PROTEST OF PUBLIC INTEREST ORGANIZATIONS ACADIA CENTER, CLEAN WISCONSIN, CLIMATE + ENERGY PROJECT, CONSERVATION LAW FOUNDATION, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL LAW AND POLICY CENTER, IDAHO CONSERVATION LEAGUE, NATIONAL AUDUBON SOCIETY, NATURAL RESOURCE DEFENSE COUNCIL, NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION, PUBLIC CITIZEN, RENEWABLE NORTHWEST, RENEW WISCONSIN, SIERRA CLUB, SOLAR UNITED NEIGHBORS, SUSTAINABLE FERC PROJECT, WESTERN GRID GROUP, and VOTE SOLAR


(NERA) Petition for Declaratory Order (the “Petition” or “NERA Petition”) as procedurally inadequate or, in the alternative, deny the Petition on its merits.

The Commission should reject the Petition as procedurally improper because it seeks an abstract opinion on how the Federal Power Act applies to retail billing practices affecting millions of retail customers across 49 states, without a concrete set of facts or sufficiently defined controversy. NERA fails to identify its own stake in the outcome; facts about any actual retail billing practice under any specific retail net metering tariff; or a matter posing discrete legal uncertainty, as opposed to seeking a change in law. The Petition would not “terminate an actual controversy or remove uncertainty with respect to a specific matter capable of resolution,” as required for a declaratory order by this Commission. Instead, the Petition seeks an order that would both reverse established precedent and sow uncertainty regarding retail billing practices across the nation. NERA's Petition thus represents an abuse of the declaratory order process that should be summarily rejected.

To the extent the Commission reaches the merits, the Petition must be denied. Binding D.C. Circuit precedent rejects the specific outcome that NERA seeks: a mandate that retail authorities adopt the same billing interval in allocating

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2 We estimate, based upon data available through form EIA-861M, that there are approximately 2.3 million current participants in net metering programs in the United States, spanning 49 states and including many investor-owned utilities, electric cooperatives, and municipal utilities. The NERA Petition indicates net metering policies exist within 41 states, but that figure does not appear to include policies administered by coops or other entities.

3 Interstate Nat. Gas Ass'n of Am., 18 FERC ¶ 61170, 61337 (Feb. 24, 1982).
retail costs through retail rates as applied at wholesale. NERA’s fundamental premise is that by asserting jurisdiction over wholesale sales, this Commission can preclude a retail authority’s rightful role to allocate and bill for retail service costs. It is indisputable that “Full Net Metering” is a mechanism that assigns costs of bundled retail service and through which customers pay for retail service. The Federal Power Act therefore rightly leaves the choice whether to adopt net metering and the applicable periods for defining the retail rate components and billing determinants to the retail authorities. Thus, even if the Commission chooses to define a wholesale sale on a one-hour basis, as the Petition requests, it can mandate separate compensation for such short term electricity flows. However, it cannot mandate that retail authorities apply the same billing interval when designing retail rates.

Moreover, the Petition offers no reasonable basis for the Commission to depart from its established precedent disclaiming jurisdiction over retail billing practices. While NERA argues D.C. Circuit caselaw requires the Commission to revisit MidAmerican Energy Company (“MidAmerican”)4 and SunEdison LLC (“SunEdison”),5 the cases do exactly the opposite: they affirm the soundness of the Commission’s conclusion that its jurisdiction over wholesale sales does not preclude retail net metering. NERA also fails to offer new factual circumstances to warrant its request for a radical departure from the Commission’s MidAmerican and

5 129 FERC ¶ 61146 (2009).
SunEdison precedent. The Petition utterly lacks core facts that the Commission would need and offers no compelling case for the Commission to take on the impossible task of scrutinizing billions of retail billing transactions to identify any purported wholesale sales connected to them.

Lacking a basis in the law and key facts, the Petition fails to provide the Commission a rational basis for changing course and harming state decision-makers who acted based upon, and millions of customers who made investments in reliance upon, this Commission’s settled precedents.

Finally, while the Commission need not and should not reach the policy matter of net metering’s retail value—which is inherently a matter for state decision makers—we cannot leave NERA’s deeply flawed characterization of net metering policies unrebutted. Robust study and real-world experience demonstrate net metering policies can promote a broad range of important public benefits, including cost savings, and state policymakers have abundant reason to adopt this billing practice.
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I. NERA’s Petition Is an Abuse of the Declaratory Order Process.

NERA’s Petition seeks a declaration that state net metering laws throughout the country are unlawful because they conflict with the Commission’s jurisdiction over purported wholesale transactions by behind-the-meter resources. Such a broad attack against retail billing programs in place in a large majority of states is far beyond the proper scope of a declaratory order. Declaratory orders are discretionary, and this Commission’s precedent makes clear that a declaratory order is appropriate only when it tends to terminate controversy or remove uncertainty. Granting NERA’s Petition not only would fail to advance these goals, it would have the opposite effect. A declaration by the Commission that, in its view, state net metering program are preempted would have no legal effect because the Commission cannot overturn state laws by declaratory order. At most, a declaration would announce a future litigation position, should an entity with standing bring suit in an appropriate forum. Announcing a potential future litigation position in this context does not terminate uncertainty, it sows more uncertainty in an otherwise settled part of the nation’s energy landscape, inviting—indeed, necessitating—additional litigation to resolve. In short, NERA’s Petition is an abuse of the declaratory order process and the Commission should reject it.

6 Pet. at 44-45.
A. The Commission issues declaratory orders only to terminate controversy or remove uncertainty.

Under Rule 207 of the Commission's rules of practice and procedure, a declaratory order functions to “terminate a controversy or remove uncertainty.”7 As the Commission explained in 2008:

Any person seeking to terminate a controversy or remove uncertainty regarding a matter within the Commission's jurisdiction may file a request for a declaratory order under Rule 207(a)(2) of the Commission's rules of practice and procedure. The declaratory order process can be very useful to persons seeking reliable, definitive guidance from the Commission...As with other formal Commission actions, a declaratory order represents a binding statement of policy that provides direction to the public and our staff regarding the statutes we administer and the implementation and enforcement of our orders, rules and regulations. A declaratory order is therefore the most reliable form of guidance available from the Commission.8

The Commission has consistently denied petitions for declaratory order when issuing such an order would not terminate controversy or remove uncertainty—such as when “the petition does not present any issues that would affect any existing disputes concerning the Commission's regulatory responsibilities with respect to the petitioners.”9 Moreover, the Commission regularly denies petitions that do not arise

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7 18 C.F.R. § 385.207(a)(2).
8 Obtaining Guidance on Regulatory Requirements, 123 FERC ¶ 61157, 62025 (May 15, 2008).
9 Phillips Petroleum Co. & Marathon Oil Co., 58 FERC ¶ 61290, 61932 (Mar. 16, 1992). See also The Cities of Lafayette and Plaquemines, Louisiana v. Gulf States Utilities Company, Louisiana Power and Light Co., 47 FPC 62 (1972) (denying a petition for declaratory order, stating, “[w]e decline to engage in such hypothetical activities which offer a substantial likelihood of becoming academic and which would serve no valid present interests of the parties.”).
from concrete and well-established facts because declaratory orders “are based on the specific facts and circumstances presented,”\(^\text{10}\) and declaratory orders are, therefore, improper when a petition lacks a narrow and sufficient factual basis.\(^\text{11}\)

