

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Ratepayers Association

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Docket No. EL20-42-000

Motion to Intervene and Comments of the R Street Institute

Pursuant to Rule 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC or Commission), 18 C.F.R. §§ 385.214, the R Street Institute hereby moves to intervene and submit comments on New England Ratepayers Association's (NERA) filing submitted on April 14, 2020 in the above-captioned proceeding.

I. Motion to Intervene

A. About R Street Institute

The R Street Institute (R Street) is a nonprofit, nonpartisan public policy research organization. Our mission is to engage in policy research and outreach to promote free markets and limited, effective government. We favor regulation that is transparent and applied equitably, as well as systems that rely on price signals rather than central planning. At the same time, we recognize that natural monopolies and externalities are real concerns that governments must address. We offer research and analysis that advance the goals of a more market-oriented society and an effective, efficient government, with the full realization that progress takes time.

As one of the preeminent free-market entities in the United States, R Street has a unique perspective as to the issues raised in this proceeding regarding the appropriate role of FERC and state energy policy. Accordingly, their interests cannot be represented by any other party, and their intervention is in the public interest.

B. Communications

Correspondence and communications regarding this filing should be addressed to the undersigned as follows:

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II. Comments

A. Background

On April 14, 2020, the New England Ratepayers Association submitted a Petition for Declaratory Order requesting that the Commission (1) declare that there is exclusive federal jurisdiction over wholesale energy sales from generation sources located on the customer side of the retail meter, and (2) order that the rates for such sales be priced in accordance with the Public Utility Regulatory Policies Act of 1978 (PURPA) or the Federal Power Act (FPA), as applicable. FERC issued a Notice of filing on April 15, 2020, setting due date for comments for May 14, 2020. On May 4, 2020, FERC issued a Notice of Extension of Time to submit comments to June 15, 2020.

B. Overview of R Street's Comments

R Street is opposed to NERA's Petition requesting FERC to exercise jurisdiction over sales of electricity under state net energy metering (NEM) rules. NERA claims that NEM falls under FERC authority since certain state NEM programs are resales of electricity to a utility's retail customers, which makes the transaction a wholesale sale of electricity in interstate commerce.² NERA and the attached report of Ashley Brown provide a litany of negative impacts of NEM upon retail customers and impacts on the operation of the distribution system. In all cases, NERA's arguments should be rejected.

The issues raised by NERA are more appropriately, and legally, to be determined by the states. NERA's petition is an attempt to get around state authority and actions and fails to provide any justification for FERC to assert jurisdiction on a topic that for the entire history of FERC (and its predecessor the Federal Power Authority) has been firmly held by the states: the design and implementation of retail rates and service. Should FERC assert jurisdiction, FERC will be left with the sole authority to oversee the thousands of contracts and sales for NEM that are currently managed by states, municipal utilities or cooperatives. FERC has wisely avoided stepping too far into areas best left to the states, especially considering the varied types of utilities, utility

¹ Person designated for service.

² New England Ratepayers Association, Petition for Declaratory Order of New England Ratepayers Association Concerning Unlawful Pricing of Certain Wholesale Sales, Docket No. EL20-46 at 5-6 (filed April 14, 2020) (NERA Petition)

structures, policy preferences and customer choices. This would upset the long-held application of cooperative federalism as outlined by PURPA,³ and as described in *FERC v. EPSA*⁴ and *Hughes v. Talen*.⁵ FERC should reject NERA's petition.

C. FERC Lacks Authority Over NEM

FERC previously determined that it is not exerting authority over NEM sales. In both *MidAmerican*⁶ and *SunEdison*,⁷ FERC determined that state-level NEM transactions are not subject to FERC jurisdiction. NERA takes a part of those rationales—the role of netting—and uses two more recent cases related to station power complaints as justification for FERC to assert authority. In those cases, *SCE*⁸ and *Calpine*,⁹ the D.C. Circuit provided further clarity on FERC jurisdiction over netting of station power usage. NERA relies on a part of the *Calpine* decision that, in NERA's view, supports the view that netting of station power usage negates FERC's prior decisions on NEM. However, as the D.C. Circuit concluded, the reach of this case is appropriately narrow—"it simply determines under what conditions generators will be assessed transmission and retail charges for their use of station power" and "[w]hile the regulation of transmission charges is undoubtedly within FERC's jurisdiction, retail charges are not."¹⁰ The lengthy review of the D.C. Circuit's attempt to understand *Calpine*'s position should be considered as dicta—in this case, the D.C. Circuit was merely using an analogy to explain *Calpine*'s position.

