

CLIENT ALERT

Net Metering Policies Challenged At FERC

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The New England Ratepayers Association (NERA) petitioned the Federal Energy Regulatory Commission (FERC) last week to assert jurisdiction over net metering programs created by states which allow a customer to receive credits on its retail electricity bill for generation from rooftop solar or other behind-the-meter generation in excess of what the customer uses to meet its on-site needs. This would be a significant change in FERC's policy, established in 2001, which holds that there is no FERC-jurisdictional sale as long as the customer's load during the relevant billing period exceeds the amount of energy deliveries credited to the customer during that period (called the "netting" period). If FERC grants NERA's petition, and reverses its decades long precedent, it will increase the tension between FERC and the states and potentially undermine not only state objectives to incentivize renewable generation, but also the economic basis that retail customers relied upon when installing their on-site generation because, as NERA posits, any resulting rate likely will be lower than the value of the credits currently awarded under state net metering programs.

Net metering programs allow retail electric customers to generate their own electricity and to receive credit from their utility company for any excess above the amount used to meet the customer's on-site requirements. Net metering program rules and credit rates are set by the states. FERC's longstanding policy, first set out in *MidAmerican Energy Company*, 94 FERC ¶ 61,340 (2001), is to assert jurisdiction over net metering arrangements only to the extent net sales occur over a state-determined netting period, e.g., monthly, over which an end-use customer's sales and purchases are netted and often result in no net sales.

NERA says FERC should now reverse its policy. It argues that regardless of whether net sales occur over a netting period, delivery of energy by the end-use customer to the local utility that occurs as part of a net metering arrangement is a wholesale transaction (i.e., a sale to the local utility that provides the billing credit) over which FERC – not the states – has jurisdiction, and that such sales to the utility should therefore be valued at the wholesale price rather than the retail tariff rate that most states currently adopt as the net metering credit.

NERA relies heavily on two decisions of the Court of Appeals, District of Columbia Circuit, *Southern Cal. Edison v. FERC*, 603 F.3d 996 (D.C. Cir. 2010) and *Calpine Corp. v. FERC*, 702 F.3d 41 (D.C. Cir. 2012), finding that FERC exceeded its jurisdiction when it imposed a monthly netting period for the purpose of determining if a generator purchased electricity at retail when it consumed electricity for its own station power purposes. Typically, a generator will meet its on-site electricity needs (i.e. station power requirements) using its own operational generation equipment, but when its generator is idle, those on-site needs often are met by electricity delivered from the local utility. FERC said that no retail purchase occurred as long as the electricity provided by the local utility did not exceed the output of the generator during the monthly netting period, but the court rejected FERC's position, finding that FERC did not have the authority to set the netting period for determining whether deliveries from the local utility constituted retail sales. NERA argues that FERC's reliance on a netting period to define its jurisdiction over net metering sales is similarly impermissible.

There are some important differences between this station power precedent and FERC's net metering policy. The station power cases rejected a netting period imposed by FERC to define the scope of state jurisdiction over retail sales, and left the determination as to whether a retail sale occurred to the states. With respect to net metering, however, FERC determined it was appropriate to adopt the billing cycle specified by the state as the netting period for determining when a sale is subject to FERC's jurisdiction.

If FERC accepts NERA's position, it likely will create another jurisdictional conflict with states, which will argue that the decision effectively undermines state programs. Depending on how a wholesale energy price is determined, it very likely will be lower than the retail tariff rate typically credited under a net metering program, because, among other things, the retail rate is designed to also recover the costs of transmitting and distributing energy to retail customers. This could significantly reduce credits paid to net metering customers, making more difficult the economic case for rooftop solar and other behind the meter generation under state net metering programs, and which could be a particular hardship for customers that already made the decision to install on-site generation based on the economics of the then-existing net metering program and FERC's longstanding precedent.

NERA's petition is [available here](#), and comments are due by May 14, 2020. For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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