Thus, the Commission has previously denied petitions implicating broad policy questions ill-suited for resolution by declaratory order. In *Itc Grid Dev., LLC* (“*ITC Grid*”), the petitioner requested a declaratory order from the Commission finding that bids for transmission projects meeting certain criteria would be deemed just and reasonable, and thus entitled to protection under the *Mobile-Sierra* doctrine.\(^\text{12}\) The Commission denied the petition, observing that “the type of uncertainty that ITC describes is *uncertainty that results from applying the law as it currently exists, not uncertainty about what the law requires or whether the law applies to particular facts*. To mitigate this uncertainty as ITC requests involves matters of policy that are beyond the normal scope of a declaratory order proceeding.”\(^\text{13}\) That is, declaratory order procedures should not be used to change

\(^{10}\) *Puget Sound Energy Inc.*, 139 FERC ¶ 61242, at P 12 (2012).

\(^{11}\) *See, e.g.*, *Nw. Corp.*, 170 FERC ¶ 61266 (Mar. 27, 2020) (“[H]ere we exercise our discretion and decline to address NorthWestern's Petition and the various arguments raised in this proceeding. Whether or not avoided energy costs can be zero depends on the facts of the case, and here NorthWestern provides insufficient information upon which to base such a determination.”): *Interstate Nat. Gas Ass'n of Am.*, 18 FERC ¶ 61170, at 61338 (“With so many questions left unanswered, granting INGAA's petition would not be the judicious exercise of discretion by the Commission to terminate a controversy or remove uncertainty.”).


\(^{13}\) *Id.* at P 44 (emphasis added). *See also Interstate Nat. Gas Ass'n of Am.*, 18 FERC ¶ 61170, at 61337 (“[T]he issuance of a Declaratory Order is discretionary, and will only issue from the Commission if, in its opinion, the order will terminate an actual controversy or remove uncertainty with respect to a specific matter capable of
the law or stir up controversy based on existing law, but only to apply existing law
to specific facts to remove uncertainty.

B. NERA’s Petition does not present issues suitable for resolution by a declaratory
order.

NERA’s broad attack on state net metering policies across the country is not
susceptible to resolution by declaratory order. First, the Petition provides no
evidence whatsoever of a real-world controversy implicating the Commission's
regulatory responsibilities with respect to NERA. For example, it does not allege
that NERA or its members suffer adverse consequences from any particular net
metering policy, let alone substantiate the existence of any such particular policy
within states throughout the country. Additionally, while NERA grounds its
challenge to net metering in purported preemption by PURPA, NERA does not have
standing to actually enforce PURPA under section 210(h). Because only electric
utilities and Qualifying Facilities (“QFs”) may bring PURPA enforcement actions
under Section 210(h), and NERA is neither, there is no justiciable controversy to

resolution through the declaratory order procedure. Conversely, the Commission
has refused to utilize the declaratory order procedure where, as here, the
uncertainty is based upon the assumption of hypothetical facts which are not
actually extant and therefore, not susceptible of resolution through the issuance of a
declaratory order.”).

14 Pet. at 32.

15 NERA has stated that it is a nonprofit organization “established to advocate for
ratepayers located throughout every state in New England,” but its membership is
comprised of a small number of unidentified companies that each pay tens of
thousands of dollars yearly in membership dues. See Docket No. EL19-10, Motion to
Intervene Out-of-Time, and Comment of Public Citizen, Inc., Chairman Robert
Backus, and Chairman Renny Cushing at 1 (July 17, 2019). Membership
associations representing the interests of members with standing may bring and
be resolved. In short, NERA lacks any apparent and actual stake in the state policies it attacks in the Petition, so any declaratory order granted in this case would be a “purely academic” exercise.

Second, the Petition fails to establish that there is uncertainty regarding the application of laws or regulations under the Commission’s jurisdiction to specific facts regarding distributed resources taking service under specific net metering tariffs. As NERA acknowledges, the Commission has already spoken clearly on the very questions presented in the Petition. The only changed circumstances the Petition can point to is a series of subsequent cases at the D.C. Circuit, which, as detailed below at Section III.A, reinforce rather than undermine the premise that state net metering policies are not preempted by federal law. As in *ITC Grid*, NERA’s Petition is based on its disagreement with the policy behind existing law, not an uncertainty about what the law requires or whether the law applies to particular facts.

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enforcement action along with QFs, themselves. But NERA also fails to allege that it represents QFs.

16 16 U.S.C § 824a–3(h)(2).

17 *Cf. Phillips Petroleum Co. & Marathon Oil Co.*, 58 FERC ¶ 61290, at 61932 (“The only outstanding issue which Commission action on the request for declaratory order could affect is the tax dispute between petitioners and the state of Alaska. However, that is a matter outside the purview of this Commission. From the Commission’s point of view, the petition presents a question which is purely academic.”)

C. Granting NERA’s Petition would have no binding effect on any state or regulated entity.

NERA asks the Commission to “find unlawful and therefore reject” state net metering policies, which it claims establish unlawful prices over transactions subject to the Commission’s exclusive jurisdiction.\textsuperscript{19} However, the Petition does not explain what authority the Commission has to “reject” state laws. In fact, even if the Commission agreed with the Petition and declared state net metering laws preempted, those laws would remain in effect unless and until separate, additional challenges are filed in courts competent to overturn state laws. In such challenges, courts would not be bound by this Commission’s opinions.\textsuperscript{20}

\textsuperscript{19} Pet. at 45. The Petition’s request for relief in ambiguous. To the extent a petition for declaratory order seeks “more than a mere interpretive ruling” it may be treated instead as a formal complaint. FERC eLibrary, Application/Petition Definitions, available at: https://elibrary.ferc.gov/idmws/help/Definitions/Sub_Definitions/Submittal/Applicant_on_Petition_Definitions.htm. However, NERA’s Petition does not provide information required of formal complaints under FPA Section 206 by Commission regulations, including “the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant” and “a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction.” 18 C.F.R. § 385.206(b).

\textsuperscript{20} \textit{Wyeth v. Levine}, 555 U.S. 555, 577 (2009) (“agencies have no special authority to pronounce on pre-emption absent delegation by Congress”); see also \textit{Seminole Tribe of Fla. v. Stranburg}, 799 F.3d 1324, 1338 (11th Cir. 2015) (“[D]eference to an agency’s ultimate conclusion of federal preemption is inappropriate.”); \textit{Steel Inst. of N.Y. v. City of New York}, 716 F.3d 31, 39-40 (2d Cir. 2013) (“We do not defer to an agency's legal conclusion regarding preemption.”); \textit{In re Universal Serv. Fund Tel. Billing Practice Litig.}, 619 F.3d 1188, 1200 (10th Cir. 2010) (“An agency's conclusion that state law is preempted is not necessarily entitled to deference.”); \textit{St. Louis Effort for AIDS v. Huff}, 782 F.3d 1016, 1024 (8th Cir.2015); \textit{Do Sung Uhm v. Humana, Inc.}, 620 F.3d 1134, 1155-56 (9th Cir. 2010).
The Commission’s powers are limited to those granted to it by Congress. Accordingly, the scope of its declaratory orders is limited to, in the Commission’s words, “the statutes we administer and the implementation and enforcement of our orders, rules and regulations.” If the issue presented is beyond the Commission’s authority, then any declaratory order by the Commission merely represents the Commission’s position on the issue, without having any binding legal effect.