NEM is not the equivalent of station power. As noted in *SunEdison*, under NEM, a third party contracts with an end-use customer to provide service.¹¹ The customer maintains service with the distribution utility. The amount of electricity generated by the NEM resource allows the customer to reduce its utility bill. When there is excess electricity, that electricity is then compensated back to the customer at a rate determined by the state regulatory commission, or by statute for utilities not under state regulatory jurisdiction. For customers who do not produce more electricity in a given month, as set by state NEM practices, there would be no excess over the course of a month. As noted in both *SunEdison* and *Calpine*, those costs are subject to state jurisdiction.¹² States have freedom to craft their NEM policies however they like, consistent with the both the Federal Power Act and the applicable state laws. *Calpine* is clear that FERC does not have jurisdiction over retail charges.¹³ In sum, *Calpine* does not support NERA's petition, and should not be read to equate the different situations between station power and the treatment of excess electricity provided to distribution utilities under a

³ 16 U.S.C. § 2621(d)(11).

⁴ *FERC v. EPSA*, 577 US ____ (2016).

⁵ *Hughes v. Talen*, 578 U.S. ____ (2016).

⁶ *MidAmerican Energy*, 94 FERC ¶ 61,340 (2001).

⁷ *SunEdison LLC*, 129 FERC ¶ 61,146 (2009).

⁸ *Southern California Edison v. FERC*, 603 F.3d 996 (D.C. Cir. 2010).

⁹ *Calpine Corp. v. FERC*, 702 F.3d 41 (D.C. Cir. 2012).

¹⁰ *Calpine*, 702 F.3d 50.

¹¹ *SunEdison* at P. 19.

¹² *SunEdison* at P. 19; *Calpine*, 702 F.3d at 50.

¹³ *Calpine*, 702 F.3d at 50.

state NEM program. As such, FERC does not have authority under the Federal Power Act to assert jurisdiction over state NEM policies.

D. Lack of Specified Harm

NERA's petition also suffers for lack of direct harm. NERA's petition fails to note how its members are specifically harmed by a specific state NEM program. Instead, NERA casts a wide net over every NEM program across the country.¹⁴ This puts FERC in an untenable position of identifying specific NEM program details of every state and every applicable utility. Not every NEM program around the country is the same. Every state and distribution utility has different costs and policies, and the effects of NEM are also therefore different. As will be discussed below, the supposed harm identified by NERA in its petition is entirely with the distribution utility and its retail customers, and therefore appropriately within the authority of the states. The operations of the distribution utility, how the distribution utility charges customers and operates its system is entirely within the jurisdiction of the state, or its local governments and boards. Since NERA fails to express an argument with any specifics, FERC should reject NERA's petition.

E. States are Best Prepared to Address NERA's Issues

As NERA notes, there are over 40 states with NEM programs.¹⁵ NERA's petition is grounded in a set of generalities about the nature of NEM without providing additional details to provide FERC with a detailed set of issues about NEM itself. For example, NERA takes aim at the monthly netting of NEM. NERA argues that the monthly netting that currently occurs with most NEM programs should be done on a much shorter basis, such as hourly, in accordance with wholesale market rules.¹⁶ FERC Order 888 allows states to determine whether to join an Regional Transmission Organization (RTO), and associated rules identified by NERA govern participation in organized wholesale markets. Not every state is part of an RTO, so applying those rules for organized wholesale markets to the distribution level would be an inappropriate extension of FERC authority into those states without organized markets.

NERA also argues that all sales in excess of a customer's demand, at any time, are wholesale transactions and subject to FERC jurisdiction.¹⁷ This is an astounding position to take. NERA is asking FERC to assert jurisdiction and provide a set rate, across the country, for every minute or hour in which a customer exports electricity back onto the distribution grid, even if, over the course of a customer's billing period, they consume more electricity from the distribution utility. This would be an unreasonable assault on state sovereignty and subject states to a one-size-fit-all construction that is completely devoid of any analysis regarding actual costs and benefits being provided to the system.

¹⁴ NERA Petition at 18.

