (Center member and online activist comments). The Center intervened in this proceeding on April 28, 2020.

only by the Commission, but by every other federal agency to have ever addressed the matter. While NERA gets high marks for audacity, there is simply no basis for NERA's claim that its interpretation of these statutes is not only the best one (in NERA's view), but is in fact the *only* interpretation allowed. *See infra* at 16-17.

3. As regards the Energy Policy Act, NERA claims that while Congress expressly directed states to consider "net metering," and defined that term to include "offset[s] . . . during the applicable billing period," 16 U.S.C. § 2621(d)(11), Congress really only meant that states could allow net metered customers to obtain credit for avoided cost. NERA Pet. at 35-37. This makes no sense for many reasons. For example, if the Public Utility Regulatory Policies Act ("PURPA"), Pub. Law No. 95-617, enacted decades earlier than the Energy Policy Act, *already* guaranteed that retail solar providers could obtain at least avoided cost for excess energy (as NERA recognizes, NERA Pet. at 31-33), NERA's interpretation would render the Congressional directive largely superfluous. *See infra* at 13.²

4. Finally, as regards the Federal Power Act, NERA's argument that D.C. Circuit rulings from many years ago dictate that FERC has no choice but to adopt NERA's interpretation of that statute ignores the Energy Policy Act, and in any event holds no water on its own terms. Those D.C. Circuit cases involved FERC's *disclaiming* jurisdiction over an aspect of retail rate-making, while here NERA claims that FERC has no choice but to *claim* jurisdiction over the retail rate sphere long regulated at the state level. *See infra* at 17-18. Particularly given the

² This directive for net metering to be considered on the state level also flies in the face of NERA's claim that FERC should instead nationalize policy-making determinations regarding net metering. NERA Pet. at 37-44. And, in any event, NERA's policy arguments run contrary to ample evidence – as distinguished from NERA and its expert's bald and unsubstantiated assertions – that retail net metering and its role in supporting distributed solar development is in fact *beneficial* to customers, the grid, the environment, and the climate. *See infra* at 18, n.17.

Supreme Court’s recent affirmations of FERC’s broad power to demarcate the precise lines between federal and state jurisdiction, NERA’s fundamental claim that FERC has no choice but to exercise federal jurisdiction over *every bit* of excess energy generated by a net-metered generator simply cannot be taken seriously. *See, e.g., FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 776 (2016).

The Petition for Declaratory Order should be denied.³

ARGUMENT

I. NERA IS NOT ENTITLED TO RESOLUTION OF ITS PETITION.

Neither the Federal Power Act, nor any other statute administered by FERC, authorizes the filing of NERA’s Petition for Declaratory Order. Rather, FERC’s regulation authorizing such a Petition – 18 C.F.R. § 385.207 – implements the Administrative Procedure Act (“APA”), which provides:

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*.

5 U.S.C. § 554(e) (emphasis added). Thus, echoing this APA definition, FERC itself defines a Petition for Declaratory Order as a “petition requesting the issuance of an order or ruling on jurisdictional issues where uncertainty, ambiguity, or controversy exists.” *See* FERC Definition of a “Petition for Declaratory Order” (“FERC Definitions”).⁴

³ In the event that other Intervenors present additional arguments in favor of NERA’s Petition, or that NERA is permitted to file a second brief in support, the Center respectfully requests an opportunity to respond.

⁴ *See also* FERC, Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance, 123 FERC ¶ 61,157, P19 & P20 (May 15, 2008), ¶ 19 (similarly reiterating that a declaratory order request is reserved for “person[s] seeking to terminate a controversy or remove uncertainty . . .”).

Given these criteria, FERC would be well within its “sound discretion,” 5 U.S.C. § 554(e), to determine that the predicates for a Declaratory Order have not been satisfied here. *See, e.g., Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (affirming agency refusal to grant declaratory order); *Climax Molybdenum Co., Div. of Amax, Inc. v. Secretary of Labor, Mine Safety & Health Admin.*, 703 F.2d 447 (10th Cir. 1983) (noting agency’s broad discretion to resolve Declaratory Order request).