For example, PURPA places responsibility for adjudicating enforcement actions under Section 210(h)(2) in the U.S. District Courts, not the Commission. Accordingly, Commission declaratory orders regarding PURPA enforcement are purely advisory in nature. The D.C. Circuit described one such order as follows:

Unlike the declaratory order of a court, which does fix the rights of the parties, this Declaratory Order merely advised the parties of the Commission's position. It was much like a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action; the only difference is that the Commission itself formally used the document as its own statement of position. ... the Declaratory Order is legally ineffectual apart from its ability to persuade (or to command the deference of) a court that might later have been called upon to interpret the Act and the agency's regulations in an private enforcement action.

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21 See Tesoro Alaska Co. v. F.E.R.C., 778 F.3d 1034, 10; 38 (D.C. Cir. 2015) (“FERC is a creature of statute, and 'if there is no statute conferring authority, FERC has none.’”) (citing Atl. City Elec. Co. v. FERC, 295 F.3d 1, 8 (D.C. Cir. 2002)).
22 123 FERC ¶ 61157, at 62025.
23 16 U.S.C § 824a–3(h).
24 Indus. Cogenerators v. F.E.R.C., 47 F.3d 1231, 1234-35 (D.C. Cir. 1995). See also Hydrodynamics Inc., 146 FERC ¶ 61193, 61844 (Mar. 20, 2014) (“The statement of position by the Commission, in a case where, as here, the Commission decides not to go to court on behalf of petitioners can provide assistance to a court on the
As in the PURPA enforcement context, any declaratory order “rejecting” state net metering policies would itself be “legally ineffectual.” The net metering policies attacked in the Petition are enacted and enforced by the states, not the Commission, and the Petition points to no statutory authority permitting the Commission to nullify state law via declaratory order. Accordingly, for NERA’s requested declaratory order to have any legal effect, its reasoning would have to be adopted by a forum with the authority to hold that those state policies are preempted (i.e., a court with jurisdiction).25

NERA’s Petition thus elides the likely real-world consequences of the relief it seeks. It could only introduce uncertainty because it cannot achieve changes to state law through this Commission. A hortatory declaration by the Commission that state net metering policies are unlawful does not effect change. It only invites a flood of new litigation challenging the legality of individual policies in the various states. And while those challenges will be unsuccessful for the substantive reasons detailed below, the intervening uncertainty and tumult would have a chilling effect on investment in distributed solar generation. That is, granting the requested

\[\text{Commission's thinking in the event that the petitioners decide to bring enforcement cases.}\]

25 Cf. Niagara Mohawk Power Corp. v. F.E.R.C., 117 F.3d 1485, 1488 (D.C. Cir. 1997) (“An order that does no more than announce the Commission's interpretation of the PURPA or one of the agency's implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA. . . . As a result, in the framework established by the Congress it is the district court that has been given the task of deciding in the first instance whether to adopt or reject a position advocated by the Commission.” (internal citation omitted)).
declaratory order would increase rather than decrease uncertainty in the forty-one states with net metering programs\textsuperscript{26}, in direct contradiction to the purpose of declaratory order authority in the first place.\textsuperscript{27}

The Commission should not allow the declaratory order process to be abused by entities with an agenda of advancing their narrow policy agenda. NERA’s Petition points to no extant controversy or uncertainty that could be remedied by the declaratory order it seeks—indeed, such an order would be legally ineffectual with regard to the state programs at issue. Moreover, granting the requested order would undermine the very purpose of declaratory orders by inviting controversy and inducing uncertainty where none currently exists. The Commission should thus reject NERA’s Petition.

II. FERC’s Jurisdiction Over Wholesale Does Not Preempt Retail Net Metering Programs.

The Petition asks the Commission to “declare its jurisdiction” over all electricity flows from generation connected behind a customer’s meter to the utility distribution system during any one-hour period or longer as “wholesale sales in interstate commerce.”\textsuperscript{28} NERA asserts that Commission jurisdiction over those electricity flows would then preclude states from using net flows over longer time


\textsuperscript{27} \textit{Hollister Ranch Owners’ Ass’n v. F.E.R.C}, 759 F.2d 898, 903 (D.C. Cir. 1985) (vacating declaratory order that “served only to exacerbate uncertainty” rather than alleviate it).

\textsuperscript{28} Pet. at 1, 5-6.
periods when designing retail rates. Thus, the Petition’s request to classify electric
c outflows from rooftop solar customers as “wholesale sales” is intended to preempt
and end retail net metering programs. The law does not support that radical
usurpation of state authority. Even if the Commission accepts the Petition’s
premise that all short-term outflows are wholesale sales, it does not follow that net
metering is preempted. States’ retail rates are not bound to FERC’s wholesale
netting conventions.

A. The Commission’s Netting Convention for Defining Wholesale Sales Would
Not Preempt States’ Use of Different Netting Conventions for Retail Rates.

The Petition asserts that “state law may not govern the rates for net sales
from the [Full Net Metering] customer to the interconnected utility” because all
outflows are “governed exclusively by federal law” and retail net metering
“invade[s] FERC’s exclusive jurisdiction and [is] preempted by the FPA and
PURPA.”29 That assertion misunderstands both what net metering is and the law
on preemption. Net metering is a ratemaking convention that assigns the costs of
retail service to customers based on net flow of electricity. Defining retail rate
components and billing determinants on net flow is not a compensation for
wholesale power generation. Nor is the Federal Power Act’s split between federal
and state jurisdiction based on allocating a particular flow of electricity exclusively
into one or the other. Instead, jurisdiction depends on what costs are being allocated
and what services are being compensated. Net metering falls squarely within the

29 Pet. at 18-19.
retail rate design authority of the states, regardless of how the Commission treats electricity flows for wholesale compensation.

1. **Net Metering Is Retail Rate Design for Allocating Costs of Retail Service to Customers Not a Compensation for Sale of Exported Wholesale Energy.**

The Petition rests on a flawed premise that net metering is an “in-kind” exchange of inflowed kilowatt hours for outflowed kilowatt hours in “offsetting transactions” during the billing period. The Petition presumes that the costs of retail service are collected by charges applied to the total amount of inflowed electricity and that net metered customers are separately transacting for generation they provide and using revenues from the generation to pay for retail service. Thus, the Petition argues, a customer buys inflowed kilowatt hours by cashing in credits earned in separate transactions for outflowed kilowatt hours, effectively “compensate[ing]” the customer the retail rate for each outflowed kilowatt hour of electricity. That is not what net metering is. Net metering involves one transaction—sale of retail service—which allocates the cost of that service to individual customers based on an attribute of net electricity flow during the billing period.