¹⁵ NERA Petition at 3, citing National Renewable Energy Laboratory, *Net Metering* (May 29, 2019).

¹⁶ NERA Petition at 26-30.

¹⁷ NERA Petition at 22.

Separately, NERA also claims that existing NEM programs are violating PURPA by not compensating NEM at avoided cost.¹⁸ NERA's expert, Ashley Brown, further states that NEM causes operational problems with the distribution system and increases costs of the distribution utility to respond to the growth of NEM.¹⁹ NERA misses the point of avoided cost methodologies, which is to balance the costs and benefits of investments over time. All things being equal, a resource would be compensated for avoiding other, more expensive solutions. However, NERA fails to account for benefits of distributed solar under NEM programs.²⁰ In developing the avoided cost, states must balance a set of costs and benefits. NERA only focuses on the costs and claims that NEM and rooftop solar provide no benefits. This is simply untrue. State commissions around the country have NEM proceedings where they go through this exact methodology, based on evidence presented by all parties. Those determinations are then guided by state policy. For example, some states are concerned about carbon emissions and may direct state commissions to include societal benefits or a cost of carbon. Other states may focus on other components. Having FERC adjudicate the costs and benefits for the distribution utility goes well beyond the authority of FERC and would severely impact our federalist government system.

Furthermore, NERA claims that NEM programs result in an increase in intermittent, more expensive and less firm resources on the distribution system.²¹ It is not FERC's job to manage the operations, rates and investments of the distribution utility—that is the job of the states. Indeed, NERA's petition seems utterly unaware of the emergence of technologies like advanced inverters and non-wires alternatives, and state regulatory initiatives on distribution system planning. The result of NERA's petition, should FERC accept it, would be a need for FERC to approve investments in distribution system, retail rates to recover those costs and manage the operation of the distribution system, all of which is inconsistent with the FPA. All the issues identified by NERA and the attached report of Ashley Brown are fully within the authority of the states.

For example, NERA notes the emergence of the “duck curve” scenario from the California Independent System Operator.²² In that instance, solar PV produces an excess of electricity across the California ISO footprint. Then, as the sun sets, a ramp occurs in the evening to

¹⁸ NERA Petition at 32-33.

¹⁹ NERA Petition at 38.

²⁰ In its petition, NERA raises a theory that NEM should only be compensated for the energy portion of its service, and infers that NEM does not provide transmission, distribution, or ancillary benefits. This is wrong on its face. This would no doubt be a surprise to FERC since its Orders 719, 745, and 841 all focus on the ability of DER to participate directly in wholesale markets, thereby providing ancillary services value to those markets. NEM clearly provides distribution value through the avoidance of procurement of extra generation and potential deferral of other infrastructure. Lastly, updates to IEEE 1547-2018 enables the advanced inverter to provide services, such as voltage ride-through and volt-var support, directly to the distribution grid. See, e.g., *Resolution Recommending State Commissions Act to Adopt and Implement Distributed Energy Resource Standard IEEE 1547-2018*, NARUC (adopted February 12, 2020).

²¹ NERA Petition at 37-38.

²² Report of Ashley Brown at 17.

replace the lost electricity from the solar output. FERC and California are fully handling that situation through a change in the retail rate structure, the passage of energy storage procurement targets, the increased use of energy efficiency and demand response, and the development of distribution system planning initiatives and distribution locational valuation methodologies.

At its core, NERA's complaint is based on its perception that NEM favors resources at the expense of utility resources and asks FERC to interfere with state policymaking to achieve its preferred outcome. The problems identified by NERA with NEM are entirely within the authority of state or local authorities. It is within state authority to determine the base metering technology to generate bills; it is within state authority to review utility costs for distribution; it is within state authority to review and adopt retail rates; and it is within state authority to set rules for implementation of retail programs. NERA ignores that NEM programs and, more broadly, distributed energy resources, are capable of solving local distribution solutions.

R Street recognizes that NEM may not be the most efficient program to facilitate growth of distributed energy resources. However, NERA's petition is not about the reasonableness of NEM—NERA's petition is to have FERC assert jurisdiction into areas that rightly belong to the states. R Street supports the basic ratemaking principle of cost causation; however, NERA falls into the trap of only looking at costs from one perspective, without accounting for the commensurate benefits that come from new resources. The development and determination of those costs and benefits vary across a utility's service territory. The entities in the best position to determine those distribution and retail costs and benefits are the state and local authorities.