Resolving the Petition is not necessary to “terminate a controversy.” 5 U.S.C. § 554(e). As courts have often explained in other contexts, “controversy must mean more than” that a person “simply disagree[s] with a particular proposition that has been decided against them.” *United States v. Philip Morris USA, Inc.*, 907 F. Supp. 2d 1, 17-18 (D.D.C. 2012); *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003) (finding that the mere “existence of opposition” does not make an agency decision “controversial”).

Here, there is presently no controversy to “terminate” regarding FERC’s jurisdiction over retail net metering programs. To the contrary, FERC itself has repeatedly ruled, in multiple adjudicatory proceedings and one broad Order, that, “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.” Standardization of Generator Interconnection Agreements and Procedures, order on reh’g Order No. 2003-A, 106 FERC P 61,220, ¶¶ 747 (2004) (emphasis added), *aff’d. on other grounds, Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *see also Sun Edison LLC*, 129 FERC P 61,146 (2009); *MidAmerican Energy*, 94 FERC P 61,340 (2001).

Thus, rather than “terminate a controversy,” NERA seeks to *initiate* a controversy by arguing that these long-standing precedents were wrongly decided. Accordingly, NERA cannot satisfy this prerequisite to obtaining a Declaratory Order. *Cf. West Coast Truck Lines, Inc. v. American Industries, Inc.*, 893 F.2d 229, 233 (9th Cir. 1990) (characterizing a declaratory order as one which provides “a declaration of law to resolve an actual controversy”).

Neither is the requested Declaratory Order necessary to “remove uncertainty.” 5 U.S.C. § 554(e). Absent NERA’s Petition, *there is no regulatory uncertainty regarding jurisdiction over retail net metering*. And, as discussed further below, the two D.C. Circuit cases that NERA claims dictate that FERC overturn its long-standing precedents, NERA Pet. at 15-18, are in fact entirely irrelevant here. That, of course, explains why no one has ever raised this issue before, even though the first of the cases on which NERA relies was decided more than ten years ago. *Southern California Edison v. FERC*, 603 F.3d 996 (2010).

Indeed, under D.C. Circuit precedent, it would be error for the Commission to resolve NERA’s Petition when the request so obviously fails to satisfy the criteria for a Declaratory Order. *See Hollister Ranch Owners’ Ass’n v. FERC*, 759 F.2d 898 (D.C. Cir. 1985). Thus, in *Hollister Ranch*, the D.C. Circuit vacated a FERC Declaratory Order where the agency was faced with no actual controversy and, rather than removing uncertainty, the Order instead “plac[ed] matters in a ‘peculiar, uncertain limbo.’” *Id.* at 903 (citations omitted). Similarly, here, rather than resolving uncertainty, NERA’s Petition threatens to create far-reaching uncertainty regarding the legal status of state net metering programs, as well as intractable practical challenges by vastly expanding

FERC’s jurisdictional reach to millions of homes and other customers across the country where it has never previously exercised its power.⁵

While NERA’s failure to meet the statutory criteria for a Declaratory Order is more than sufficient to reject the Petition, additional factors also weigh in favor of this outcome. In particular, in considering whether to resolve a request for a Declaratory Order, agencies should take into account the “disadvantages,” which “include both the administrative burden imposed by a policy of issuing advisory opinions and the familiar problems surrounding the adjudication of abstract controversies.” *Climax Molybdenum Co., Inc. v. Secretary of Labor, Mine Safety & Health Admin.*, 703 F.2d 447, 452 (10th Cir. 1983). In this instance, both of these disadvantages weigh heavily against NERA’s requested relief.