Retail electricity service, even when priced based on volumetric use, is not a series of single kilowatt hour “transactions.” The regulator sets the price for the bundled service through various combinations of rate components applied to each

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31 Pet. at 3, 22, 37.
customer so that the total bill reflects the average customer’s allocated cost of the bundled retail service in that rate class. While most retail rates incorporate a volumetric component measured in kilowatt hours (among other rate components), the utility is not selling, and the retail customer is not buying, “kilowatt hours.” Customers pay a total bill for bundled retail service. Under net metering, a customer with generation does not “buy” kilowatt hours in one hour and “sell” kilowatt hours in another. Rather, the customer “buys” bundled retail service and the price for that service is set based, in part, on the customer’s net energy use. Conceptually, outflows of electricity reduce the amount that the customer would otherwise be charged. But, critically, those outflows reduce the allocation of the cost of retail service to that customer; there are not two separate transactions of buying retail service and selling generation and a later “exchange” of charges for one with revenues from the other as the Petition contends.\footnote{Pet. at 3.} The utility is only entitled to charge for retail service based on the net flow of electricity during that cycle, not for the gross inflow to the customer which the customer “pays for” with credits handed over for exported electricity. Whether the net energy use is an appropriate rate component for allocating the costs of bundled retail service provided to the retail customer is a policy choice for the state regulator that this Commission has no authority to second-guess.
2. A Choice to Define Wholesale Sales Based on One-hour Increments Would Not Preempt States From Defining Retail Service Based on a Different Netting Period.

The Petition incorrectly contends that if the Commission reverses its decisions in MidAmerican and SunEdison, this will preempt states’ ability to use intra-billing period netting for setting rates for retail service.\(^{33}\) The Petition appears to incorrectly assume that a single instantaneous flow of energy must be exclusively in either wholesale or retail. That is not true as a matter of law or physics.

FERC’s authority to regulate the “sale of electric energy at wholesale in interstate commerce” does not extend to retail sales.\(^{34}\) “Accordingly, the Commission may not regulate... retail sales of electricity \(i.e.,\) sales directly to users” and cannot “take an action transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates.”\(^{35}\) The distinction between the Commission’s jurisdiction over wholesale and states’ jurisdiction over retail depends on the service being priced and not, as the Petition erroneously assumes, by exclusively allocating electrons into one or the other category.\(^{36}\)

The Petition’s premise that by defining a one-hour (or shorter) outflow of electricity from a rooftop solar customer to the distribution grid as a wholesale sale, the Commission precludes any state from defining retail service charges based on a...
different time period. That is not the law. The D.C. Circuit has already determined that FERC’s choice of netting intervals to price transmission and wholesale service does not require states to use the same interval to price retail service, even when the same flow of electricity is involved in both services.\textsuperscript{37}

As the \textit{Calpine} court explained, netting “is, in essence, a kind of billing convention that determines (at the end of the month) how much a generator will be assessed for transmission and retail charges” but does not “allocate” power between retail and wholesale.\textsuperscript{38} Thus, the court concluded, this Commission’s choice of one netting period to price a product within its jurisdiction—transmission or wholesale service—does not require states to use the same period to price a different product—retail service.\textsuperscript{39} The court also was explicit that “FERC lacks jurisdiction to set netting intervals for retail charges.”\textsuperscript{40}

As noted above, retail net metering is an exercise of states’ authority to determine the cost to provide bundled retail service to a customer and how much that customer should pay for such service. There is no requirement to base those

\textsuperscript{37} \textit{Calpine}, 702 F.3d at 50; \textit{S. Cal. Edison Co. v. FERC}, 603 F.3d 996, 1001 (D.C. Cir. 2010) (“\textit{SoCal Edison}”) (rejecting argument that state’s use of different netting period for retail sales than FERC used for transmission would create a conflict that would preempt the state’s netting period); \textit{Niagara Mohawk}, 452 F.3d at 830 (“it does not follow that hourly netting of power necessarily dictates hourly netting for transmission and distribution costs.”).

\textsuperscript{38} \textit{Calpine}, 702 F.3d at 49-50.

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.} at 48; see also \textit{F.E.R.C. v. Elec. Power Supply Ass’n}, 136 S. Ct. 760, 775, 193 L. Ed. 2d 661 (2016) (FERC cannot set the “terms of sale at retail—which is a job for the States alone”).
charges on volumetric usage at all, much less to base it on volumetric usage measured on one-hour intervals as the Petition suggests. This Commission would exceed its authority if it attempted to dictate a netting period to the states for assessing retail costs and charges.\textsuperscript{41}

There also is no preemption of state-set retail rate netting periods based on this Commission’s netting interval for wholesale or transmission rates because retail and wholesale service are separate transactions that allocate separate costs. The D.C. Circuit has held that “transmission and power are procured through separate transactions. And, as we recognized in \textit{Niagara Mohawk}, the netting periods for power and transmission need not be the same.”\textsuperscript{42} Likewise, netting periods for whole and retail need not be the same. Thus, even if this Commission agrees to use single-hour flows to define wholesale sales, as the Petitioner requests, states are free to define retail sales and charges using whatever netting period they choose without conflict or preemption by the Commission’s choice. In fact, as the D.C. Circuit has noted, an attempt by this Commission to use its choice of netting

\textsuperscript{41} \textit{Calpine}, 702 F.3d at 50; \textit{see also SoCal Edison}, 603 F.3d at 1000-01 (FERC exceeded its jurisdiction by ordering states to apply the same netting period for retail sales of energy as FERC applied to assess transmission charges).

\textsuperscript{42} \textit{SoCal Edison}, 603 F.3d at 1002; \textit{see also id.} at 997, 999-1000 (FERC encroached on state retail ratemaking authority and exceeded FERC’s wholesale and transmission ratemaking authority by dictating retail netting periods to states); \textit{Duke Energy Moss Landing LLC v. California Independent System Operator Corp.}, 132 FERC ¶ 61,183 P16 (2010) (FERC and states can use different netting periods and methodologies for determining the amount of FERC-jurisdictional transmission and state-jurisdictional retail energy for the same station power requirements).
interval to dictate that states use the same interval is an improper frontal attack on state jurisdiction. 43

The Petition selectively quotes portions of the D.C. Circuit’s Calpine decision but gets the holding backwards. 44 The court’s statement that retail rate netting does not “determine[] how much energy is available for sale at wholesale” was not a rejection of using netting in rates, but a rejection of Calpine’s argument in that case that a particular flow of electricity must be allocated exclusively to either wholesale or retail jurisdiction. 45 Indeed, the court held that the manner in which a particular electricity flow is treated in wholesale does not dictate how it is treated for retail—which is exactly contrary to the Petition’s premise that treating electricity outflows from distributed generation as a wholesale sale makes that outflow unavailable for states’ net metering retail charges. As the court held, “different netting intervals may be used” by the states to set retail charges than FERC uses to set wholesale or transmission charges; different treatments “affect only the value” of electricity to the generator “not its allocations between users.” 46 Thus, the Calpine court did not “reject[] the very basis of the Commission’s decision to disclaim jurisdiction over