F. States are Responding to NERA's Concerns

NERA identifies a number of additional issues with the growth of solar PV due to NEM. Notably, NERA argues that the growth of NEM increases costs to the utilities to meet demand, makes other resources less competitive and increases costs to customers. All of these are without merit. Furthermore, even assuming they were true, those issues are all firmly within the jurisdiction of the states, and state commissions are addressing these issues.

i. There is no cost shift

NERA states that NEM increases costs to consumers and "does not reduce transmission investment costs and may not reduce losses."²³ NERA and the attached report of Ashley Brown dismiss the benefits of NEM from avoided power purchases, avoided capacity needs, avoided construction costs and all around lowering of capital expenses. Those are all benefits that flow through to customers and are unaccounted for in NERA's arguments.²⁴ NERA then includes a

²³ NERA Petition at 42.

²⁴ Most basic NEM cost of service studies include a defined set of costs and benefits. NERA simply cannot choose to ignore those benefits.

generic argument that NEM will increase costs to the distribution system due to the need to re-design the distribution system.

NERA couches its argument under the guise of equity between more affluent customers who install solar and other communities that have less capability to purchase solar. Regardless of NERA's perspective, there are clear categories of benefits from NEM, and avoided cost methodologies are not limited only to the confines of transmission. Even if NEM benefits affluent customers, the end result remains the same: the utility avoids construction of new transmission and new generation. For the distribution system, it may result in new distribution spending, but that is entirely within the confines of state regulation. State commissions are responsible for ensuring there is a reasonable balance between a myriad of policy objectives at the state level and ensuring that rates and prices are reasonable. NEM is no different. NERA avoids any semblance of an attempt to construct an argument that NEM benefits can be greater than its costs, because it knows that a) those determinations are highly dependent upon the utility's costs and rates, and b) the states are in the best position to make those decisions—not FERC.

Impacts across customer classes, which are within the authority of the states, depend on more than the simple belief that NEM is inequitable. NERA fails to show any numbers or analysis identifying this inequity. A state with a low amount of NEM will have a significantly different analysis than a state with high amounts of NEM adoption. For example, in a state with a low amount of NEM, like Arkansas, any "subsidy" would be minimal because there is so little actual usage of the program.²⁵ On the other hand, in a state like Hawaii with a very substantial amount of NEM, the state can act to minimize the initial impacts of the NEM program and continue to modify it as the program goes on, which is exactly what the Hawaii Public Utilities Commission has done.²⁶ Considering the success of Hawaii's NEM program, the Hawaii Commission noted that changes to NEM were "necessary to ensure a smooth transition to a re-designed, market-based structure for distributed resources in Hawaii."²⁷

This adoption is not only a function of the compensation rate, but also the retail rate. If NERA is so concerned about the compensation level for NEM, their real focus should be on trying to make the retail rate more in-line with costs and reflective of the costs to serve. For example, in 2017, NorthWestern Energy in Montana was directed to conduct a NEM cost benefit analysis pursuant to an order of the Montana Public Service Commission.²⁸ NorthWestern issued their

²⁵ Recently, the Arkansas Public Service Commission issued a major order in regards to its NEM program. The Arkansas Commission kept the full retail rate compensation for non-demand billed customers, and notes that in the future, it may be necessary to move to a different rate. *In the Matter of Net Metering and the Implementation of Act 827 of 2015*, Order No. 28, Docket No. 16-027-R (issued June 1, 2020).

²⁶ In 2015, the Hawaii Public Utilities Commission voted to end the old version of NEM and move to a structure that provides compensation close to or at the wholesale price of electricity for Hawaii.

²⁷ *In the Matter of Public Utilities Commission Instituting a Proceeding to Investigate Distributed Energy Resource Policies*, Decision and Order No. 33258, Docket No. 2014-0192 (issued October 12, 2015).

²⁸ *In the Matter of Establishing Minimum Information Requirements for NorthWestern Energy's Study of the Costs and Benefits of Customer Generators*, Notice of Commission Action, Docket No. D2017.6.49 (issued August 9, 2017).

cost benefit report in 2018, and it showed a levelized value of less than \$0.05/kwh.²⁹ Also in 2018, the Maryland Public Service Commission issued a report that showed a value from behind the meter solar between \$0.30-0.38/kwh.³⁰ The difference in those valuation models can be tied largely to the difference in average retail rates.³¹ This would include greater advocacy for time of use rates, which would go much further to address NERA's complaint about cost shifting and equity than having FERC assert jurisdiction over NEM. NERA of course cannot ask FERC to do so since retail rate design is solely within the auspices of the state.