First, rather than seeking resolution of a particular, concrete controversy, NERA has filed an abstract request for FERC to adopt NERA’s preferred interpretation of various FERC-administered statutes. Indeed, absent further action on the state level, granting NERA’s Petition itself will provide NERA and its members no relief whatsoever from whatever harms they might contend they are suffering. Moreover, given the wide variety of net metering programs across the country, and the need to tailor those programs to each states’ unique circumstances, NERA’s request for a rule that would apply across-the-board is simply irreconcilable with the very fact-specific nature of the issues at the heart of NERA’s Petition.⁶ FERC would thus be well within its broad

⁵ See Energy Information Agency, Form 861M “Monthly Electric Power Industry Report” (March 2020), available at <https://www.eia.gov/electricity/data/eia861m/>.

⁶ See, e.g., Fine, S. *et al.*, *The Value in Distributed Energy: It’s All About Location, Location, Location*, 2015, ICF International, available at http://www.ourenergypolicy.org/wp-content/uploads/2015/09/Value_in_Distributed_Energy_Location.pdf.

discretion to decline issuing such an advisory opinion. *See, e.g.*, Charles H. Koch, 2 Admin. Law and Practice, § 5:17, at 40 (3d ed.) (“Ordinarily declaratory orders should be issued only where critical facts are clear and cannot be altered by subsequent events.”).

Second, and for similar reasons, the fact that NERA has not at all explained its own particular interest in this issue serves further to highlight that NERA has presented the very kind of “abstract controversy” unsuited for declaratory relief. *Climax Molybdenum*, 703 F.2d at 452. Thus, although a Declaratory Order request may certainly involve the interpretation of a statute, the Commission has made it clear that such a request must concern “an interpretation of *a party’s rights or obligations*” under the statute. *See* FERC Definitions (emphasis added).⁷

What are NERA’s rights or obligations at issue here?

NERA has provided no answer. Indeed, at no point in its Petition does NERA even *attempt* to explain its stake in these matters, or the members it represents. It does not appear that FERC has previously entertained a Declaratory Order from an unknown entity who comes before the Commission seeking resolution of an abstract question of law, completely untethered to any specific matter as to which the entity has a demonstrated, concrete interest. *Cf. Climax Molybdenum*, 703 F.2d at 452 (the fact that a petitioner “faces no greater peril than other[s]” and has shown “no special need for

⁷ Following this premise, FERC’s regulations concerning Declaratory Order requests relate to *particular* matters of direct interest to the petitioning party. *See, e.g.*, 18 C.F.R. § 35.28(e) (declaratory order request concerning petitioner’s specific proposed transmission tariff); *id.* § 35.24(d)(3) (declaratory order request concerning whether a specific entity qualifies as an RTO); *id.* § 35.35(d) (declaratory order request concerning specific “incentive-based rate treatments”). Similarly, other agencies reserve such petitions for parties who demonstrate a specific “potential legal peril” warranting the agency’s attention. *See, e.g.*, Pet. of Olympus Growth Fund III for Declaratory Order, 2009 FMC LEXIS 47, *15 (Federal Maritime Comm’n 2009).

declaratory relief’ counsels against entertaining a request for a declaratory order). Thus, the NERA Petition should be denied on this basis as well.⁸

* * *

In considering whether to resolve a declaratory order petition, FERC should be “informed by an examination of the proper institutional role of an adjudicatory body and a concern for judicial economy.” *Climax Molybdenum*, 703 F.2d at 451. Here, in light of NERA’s abject failure to demonstrate how resolution of its Petition would further either its own interests, or the interests Congress sought to safeguard in authorizing agencies to issue declaratory orders under the APA, 5 U.S.C. § 554(e), FERC would be well within its “sound discretion” to reject NERA’s Petition at the outset. *Id.*

⁸ The fact that NERA has not disclosed its interests or members also raises a related concern: whether NERA may be precluded from presenting its Petition altogether. FERC’s Order 2003A – in which FERC ruled that “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,” *see supra* at 4 – was appealed to the D.C. Circuit, and thus the many parties to that proceeding had an opportunity to challenge that holding. *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Circ. 2007). Those parties should therefore be estopped from bringing a separate action raising an issue that they declined to pursue. *See, e.g., Williams Natural Gas Co.*, 83 FERC P63,015, 1998 FERC LEXIS 1207 (June 18, 1998) (explaining that a “judgment on the merits is conclusive not only as to matters actually raised but also to matters which could have been raised and litigated.”) (emphasis added); *cf. Nat’l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830 (D.C. Circuit 2005) (precluding party from raising issue that came up in prior FERC proceeding).