43 SoCal Edison, 603 F.3d at 1001.
44 Pet. at 17-18.
45 Calpine, 702 F.3d at 48.
46 702 F.3d at 48 n.4; see also SoCal Edison, 603 F.3d at 1001-02 (rejecting argument that use of different netting conventions for application of retail rates ordered by states and wholesale or transmission rates ordered by FERC creates a conflict triggering preemption); Duke Energy Moss Landing, 132 FERC ¶ 61,183 P16 (recognizing that FERC is prohibited from exercising jurisdiction over transmission in a way that preempts states from determining whether a retail sale occurs).
FNM” because “the existence of wholesale or retail sales is not determined by netting intervals.” Just the opposite, by rejecting the use of netting to exclusively define wholesale or retail service the Court acknowledged that states can use whatever netting period they choose for retail rates regardless of the netting period FERC chooses for transmission and wholesale sales.

Thus, even if this Commission reverses its MidAmerican and SunEdison decisions and requires utilities to compensate distributed generation customers at avoided cost prices for wholesale short term energy flows, D.C. Circuit caselaw makes clear that states are not precluded from using longer netting periods to charge for retail service.

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47 Pet. at 18.

48 Calpine, 702 F.3d at 50. FERC’s brief in the Calpine case is also instructive. As FERC noted, prior to the D.C. Circuit’s decision in Southern California Edison, FERC had incorrectly assumed that FERC’s determination that a transaction was FERC-jurisdictional controlled a state’s determination and required the states to comport to FERC’s determination when setting retail rates. Calpine v. FERC, Response Br. of FERC at 26. However, as FERC’s brief recognized, in 2010 the D.C. Circuit “affirmatively rejected” that interpretation and held that FERC exceeded its authority by “by requiring that the netting interval used to calculate [FERC jurisdictional] charges associated with a generator’s procurement of station power apply to the exclusion of any conflicting netting intervals in state retail tariffs. Id. at 27-29, 31, 36. FERC’s brief also recognized that the D.C. Circuit rejected FERC’s prior argument that FERC can determine whether and when a generator takes retail service if doing so is the “incidental effect” of regulating transmission or wholesale sales. Id. at 29-30. Thus, even to the extent the Commission’s MidAmerican and SunEdison decisions were based on the presumption that the Commission needed to adopt monthly netting for purposes of defining wholesale sales to preserve states’ ability to offer retail net metering, that presumption was in error. As the D.C. Circuit held after the MidAmerican and SunEdison decisions, the Commission’s netting period for purposes of wholesale sales does not bind states’ netting period for purposes of retail rates.
B. The EPAct of 2005 Belies the Petition’s Argument That Congress Preempted Retail Net Metering.

The Petitioner’s argument that Congress preempted states from adopting net metering for bundled retail rates conflicts with what Congress actually did, which was to require states to “consider” providing retail net metering:

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(d)(11). Because Congressional intent “is the ultimate touchstone of in every pre-emption case,” and preemption in areas of traditional state authority requires a “clear and manifest purpose of Congress,” the fact that Congress explicitly encouraged net metering through the 2005 Energy Policy Act belies the Petition’s opposite argument. 49

The Petition attempts to avoid Congress’s clear intent to preserve and expand retail net metering through 16 U.S.C. § 2621(d)(11) by redefining and rewriting the statutory text to bend it to the Petitioner’s preferred meaning. According to the Petition, when Congress used the term “electric energy” in the definition of “Net Metering” it meant short term wholesale market prices for energy. 50 The Petition concludes that applying that definition would then preempt traditional retail net metering.


metering and limits customer generators to instantaneous bi-directional metering with exports valued at the short-term wholesale energy market price.\textsuperscript{51}

There is no basis for the Petition’s revisionist interpretation of 16 U.S.C. § 2621(d)(11). First, net metering was well established retail pricing practice in more than 30 states leading up to the enactment of the Energy Policy Act of 2005.\textsuperscript{52} As the Congressional Research Service noted, under those programs “a customer’s electric meter is permitted to run backward when the customer is self-generating” to offset otherwise applicable retail charges.\textsuperscript{53} The legislative history confirms that Congress was aware of those state programs applying net metering to offset otherwise-applicable full retail rates and 16 U.S.C. § 2621(d)(11) appears intended to expand upon, rather than displace that traditional form of net metering.\textsuperscript{54} In fact, there is no indication in the Congressional record that Congress intended to

\textsuperscript{51} Pet. at 35
overturn the established practice of net metering through the 2005 legislation, much less do so indirectly through obscure definitional text.

Second, the Petition’s interpretation of 16 U.S.C. § 2621(d)(11) would render the statute meaningless because it would limit Congress’s instruction that states consider offering net metering to mean no more than what existing law already required. That is, under the Petition’s interpretation of 16 U.S.C. § 2621(d)(11), Congress only instructed states to consider offering customers with distributed generation a short term wholesale energy market price for any instantaneously exported electricity. But, of course, states were already required to ensure small scale renewable generation received prices at least equal to avoided costs, which include energy value. That is, the Petition would interpret § 2621(d)(11) as superfluously requiring states to consider doing something that federal law already required— contrary to cardinal principles of statutory construction.

Third, the Petition’s interpretation is inconsistent with the statutory context. Section 2621(d)(11)’s instruction is to states, which set retail rates, not wholesale rates. In the context of traditional retail rate design, “electric energy” refers to the volumetric energy component in typical two-part and three-part retail rate structures. That is further confirmed by 2621(d)(2), which uses the phrase “energy component of a rate” to refer to the kilowatt-hour volumetric charge in retail rate

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designs. This context further confirms that Congress’s reference to electrical energy in 2621(d)(11) refers to the volumetric charges in traditional retail rates, not to short-term wholesale market prices set by this Commission.

Tellingly, the Petition provides no authority for its interpretation of the 2005 EPAct’s net metering provision. Instead, the Petition attempts to rely on a state court decision interpreting a wholly different state statute specific to that state’s transition from bundled monopoly supply to unbundled retail choice. The Ohio decision the Petition cites had to apply a state statute requiring net metering of “electricity” to a statutory scheme expressly separating regulated distribution service from unregulated energy supply. In the context of that state-specific statute unbundling distribution service from electricity supply, the court interpreted a reference to electricity supply as referring to the unbundled energy supply charges. That state court interpretation of a specific state statute has no relevance to Congress’s different language used in a different context in 16 U.S.C. § 2621(d)(11).

III. A Declaratory Order Asserting Federal Jurisdiction over Retail Customer Behind-the-Meter Generation Would Be Contrary to FERC Precedent and Practically Unworkable.

As noted above, net metering is a retail rate design that allocates the cost of retail service based on net energy as the billing determinant, not a series of sales of

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59 FirstEnergy, 768 N.E.2d at 650-51.