States are fully aware of these issues and have routinely reviewed the costs and benefits of NEM compared to the potential for unfair shifting of costs onto non-participating customers. The states have done their job, based on the record evidence before them, and have rendered decisions on the appropriate methodology for compensating NEM. Additionally, states recognize that NEM will need to evolve as adoption grows.³² FERC should allow the states to continue this work and reject NERA's petition.

ii. States are moving ahead with grid modernization

NERA also identifies issues with the operations of the distribution system in regard to the growth of NEM programs. While firmly within the authority of the states, it is important to note that where NEM and solar adoption are growing, state commissions around the country are addressing that growth through review of rate designs, but, most importantly, through the development of grid modernization and distribution system planning initiatives. These initiatives are not limited to solar-heavy states but include states with little amounts of solar. States from California and Hawaii to New Hampshire, Rhode Island and Arkansas have all opened proceedings specifically looking the evolving role of the distribution system. Topics that these states are addressing include more transparent distribution system planning, hosting capacity analysis and interconnection reform.

FERC itself, in RM18-9-000, recognizes the changing nature of the distribution system in response to the growth of distributed energy resources across the states. FERC would do best to continue the work in that docket to develop policies that focus on better alignment and integration of distributed energy resources (including NEM resources) with wholesale markets than take up this petition when states are already doing much of what NERA claims needs to be addressed.

²⁹ "Net Energy Metering (NEM) Benefit-Cost Analysis," Navigant Consulting, prepared for NorthWestern Energy (March 29, 2018).

³⁰ "Benefits and Costs of Utility Scale and Behind the Meter Solar Resources in Maryland," Daymark Energy Advisors, prepared for the Maryland Public Service Commission (November 2, 2018).

³¹ This also goes against NERA's overall argument against cost-effectiveness of NEM itself as the retail rate is the biggest difference in these studies.

³² See, "Distributed Energy Resources Rate Design and Compensation: A Manual Prepared by the Staff Subcommittee on Rate Design," NARUC (November 2016).

iii. Petition seeks to limit a state's ability to respond

Not only are states looking to better understand the nature of the distribution system and develop policies to provide better guidance to distribution utilities going forward, but should FERC assert jurisdiction over NEM programs, this would greatly harm and limit the ability of the state itself to develop and design innovative programs. State policy reflects the interests and needs of the given state. Those vary across the country. A state that may identify a need for hosting capacity as an avenue to address the differences in costs across a utility's distribution service territory would be limited in the value of those policies due to FERC's taking control of NEM. A one-size-fits-all NEM tariff would substantially affect the states' ability to effectively respond to the growth of NEM and craft appropriate policy changes in response to that growth. FERC would likely have to develop a utility-by-utility set of avoided cost methodologies and values. This would create an enormous administrative burden on FERC and provide no benefit, as the states already perform this work.

States have superior access to utility-specific information to make these decisions, compared to FERC. Further, utility-specific NEM policy also interacts with other state rate vehicles, which furthers the compelling point that the most economical and legally defensible institutional arrangement for NEM resides with state authority. As noted previously, states like Montana, Maryland, Arkansas and Hawaii, among many others, have gone through extensive record development, studies and reports investigating the appropriate costs and benefits for their respective utilities. This is substantial work accomplished by state commissions, utilities and stakeholders who best understand the landscape in their respective states. A significant contributor to any difference between value is tied to the retail rate, which reflects the variety of rate design goals and objectives of the state. For FERC to attempt to wade into an area would be a significant administrative burden to FERC and stakeholders.