NERA as an association was not a party to the 2003 Order proceeding, but it is unknown whether its members were, because NERA refuses to disclose its membership. It is well-established that “a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy.” *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008). As the Supreme Court has explained, “[p]reclusion is thus in order when a person who did not participate in a litigation later brings suit . . . as an agent for a party who is bound by a judgment.” *Id.* Accordingly, at a bare minimum, *before FERC could proceed to consider the merits of NERA’s petition, NERA must be compelled to disclose its members*, for if those members all participated in the 2003 proceeding, NERA may be precluded from presenting this Petition altogether.

Importantly, such an outcome would not deny NERA, or its members, an opportunity to have their concerns resolved. For example, NERA could file a rulemaking petition – a considerably more appropriate vehicle for the sweeping regulatory changes NERA requests, and one which would require that NERA actually specify the precise regulations sought – rather than simply raising concerns and suggesting that the agency has some obligation to sort them out.⁹

Alternatively, a petitioner who maintains that state net metering policies actually cause concrete injuries that FERC has the authority to redress could seek review of a specific regulatory decision or program. Indeed, as discussed, *see supra* at 7, that is precisely the kind of controversy for which a declaratory order petition may be appropriate.

However, the Commission should not permit NERA to hijack the Declaratory Order process for its own ends and obtain a broad and general order over a matter as to which there is presently no controversy or uncertainty, and as to which NERA has no concrete interest.

II. NERA PRESENTS NO CREDIBLE ARGUMENT THAT FERC MUST ASSERT JURISDICTION OVER NET METERING.

A. PURPA Section 1251 Forecloses NERA’s Argument That States Have No Authority To Develop Retail Net Metering Programs.

In the more than a decade leading up to the 2005 Energy Policy Act, states across the country began offering full retail net metering programs as a mechanism to encourage distributed solar development. *See* Steven Ferrey, *Nothing but Net: Renewable Energy and the Environment*, 14 Duke Envtl. L. & Pol’y (Fall 2003) (noting many states with retail net metering programs by the early 2000s); Gilbert Michaud and Damian Pitt, *Non-utility Photovoltaic Deployment: Evaluation of U.S. State-level Policy Drivers*, 38 Strategic Planning for Energy and the

⁹ For example, NERA claims that FERC should “direct all sellers of energy to comply with federal law with respect to” what NERA calls “excess sales,” NERA Pet. at 5. n.10, but does not explain what in fact NERA is asking FERC to do in this regard in the context of a request for a declaratory order.

Environment 52 (2019) (finding net metering policies are a primary driver of non-utility PV deployment). Against that backdrop, in Section 1251 of the Energy Policy Act Congress specifically directed regulatory agencies to consider “whether or not it is appropriate to implement” net metering programs, providing as follows:

Each electric utility shall make available upon request net metering service to any electric consumer that the electric utility serves. For purposes of this paragraph, the term “net metering service” means service to an electric consumer under which *electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period.*

16 U.S.C. §§ 2621(a) – 21(c); (d)(11) (emphasis added). Thus, recognizing that retail net metering was a valuable tool, Congress directed that it be considered across the board as a mechanism to allow excess generation to “offset” retail customers’ electricity bills. *See, e.g., Tanvir v. Tanzin*, 889 F.3d 72, 86 (2d Cir. 2018) (invoking “the venerable canon of construction that Congress is presumed to legislate with familiarity of the legal backdrop for its legislation”).