60 Id.
kilowatt hours between customers and the utility. As such, it falls squarely within the jurisdiction of states, not the Commission, under both the FPA and PURPA. The Commission has already reached this same conclusion, twice. In *MidAmerican*, the Commission was presented with a request identical to NERA’s—albeit from a utility that actually had standing under PURPA to pursue the ultimate enforcement of a declaratory order, unlike NERA, as explained above—for a “declaratory order” that state net metering programs “are preempted by Federal Law.” In response to that request, this Commission concluded that “no 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.”61 The Commission reaffirmed this holding in 2009 in *Sun Edison*. NERA’s Petition offers no compelling reason to overturn this longstanding decision: The D.C. Circuit opinions that it claims undermine *MidAmerican* actually reaffirm and solidify the order’s core holding. In contrast, NERA’s argument for a contrary result is facially inadequate. Moreover, reversing *MidAmerican* and displacing state jurisdiction over rate design for customers with behind-the-meter generation would be practically unworkable and would upset retail customer’s significant reliance on state net metering programs that states adopted and retained according to this Commission’s long-standing precedent.

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61 *MidAmerican*, 94 FERC ¶ 61340, at 62263.
A. The Commission lacks a sound basis to depart from its prior decisions finding no federal jurisdiction over net-metered energy generation.

Where the Commission has previously ruled on an issue, the Commission will depart from that precedent only if there is “special justification.” No such justification exists here: Contrary to NERA’s assertion, neither SoCal Edison nor Calpine call into question the Commission’s conclusion in MidAmerican and Sun Edison; and NERA identifies no changed facts or circumstances that would undermine the Commission’s prior conclusions. Instead, NERA simply asks the Commission to reverse itself on an issue it resolved twice without offering any evidence or law to support overturning the Commission’s prior interpretations that are currently relied upon by millions of homeowners and small businesses.

When the Commission determined in MidAmerican that net metering arrangements do not constitute a wholesale “sale,” it adopted a specific interpretation; and, as the Commission has previously acknowledged, any change in that interpretation—and thus a “departure from the doctrine of stare decisis[—]demands special justification.” Such “special justification” includes changes in facts or changes in law. However, those factors are not shown in NERA’s Petition.

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64 Clifton Power Corp., 91 FERC ¶ 61,133, 61,493 n. 2 (May 17, 2000) (holding that stare decisis does not prevent the Commission from making a redetermination of jurisdiction over a waterway for purposes of the Federal Power Act, and noting that a “redetermination of jurisdiction can for example be based new [sic] on additional
Thus, the Commission would not be justified in departing from the precedent it established in *MidAmerican* and reaffirmed in *Sun Edison*. For these same reasons, a reversal in the Commission’s position as to its jurisdiction over behind-the-meter generation would not meet the standard applied in judicial review of agency departures from precedent and would likely be overturned on review.\(^{65}\)

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\(^{65}\) Courts have found that the administrative law principle of reasoned decision making also “necessarily requires consideration of relevant precedent,” *Williams Gas Processing-Gulf Coast Co., L.P. v. F.E.R.C.*, 475 F.3d 319, 326 (D.C. Cir. 2006), and “an adequate explanation for [the agency’s] departure from established precedent,” *Dillmon v. Nat’l Transp. Safety Bd.*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S.Ct. 1800, 1811 (2009)). In *Fox Television*, the U.S. Supreme Court held:

> [T]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters. *In such cases it is not that further justification is demanded by the mere fact of policy change: but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.*

*Fox Television*, 556 U.S. at 515-16 (emphasis added) (internal citations omitted). Accordingly, because the facts and circumstances of net metering have not changed since *MidAmerican*, and because of the reliance interests explained below, a decision by the Commission to depart from its long-standing precedent in *MidAmerican* would require a more detailed justification than what would suffice for new policy.
NERA contends that two D.C. Circuit opinions, *SoCal Edison* and *Calpine*, made *MidAmerican* and *Sun Edison* “dead letters.” That misconstrues or mischaracterizes the holdings and reasoning of *MidAmerican*, *SoCal Edison*, and *Calpine*. In *SoCal Edison*, the Court observed that the Commission’s reliance on the length of a netting period to determine whether a retail sale had occurred (and thus whether a state had jurisdiction) was arbitrary. But, importantly, the Court recognized that the appropriate netting period to determine whether a retail sale occurred is to be determined by the state regulator with jurisdiction over the retail sale. Thus, if anything, *SoCal Edison* reinforced the basis for the Commission’s decision in *MidAmerican*.

*Calpine* similarly left the Commission’s conclusion in *MidAmerican* unaffected. In *Calpine*, the Court again held that netting can be used to “determine how much a generator earns at wholesale” but because FERC’s choice of netting period does not allocate an energy flow exclusively to wholesale jurisdiction to the exclusion of the retail jurisdiction of the states, states are free to use a different netting period for purposes of determining retail rates. That is, the D.C. Circuit held that netting is a “practice” by which a generator “accounts for its dealings with [its] utility” for purposes of retail service charges—just as the Commission determined in *MidAmerican*.

66 Pet. at 18.
67 *SoCal Edison*, 603 F.3d at 1002.
68 *Calpine*, 702 F.3d at 49-50.
69 *MidAmerican*, 94 FERC ¶ 61340, at 62263.
Furthermore, *MidAmerican* did not hold, contrary to NERA’s mischaracterization, that a customer’s *net* consumption of electricity during a particular period dictated whether a sale had occurred. To the contrary, *MidAmerican* rejected the premise that NERA attempts to resuscitate here: that every flow of power necessarily constitutes a sale. Nothing in *Calpine* or *SoCal Edison* supports such a theory. Rather, as discussed above, those cases hold that net metering is a convention for assigning costs of service, not allocating each flow of electricity into exclusively wholesale or retail jurisdiction. That leaves the choice of retail net metering in retail rates squarely within a state’s jurisdiction.\(^70\)

In addition to misreading the cases it cites, NERA also failed to identify any changed facts since this Commission decided *MidAmerican* and *Sun Edison* that would justify a departure from its established precedent. Although net metering programs vary across states, neither the physical infrastructure of behind-the-meter generation nor the basic billing mechanics used to account for that generation by retail customers has changed. Indeed, nothing in the more than 100 pages of documents NERA submitted to the Commission as part of its Petition identifies *any* relevant changed facts since *MidAmerican* was decided.

Without any valid argument of changed facts or law, NERA now asks the Commission to do precisely what it declined to do in *MidAmerican*: Declare that “PURPA and the FPA require that two meters be installed,” and that “every flow of

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\(^{70}\) *See Calpine*, 702 F.3d at 46.
power from a homeowner or a farmer” to a utility be treated as a sale. The Commission properly rejected this request in 2001 and again in 2009, and judicial interpretations since 2009 have only solidified that conclusion. NERA thus fails to show any change that constitutes “special justification” to depart from the Commission’s established precedent.

B. NERA’s Petition offers no evidentiary or legal basis to conclude behind-the-meter generation constitute wholesale sales subject to FERC’s jurisdiction.