G. NERA's Petition Seeks to Protect Utilities from Competition

One of FERC's main objectives is to facilitate and grow competition across the areas under its jurisdiction. This has resulted in many FERC Orders that are designed to enable markets. FERC Orders, such as Order 888, Order 1000, Order 2000, Order 745 and Order 841 all focus on eliminating barriers to market participation for entities across the country. In this petition, NERA seeks to flip FERC's support of markets on its head. NERA states that NEM's "overpayments result in over-investment in the production of this less efficient and reliable energy with a corresponding reduction in investment in both grid-based renewable generation (e.g., wind and central station solar) and the resources that provide the dispatchable firm power required for reliable operations" and that NEM "allows the sellers of behind the meter energy to avoid competition, even if competition is defined narrowly to include only renewable forms of energy."³³ What NERA is really asking for here is to protect utilities and utility-scale

³³ NERA Petition at 37-38.

projects from competition. This is laid bare here: “forcing electric consumers to pay the bundled retail rate for one form of variable renewable energy, when energy with all of the same environmental attributes can be purchased for a fraction of that amount from the grid, is untenable. ... It will also stifle innovation as capital is inefficiently directed to one of the least efficient forms of renewable energy and FNM sellers are disincentivized to make their product better.”³⁴ In short, NERA is asking FERC to pick winners and erect new barriers to entry for competitive resources.

The growth of NEM programs across the country reflects the desire of retail customers for more choice than what is otherwise provided to them by their local monopoly. Even in states without retail choice, NEM affords customers an opportunity for choice and engagement with market-based innovation of products and services, including solar PV. Solar panel costs continue to decline as traditional technology curves would suggest. Similarly, storage costs are following the same, if not a faster cost decline curve. This all means that customers will be seeing even more opportunity for choice and options from the market. NERA’s petition is an attempt to stifle these markets and innovation. NERA would prefer that FERC adopt a one-size-fits-all solution to NEM programs while allowing utility-scale programs to continue without being subjected to competition. This takes away customer choice, market development and the ongoing and quickening pace of innovation and cost declines.

Indeed, NERA notes that NEM “also inefficiently allocates capital to behind-the-meter generators by generating excessive profits to this class of generators while more efficient renewable and non-renewable generators located on the grid-side of the meter are paid wholesale market prices or avoided costs. If the Commission turns a blind eye to the distortions created by FNM, it will be abandoning its commitment to promoting efficient, non-discriminatory power markets.”³⁵ If FERC accepts NERA’s petition, FERC will instead be abandoning its commitment to lowering barriers to entry to new technology and will be protecting resources from competition.

Markets are a far better means of allocating resources. It goes without saying that in the electric industry, all players receive some form of subsidy, be it Price-Anderson protection for nuclear, federal and state subsidies for coal and natural gas production and delivery, or NEM. Customers are deciding for themselves that they may have concerns beyond simply looking at the cheapest resource and are willing to pay a premium for resources that satisfy concerns other than costs. If FERC steps in, it will be intruding into an emerging market that is driven by customer choice and customer demand. NERA’s attempt to cast NEM as a barrier to carbon reductions and storage adoption is simply untrue. NERA may prefer utility-scale resources to be the only type of resource to achieve those goals, but customers are routinely preferring the company of others.

³⁴ NERA Petition at 38-39.

³⁵ NERA Petition at 39.

Large commercial and business customers are increasingly looking to meet corporate sustainability goals. Across the country, these corporate goals are being met by non-utility providers. Additionally, in many cases, these needs are satisfied by market providers at costs lower than the distribution utility. The only entity blocking the ability of states and customers from meeting their carbon reduction goals are utilities and their often unidentified partners who seek to eliminate the market opportunities for these resources. FERC should reject NERA's attempt to protect utilities from competition.

H. FERC Should Support Federalism

Should FERC agree with NERA's position, it would have a significant impact on our system of federalism. Under the FPA, FERC's authority is to regulate the transmission and wholesale sales of electricity in interstate commerce. In *FERC v. EPSA*, Justice Kagan, writing for the majority, described the dual roles of the state and FERC regarding the regulation of demand response. In her opinion, FERC Order 745, which prescribed compensation for demand response that participated in wholesale markets, was within FERC jurisdiction. In discussing FERC's authority over demand response, Justice Kagan states that "every aspect of the regulatory plan happens exclusively on the wholesale market and governs exclusively that market's rules. What is more, the Commission's justifications for regulating demand response are all about, and only about, improving the wholesale market."³⁶ Furthermore, "To set a retail electricity rate is thus to establish the amount of money a consumer will hand over in exchange for power. Nothing in § 824(b) or any other part of the FPA suggests a more expansive notion, in which FERC sets a rate for electricity merely by altering consumers' incentives to purchase that product."³⁷ Justice Kagan clearly notes that FERC's authority covers areas directly affecting wholesale markets, and the rest is left to the states. This is exactly what NEM does. The state determines the rate for compensation under NEM, consistent with the requirements of PURPA.