The Commission’s long-standing position on how net metering works is of course entirely consistent with this Congressional design. Thus, as noted, FERC has repeatedly explained that where, “over the billing period,” generation flowing to the grid offsets electricity used by a retail consumer, “there is no net sale,” and thus no electricity sale over which the Commission asserts jurisdiction. *Sun Edison LLC*, 129 FERC P61,146 (2009).

Nonetheless, fighting mightily against these unambiguous terms, NERA claims to have discerned an interpretation of Energy Policy Act Section 1251 that *mandates* FERC jurisdiction over these millions of customers. In particular, NERA claims that by using the term “*electric energy generated by th[e] electric consumer,*” Section 1251 is

mandating that this energy be valued at no more than avoided cost. NERA Pet. at 35-37.

This construction of Section 1251 must fail, for several reasons.

As a threshold matter, while NERA’s entire Petition proceeds on the premise that NERA’s interpretation of the statutory scheme is the only permissible one, *see, e.g.*, NERA Pet. at 7 (“The law is incontrovertible”), NERA does not actually argue that Section 1251 *must* be read in this manner. To the contrary, the most NERA can muster is that, to NERA, it “appears” that Congress was referring to avoided cost. NERA Pet. at 36. Indeed, NERA’s only effort to bolster this argument is to claim the provision does not by its terms “redefine the jurisdictional line between FERC and State jurisdiction.” *Id.* at 37. But that of course begs the question of where that line stood prior to 2005 – and, as discussed next, net metering has always been squarely on the state side of the line.¹⁰

Accordingly, since NERA does not and cannot demonstrate that the Energy Policy Act must be read to preclude states from imposing full retail net metering programs, it is not entitled to the declaratory order it seeks.

In any event, NERA’s argument regarding Section 1251 also fails as a matter of statutory construction, for three independent reasons.

First, NERA’s assertion that the term “electric energy” means avoided cost simply makes no sense. The 2005 Energy Policy Act Amendments were incorporated into PURPA, which was originally passed in 1978. Pub. Law No. 95-617. That original

¹⁰ Indeed, since, as noted, the majority of states already had full net metering programs by 2005, NERA’s interpretation of Section 1251 would also mean that Congress intended to void all these programs. Given the Supreme Court’s frequent admonition that Congress “does not, one might say, hide elephants in mouseholes,” *Bilski v. Kappos*, 561 U.S. 593, 645 (2010) (other citations omitted), this is also a strong indication that NERA’s interpretation of this language is incorrect.

statute also used the term “electric energy,” but in a manner that makes clear Congress was simply referring to *electricity itself* and not defining “electric energy” to have a particular value, as NERA now claims.

In particular, rather than defining “electric energy” in 1978, Congress defined the terms “[i]ncremental cost of alternative electric energy” to mean “the cost to the electric utility of the *electric energy* which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.” 16 U.S.C. § 824a-3(d) (emphasis added). Thus, it is the terms “incremental cost of alternative electric energy” that *means* avoided cost, not the terms “electric energy” – which is simply a reference to the provision of electricity itself, without a particular value. *See also, e.g.*, 18 C.F.R. § 292.101 (defining “avoided cost” as “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source”).

Accordingly, if Congress had intended, in Energy Policy Act Section 1251, 16 U.S.C. § 2621(d)(11), to limit the value of electricity under net metering programs to avoided cost, the section would have read as follows:

“net metering service” means service to an electric consumer under which *the incremental cost of alternative* electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period.