Even if the Commission had not already, repeatedly, rejected arguments that retail net metering is inconsistent with FERC’s jurisdictional authority, NERA fails to offer any basis for FERC to conclude that every short term outflow of electricity from behind-the-meter generation is subject to regulation by FERC, to the exclusion of use in netting for purposes of applying retail rates. As noted above, there is no requirement that states apply the same netting period for purposes of applying retail rates that FERC applies for wholesale and transmission. Moreover, even if there were, NERA has not made a sufficient factual record for this Commission to broadly find jurisdiction over all outflows to the distribution grid from behind-the-meter generation. Thus, NERA’s argument for FERC jurisdiction over all outflows from all behind-the-meter generation fails on its face.

71 94 FERC ¶ 61340, at 62263.
First, NERA asserts that “[a] sale of electric energy occurs whenever energy is delivered from one entity to another for compensation.”\textsuperscript{73} But this is a mischaracterization of the definition on which NERA purports to rely—which defines a sale as a “\textit{transaction} between two parties.” That is, wholesale sale occurs when there is a “transaction,” not anytime there is a “delivery” (whatever that term means). The only “transaction” between a utility and a retail customer is recorded at the end of the billing cycle to define a \textit{retail} sale based on the net electricity flow to the customer during that billing cycle. NERA does not identify what other “transaction” occurs, or could occur, between the utility and retail customer with behind-the-meter generation and elides this gap in its argument by substituting the term “delivery” for the “transaction.”

At most, NERA attempts to describe and characterize net metering arrangements as a series of “exchanges” of electrical energy (and thus individual transactions), characterizing each short term inflow of electricity to the customer as a unit of retail electric service and each short term outflow to the utility as a unit of “wholesale” electricity.\textsuperscript{74} But the regulations and case law NERA cites stand only for the principle that energy deliveries at another time \textit{can} be a form of compensation for wholesale sales.\textsuperscript{75} They do not stand for the premise that every

\textsuperscript{73} Pet. at 19-20.
\textsuperscript{74} See Pet. at 21-24.
\textsuperscript{75} See 18 C.F.R. §35.2(a) (“electric service as used herein shall mean...the sale of electric energy at wholesale for resale in interstate commerce...without regard to the form of payment or compensation for the sales or services rendered whether by...exchange”).
flow of electricity over any time period constitutes a transaction exclusively at wholesale. At bottom, NERA is baselessly conflating the fact that electrons flow in different directions with the legal definition of a sale based on when a transaction of a specific service (wholesale generation) occurs. But *PJM Interconnection, L.L.C.*—the putative source of NERA’s definition of “sale”—actually rejected this position.\(^76\)

Second, NERA cites the definition of a wholesale sale—a sale “to any person for resale” and summarily concludes that “excess generation” that flows from a retail customer into a utility’s distribution lines must constitute a sale at wholesale. But NERA offers no evidence or precedent (whether judicial or by this Commission) for this assertion that behind-the-meter generation in excess of usage is bought and then “resold” to other customers. In fact, net metering reduces the amount of bundled retail service sold to an individual customer, which is not measured until the end of the billing period, based on the net electricity flow during the billing period. Thus, a flow of electricity from the net metered customer to the utility during the course of the billing period does not reflect a sale of electricity that is resold to other customers, but the *non-sale* of bundled retail service to the net metered customer in the first place. That is, the net metered customer’s outflows during the course of a billing cycle are not “purchased” for resale to others, but reflect bundled retail service—including power supply—that was never sold to the net metered customer in the first place.

\(^76\) *See PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251, 61,890, 61,892 (2001).
Third, invoking *FPC v. Fla. Power & Light Co.*, NERA contends that any excess generation by a consumer reaches interstate commerce because it is “comingled” with other energy on the interstate electric grid. But *Fla. Power & Light Co.* did not address whether energy *sales* were in interstate commerce; rather, it held that energy generated by a utility was *transmitted* in interstate commerce because it commingled with energy traveling out of state through an identifiable bus. *Fla. Power & Light Co.* is inapposite.

Moreover, and notably, the decisions on which NERA relies to support its characterization of behind the meter generation as a sale at wholesale pre-date FERC’s decision in *MidAmerican.* Indeed, NERA invokes the definition of “sale” (“transaction between two parties, with one party using resources of another party for some form of consideration”) used by FERC in *PJM Interconnection, L.L.C.—the very decision on which FERC relied* in concluding that no “sale” occurs where an individual retail customer “installs generation and accounts for its dealings with the utility through the practice of netting.” The only decision cited by NERA that post-dates *MidAmerican—Cal. Pub. Utils. Comm’n*, which was decided in 2010—did not state a new principle of law or address netting or retail customer generation at all.

78 Pet. at 20.
79 See id. n. 38-42.
80 *MidAmerican*, 94 FERC ¶ 61340, at 62223.
81 132 FERC ¶ 61,047 (2010) (concluded state program requiring utilities to purchase energy from certain CHP generators with more than 20MW capacity regulated wholesale sales, but was not preempted to the extent tariffs were
Therefore, the decisions NERA relies on still require a “transaction” *a fortiori* and do not conflict with the Commission’s recognition in *MidAmerican* that there is no wholesale transactions where instantaneous outflows of electricity are used in net metering to define charges for bundled retail service.

Tellingly, NERA does not specify what it means by “whenever” when it asserts that “whenever the amount of energy generated exceeds the retail load behind the meter,” a retail customer makes a sale in wholesale to her utility company.82 But NERA implicitly acknowledges that metering on *some* interval will be necessary to determine what “sales” a retail customer with behind-the-meter generation has made to their utility—it just contends that interval must be hourly or shorter. This is, as it was for the petitioner in *Niagara Mohawk*, a fatal concession—there is “no principled basis for distinguishing” between an hour and a month “as it related to FERC’s jurisdiction.”83 If one hour is an acceptable as a netting period—and FERC’s jurisdiction is determined based on what flows of energy occur in that hour—there is no principled basis to find that 30 days is not also an acceptable netting period.

82 *See* Pet. at 18, 26.
83 *SoCal Edison*, 603 F.3d at 999.
C. Federal jurisdiction over behind-the-meter generation would be practically unworkable and disrupt significant reliance interests by customers and states

In addition to lacking any legal basis, the Petition’s request that the Commission assert exclusive jurisdiction, and displace any ability of states to apply retail charges based on netting electricity flows during a billing period, would be administratively unmanageable. That unworkability and disruption further weigh against the Petition’s requested relief and strengthens the force of *stare decisis* as applied to *MidAmerican* and *Sun Edison*. “[T]he workability of the rule [a decision] established” and reliance interests are factors relevant to the strength of *stare decisis* in a given context. In accordance with the Commission’s decision in *MidAmerican*, forty-one states have implemented net metering programs. More than two million customers have installed behind-the-meter generation with the expectation of net metering as a means (at least in part) of recouping the cost of that installation. The widespread adoption of state-level net metering programs would be undone by the jurisdictional conflicts, gaps, and administrative complexity that would result from an assertion of Commission exclusive jurisdiction over all short-term outflows from retail customers’ rooftop solar and similar generation

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85 *See* Exhibit A, excerpts from letters of rooftop solar owners describing how they would be personally affected by a decision casting doubt on state net metering policies. These letters are only a subset of the responses Public Interest Organizations received from their members and affected members of public. *See also* SaveSolar.org Public Comments, EL20-42 (June 15, 2020); Sierra Club Public Comments, EL20-42 (June 15, 2020).
installations, to the exclusion of retail rates allocating costs to net electricity flows during the billing period.