In another recent case, *Hughes v. Talen*, the Supreme Court took up another case looking at the relationship between FERC and state authority. There the Supreme Court overturned a Maryland statute that sought to infringe on the sole authority of FERC. However, Justice Ginsberg, writing for the majority, notes that the alignment between federal and state authority may be more discrete. Justice Ginsberg notes that, "States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain. But States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates, as Maryland has done here."³⁸ Justice Ginsberg concludes that there are steps that "States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures 'untethered to a

³⁶ *FERC v. EPSA*, slip op. at 20.

³⁷ *FERC v. EPSA*, slip op. at 21-22.

³⁸ *Hughes v. Talen*, slip op. at 12-13.

generator's wholesale market participation.'"³⁹ In both *EPSA* and *Hughes*, the Court is making clear that FERC and the states have significant roles to play in the ongoing technological progress occurring across the country, and that cooperative federalism can be a boon to those policies. Since NEM is appropriately within state authority, FERC should reject NERA's petition.

Nevertheless, FERC should support federalism for more than just the legal reasons outlined by the FPA and the courts. States are crafting policies that provide greater customer opportunities, well beyond what has previously been possible. These state policies, especially in the areas of solar and energy storage, are bringing increasing value to customers. These distributed energy resources are being used by customers, third parties and even utilities to better manage individual customer demand and better optimize the operations of the distribution system. States are leading the way on policy developments to support the continued development of these technologies. Along with that, states are taking a closer look at utility distribution operations and integrated resource planning. NEM is an important component of these state-led initiatives. By asserting itself into these conversations, should it agree with NERA's petition, FERC will make it harder for states to craft solutions to these challenges. It will also weaken the quality of state policy on distributed energy resources and make it more difficult to respond to market changes in solar.

Should FERC want to work with states more cooperatively, a better avenue is its open docket on distributed energy resources aggregation. There, FERC is looking at crafting rules for RTOs that would compensate aggregated distributed energy resources for wholesale products and services. FERC has asked several important questions, including the notion of coordination between an RTO and a Distribution System Operator to ensure that the each operator has sufficient understanding of what each operator is doing, including when distributed energy resources are dispatched by the RTO. In this instance, states and FERC must cooperate to ensure that both wholesale markets and retail markets are operated in alignment to ensure an efficient operation of both components, while being respectful of the policies of each. In this case, NEM, as a state policy, would require the distribution system operator to have sufficient visibility, policies, and programs to understand the impacts of NEM and the locations of NEM participants. The distribution system operator would then provide that information to the RTO to assist it in managing its system. FERC does not have the authority to infringe on states' authority to oversee and manage the retail side of the utility. It must craft policies in conjunction with states.

Lastly, surely FERC is aware of the growing number of states that are concerned with what they view as FERC infringing on state decision-making and policy development. One of the results of this belief is a loss of faith in wholesale markets. States such as Maryland, New Jersey and Connecticut have all announced their intentions to investigate leaving wholesale capacity markets due to FERC's intrusion into state authority. Should FERC accept NERA's petition, R Street is concerned that it may result in a greater number of states looking to exit wholesale

³⁹ *Hughes v. Talen*, slip op. at 15.

organized markets entirely, not to mention stamping out any movement in the Southeast, Mountain West or Pacific Northwest toward creating an organized wholesale market.

III. Conclusion

For the reasons described herein, FERC should reject NERA's petition. NERA's petition fails to provide any reasonable showing of harm, fails to provide any specifics on how a particular state NEM program is within FERC jurisdiction under the FPA and is otherwise inconsistent with practices of federalism. Furthermore, many of NERA's concerns with NEM are best left to the states, and, in many cases, are already being addressed by the states.

Respectfully submitted,

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Dated at Washington, D.C.
This 15th Day of June 2020

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing pleading has this day been served in a manner permitted by Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010) on each person whose name appears on the Official Service List compiled by the Secretary in this proceeding.

/s/ NAME
NAME

Dated at Washington, D.C.
This 15th Day of June 2020.