The fact that Congress chose to simply refer to “electric energy” thus demonstrates that Congress intended to leave questions about the *value* of that energy in the hands of the states, where it has always belonged. *Williams v. Taylor*, 529 U.S. 362, 367 (2000)

(reiteration the “cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute”).¹¹

Second, NERA’s view of Section 1251 must be rejected because it would make the provision largely superfluous. *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (reiterating statutory canon against “adopt[ing] an interpretation of a congressional enactment which renders superfluous another portion of that same law”) (other citations omitted). As NERA acknowledges, NERA Pet. at 31-33, the original 1978 PURPA statute *itself* dictates that retail solar providers are entitled to receive, at minimum, avoided cost. Given that backdrop, if – as NERA claims – Section 1251 similarly limits the value of generation to avoided cost, there would be nothing for states to “consider” and “make a determination on” regarding net metering. *See* 16 U.S.C. §§ 2621(a), 2622(b)(3)(A) (requiring each regulatory agency to “consider” and make a “determination” on net metering standards by 2007).

Third, when the “net metering” provision is compared to the other programs Congress directed states to consider under 16 U.S.C. § 2621(d), it is even more apparent that Congress intended to provide states added flexibility in taking steps – such as retail net metering – that would improve renewable energy development, not limit it. *See Star Athletica, L.L.C. v. Varsity*

¹¹ Accordingly, as the Congressional Research Service recently explained in summarizing this provision, “the law did not specify how customers should be compensated” for their excess electricity. *See* Cong. Rsch Svc., *Net Metering: In Brief* (Nov. 2019) at 6, available at <https://crsreports.congress.gov/product/pdf/R/R46010>; *see also, e.g., Reference Manual and Procedures for Implementation Of the PURPA Standards” in the Energy Policy Act of 2005* (sponsored by, *e.g.*, the Edison Electric Institute) at 36-38 (discussing the options this provision provides states to provide full net metering or other approaches), available at <https://www.energy.gov/sites/prod/files/Manual%20for%20Implementation%20of%20PURPA%20Standards%20in%20EPACT%202005%20%28March%202006%29.pdf>.

Brands, Inc., 137 S. Ct. 1002, 1010 (2017) (reiterating the importance of “look[ing] to the provisions of the whole law” in ascertaining the meaning of a particular provision). Thus, for example, Section (d)(12) directs states to consider fuel diversification, “including renewable technologies”; Section (d)(14) calls on states to consider critical peak pricing and related measures to reduce load and improve price signals; and (d)(15) addresses interconnection between an onsite generator’s facility and the grid. 16 U.S.C. §§ 2621(d)(12), (14), (15). These standards are all intended to both increase renewable energy development and decrease utility reliance on fossil fuels – an intention that is fundamentally at odds with NERA’s view of Section 1251.¹²

Accordingly, the NERA Petition can – and should – be rejected in light of Section 1251 of the Energy Policy Act.¹³

B. The Federal Power Act Also Does Not Compel Federal Jurisdiction Over Net Metering.

NERA claims that because the Federal Power Act treats “sales for resale” as under federal jurisdiction, and because energy going from a retail generator to the grid is then sold to another customer, then *ipso facto* all such generation is at wholesale. NERA Pet. at 19-21. Once again, NERA is mistaken at every turn.

¹² See Andrew Satchwell, et al., *Current Developments in Retail Rate Design: Implications for Solar and Other Distributed Energy Resources*, Lawrence Berkeley National Laboratory (2019), <https://escholarship.org/content/qt1bc7t5gz/qt1bc7t5gz.pdf> (finding alternative rate structures, including net metering structures at less than the full retail rate, constrain distributed solar development).

¹³ As we discuss next, there is no conflict between this conclusion and the Federal Power Act, but even if FERC found merit in NERA’s crabbed reading of the latter statute, the more recent Energy Policy Act would plainly control. See, e.g., *Watt v. Alaska*, 451 U.S. 259, 266, (1981) (noting “maxim of construction that the more recent of two irreconcilably conflicting statutes governs”) (citing 2A C. Sands, *Sutherland on Statutes and Statutory Construction* § 51.02 (4th ed. 1973)).

As a threshold matter, nothing in the statutory language forbids FERC from its long-standing view that these are not sales for resale because they are *not sales at all*. Rather, consistent with Congress’s express language in the Energy Policy Act, where a state program provides for an “offset” of electricity “during the applicable billing period,” 16 U.S.C. § 2621(d)(11) there is simply no sale for resale for FERC to exercise jurisdiction over during that period.¹⁴

While NERA strives mightily to argue that Congress had a different intention in the Federal Power Act, NERA ignores one critical fact: generation from retail customers did not exist when the Federal Power Act was enacted. It thus simply makes no sense to suggest that Congress intended this technology – developed decades later – to be subject to federal control. Rather, as former Chairman Norman Bay explained in testimony to Congress:

[W]hen you look at the Federal Power Act, the purpose of it, when Congress passed it decades ago, was to ensure competition in the markets, and to ensure that rates remain just and reasonable. And so, to my mind, it is not clear that when Congress passed this law, it intended some individual who has a rooftop solar unit to be viewed as a utility within the meaning of the Federal Power Act, and to be subject to Federal regulation. And I think the further argument can be made that those kinds of units, far from impeding competition, are actually furthering it. So I think that there are a number of arguments there, not only based on the language and the history of the Act, but also based on a traditional recognition of State sovereignty in the area.¹⁵

¹⁴ *MidAmerican Energy Company*, 94 FERC P61,340, 62263 (Mar. 28, 2001) (“no sale occurs when an individual homeowner [] installs generation and accounts for its dealings with the utility through the practice of netting.”); *Sun Edison LLC*, 129 FERC P61,146 (2009); Order No. 2003-A, at 175 (stating that “net metering allows a retail electric customer to produce and sell power onto the Transmission System without being subject to the Commission’s jurisdiction.”).

¹⁵ Dec. 1, 2015 Testimony of Chairman Norman Bay before the U.S. House of Representatives, Subcommittee on Energy and Power, Committee on Energy and Commerce, at 59, available at <https://docs.house.gov/meetings/IF/IF03/20151201/104237/HHRG-114-IF03-Transcript-20151201.pdf>; *see also* 16 U.S.C. §824(b) (recognizing that matters of “local distribution” would generally remain under local control).

Accordingly, as the Supreme Court has made clear in recent cases, given that “the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed,” *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 776 (2016), there is ample room within the Act for states to continue to promote their own local policies, including “the development of new or clean generation, including tax incentives, land grants, direct subsidies,” or other measures “untethered to a generator’s wholesale market participation.” *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016).

Moreover, NERA’s argument flies in the face of not only FERC’s own long-standing interpretation, but that of every other federal agency that has considered the matter. Thus, for example, when the Tennessee Valley Authority implemented its version of a net metering program, the agency initially set a “premium price” for excess generation specifically “to promote” distributed energy investments, and then later reduced that rate to closer to the retail rate – all without even suggesting that it was under some kind of legal obligation to compensate at no more than avoided cost. *See* 72 Fed. Reg. 44910, 44,911 (Aug. 9, 2007).

Similarly, the Department of Energy has long been engaged on policy questions regarding net metering. *See, e.g.*, 82 Fed. Reg., 43345 (Sept. 15, 2017) (Dept of Energy Request For Information On Costs and Benefit Considerations of Net Metering). However, like FERC, that agency has always interpreted the relevant federal statutes to permit states to determine the features of those programs, including price. *See, e.g.*, Dep’t of Energy Webpage on PURPA (stating, in reference to net metering, that “Congress has chosen not to itself regulate these retail-level decisions at the Federal level and thus preserve the legal authority of States (or local governing boards) to make these decisions . . .”).¹⁶

¹⁶ Available at <https://www.energy.gov/oe/services/electricity-policy-coordination-and->

Thus, in NERA’s view, not only FERC, but every federal agency to have considered how to implement both the Federal Power Act and the Energy Policy Act have misunderstood it, and only NERA knows what Congress plainly intended in language that says nothing at all about this issue. That cannot be. As the Supreme Court recently explained in rejecting other petitioners’ claims that only they understood the statutory scheme, “it seems more than a little unlikely, and quite a lot to find” petitioners’ lonely interpretation “buried deep in” the provision at issue. *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1903 (2019) (rejecting argument that the Atomic Energy Act preempts state law).

That leaves only NERA’s remarkable claim that, while FERC and everyone else may have thought they understood how federal law applied to retail net metering, the D.C. Circuit *sub silentio* overturned those interpretations ten years ago in a proceeding that had nothing at all to do with retail net metering. NERA Pet. at 15-18 (citing *S. Cal. Edison Co. v. FERC*, 603 F.3d 996 (D.C. Cir. 2010)). To the contrary, in *S. Cal. Edison*, and in the later ruling in *Calpine Corp. v. FERC*, 702 F.3d 41 (D.C. Cir. 2012), the D.C. Circuit simply affirmed FERC’s determination, in the context of station power facilities principally engaged in electricity generation, that FERC lacks jurisdiction over determining “when the provision of station power constitutes a retail sale . . .” *Id.* at 45.

NERA’s strained effort to convert that unremarkable conclusion into a holding that states lack all authority over retail net metering holds no water, for these cases concerned an area where the Court agreed FERC has *no* jurisdiction, whereas here NERA claims the Commission must *assert* jurisdiction. Moreover, NERA’s reliance on the Court’s discussion of “netting

[implementation/other-regulatory-efforts/public](#); cf. *Medtronic v. Lohr*, 518 U.S. 470, 488 (1996) (recognizing that preemption of state law is “a serious intrusion into state sovereignty”).

intervals,” NERA Pet. at 15, simply ignores the fact that, unlike station power, Congress has spoken directly to retail customer net metering in the Energy Policy Act, where, again, Congress *expressly directed* that states consider allowing on-site generation be “used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period.” 16 U.S.C. § 2621(d)(11).

In short, there is simply no basis to NERA’s proposition that the D.C. Circuit – in a ruling affirming FERC’s *disclaimer* of jurisdiction under the Federal Power Act – was issuing a holding that somehow dictated that FERC has no alternative but *to declare its jurisdiction* over millions of retail net metering customers. *See, e.g., Union Texas Petroleum Corp. v. FERC*, 721 F.2d 146, 147 (5th Cir. 1983) (recognizing the “great deference” that must be afforded to FERC’s interpretation of statutes it administers).¹⁷

¹⁷ While similarly irrelevant to the disposition of this Petition, NERA’s extended policy arguments – and attached Report – also only further reinforce that policy debates about the value of net metering belong at the state level, as state regulators are in a position to evaluate the value of distributed solar generation in light of the unique circumstances present in each area of the country. *See* Paul Denholm, *et al., Methods for Analyzing the Benefits and Costs of Distributed Photovoltaic Generation to the U.S. Electric Utility System*, National Renewable Energy Laboratory (2014).

Moreover, before FERC considers any of NERA’s wholly inaccurate assertions concerning the value of distributed energy resources, the Commission should at bare minimum convene an evidentiary hearing to consider the substantial evidence that runs contrary to NERA’s bald claims. *See, e.g.,* National Renewable Energy Laboratory, *Distributed Energy Planning for Climate Resilience* (2018); Galen Barbose, *Putting the Potential Rate Impacts of Distributed Solar into Context*, Lawrence Livermore Nat’l. Laboratory (2017); Muro, M. and D. Saha, *Rooftop Solar: Net Metering is a Net Benefit*, 2016, Brookings Institution, available at <https://www.brookings.edu/research/rooftop-solar-net-metering-is-a-netbenefit/>; Searson, E. and Sargeant, R., *The True Value of Solar: Measuring the Benefits of Rooftop Solar Power*, Environment America 2020, available at <https://environmentamerica.org/sites/environment/files/resources/AME%20Rooftop%20Solar%20Jul19%20web.pdf>.

CONCLUSION

For all the foregoing reasons, the Center for Biological Diversity respectfully urges the Commission to deny NERA's Petition for a Declaratory Order.

Respectfully submitted,

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