Moreover, under NERA’s reasoning, exclusive jurisdiction by FERC and states would flip back and forth hourly (or sub-hourly) depending on whether each customer’s momentary use exceeds generation or generation exceeds use. Multiplied by the millions of customers with distributed generation, this would create billions of potential disputes over which rates apply at what time and whether states or this Commission must make that determination.\textsuperscript{86} It is entirely unclear how, if at all, even ordinary billing disputes between retail customers and their utility could be resolved given this dual, vacillating jurisdictional authority.

The unworkability of FERC jurisdiction over net metering is evident in NERA’s own internally contradictory assertions about the jurisdictional boundaries between retail sales and behind-the-meter generation under its proposed rule. In its effort to argue that net metering entails wholesale sales in interstate commerce, NERA claims that FERC has jurisdiction to conduct reasonableness review of arrangements between retail customers engaged in behind-the-meter generation and their utility.\textsuperscript{87} NERA claims that with respect to distributed generation, the

\textsuperscript{86} If the behind-the-meter generation installation also uses electricity as part of its operation, even more uncertainty could arise as to which electrons are subject to which jurisdiction: Under 18 C.F.R. §292.305, the Commission regulates sales to qualifying facilities under PURPA. Arguably, then, what are now undifferentiated retail sales through a homeowner’s meter would have to be disaggregated into sales to the “qualifying facility” and the retail customer—assuming such a distinction were even practically possible—and make what had been utility retail sales subject to Commission oversight.

\textsuperscript{87} See Pet. at 23 (citing Prior Notice, 64 FERC at 61,992).
“exchange” is between energy delivered to the customer and energy generated by the customer and compares this exchange to “book out” arrangements between public utilities where both offsetting transactions are within FERC’s purview. On NERA’s theory of net metering arrangements, where FERC must approve of exchange transactions “even where the return of energy falls entirely outside of its jurisdiction,” the “in-kind” consideration provided by a utility—that is, retail energy—would be subject to FERC oversight in the same way. But of course, the retail sale of electricity from utilities to individual homeowners and small businesses is unquestionably within state jurisdiction. So, under NERA’s theory, FERC must review the reasonableness of retail rates as part of its review of offsetting wholesale transactions. That would effectively make FERC a national retail rate regulator for the millions of customers with behind the meter solar generation. NERA does not attempt to reconcile that fact with its contention that the Federal Power Act prohibits FERC from regulating retail energy sales.

Finally, an assertion of federal jurisdiction over retail net metering programs would also disrupt significant reliance interests held by state legislatures, public utilities commissions, and individual energy consumers. The installation of a typical residential or small business rooftop solar system costs tens of thousands of

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88 See id.

89 As NERA acknowledges elsewhere, “[t]o the extent that no excess energy or energy physically delivered to the local utility is involved,” a retail customer’s private generation and use of electricity is subject to state, not FERC jurisdiction. Id. at 10-11.
dollars.\textsuperscript{90} A significant percentage of homeowners who install solar panels do so through some form of financing, and continue to make payments on this investment. Whether financed or outright purchased, homeowners have invested significant sums in reliance on the continued existence of state net metering programs to set the means and rate by which they will be able to recoup this investment. Reversing its prior precedent and prohibiting net metering will cause significant financial harm to the more than 2 million families\textsuperscript{91}—none of whom are sophisticated participants in energy markets—who have invested in rooftop solar generation to lower their energy costs.

States and state public utility commissions also have relied on \textit{MidAmerican} and the jurisdictional boundary it announces in crafting state retail energy policy as well as issuing rules governing rooftop solar and other forms of behind-the-meter generation. Forty-one states have established net metering programs and have implemented regulations governing billing practices for retail customers with behind-the-meter generation.\textsuperscript{92} State regulatory bodies have relied extensively on \textit{MidAmerican} and its reasoning—particularly its holding that energy generated


\textsuperscript{91} According to form EIA-861M (retrieved April 20, 2020), there are 2,207,148 residential households that net metering, 81,105 commercial customers that net metering, and 6,463 industrial customers that net meter.

behind the meter that offsets retail customer consumption is not a “sale” within the meaning of the Federal Power Act—in asserting jurisdiction to set net metering rules and in determining the substance of those rules, such as the rules governing net excess generation. Beyond net metering rules themselves, public utility commissions have relied on its reasoning in other contexts, treating the Commission’s decision in MidAmerican as an “assurance” that, for example, “provides the bases for successfully implementing [a] pilot program” that uses volumetric incentive rates to increase solar generation by utilities. States have invested enormous administrative and judicial resources into developing their respective net metering programs; since 2014 there have been approximately 430 proceedings addressing state net metering policy and rate design that directly cite or otherwise rely on MidAmerican as the basis for state authority. Reversing MidAmerican would call into question these decisions, create significant uncertainty and increased litigation before these state regulatory bodies. Resolving

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95 Exhibit B, EQ Research, Spreadsheet of dockets addressing net metering policies (compiled May 2020).
this uncertainty, rewriting rules, and resolving disputes arising from knocking the
foundation out from these decisions would in turn cost states and utilities
significant staff hours and legal resources.

Thus, even if the Commission could practically assert jurisdiction over only
that portion of the customer-utility transaction that is both an outflow over an
hourly or sub-hourly basis, and also meets the factual predicates of being a “sale at
wholesale into interstate commerce,” the Commission is ill-suited to exercise that
jurisdiction. NERA’s Petition, if granted, would shift this Commission’s focus from
oversight of regional energy markets and large-scale generation into a national
regulator of billions of hourly or sub-hourly energy exchanges and potential conflicts
over which price applies to what short-term electricity flow, metering technology,
billing disputes, and numerous other small-scale disputes.

NERA asks the Commission to overturn its prior decision in *MidAmerican* (a
decision reaffirmed eight years later in *Sun Edison*) on the basis of a decade-old
judicial opinion that does not address the basis of this Commission’s decision in
*MidAmerican* and in fact reaffirms the jurisdictional holding as to station power on
which the Commission relied in *MidAmerican*. NERA offers no evidence or other
precedent to support its position that *MidAmerican* was wrongly decided. Reversing
*MidAmerican* would undermine significant reliance interests held by millions of
retail customers with behind-the-meter generation and hundreds of state public
utility decisions and regulations premised on its holding. Unlike current net
metering programs, which have been adapted by states to local needs and have
encouraged significant growth in rooftop solar generation, Commission jurisdiction over behind-the-meter generation would burden FERC and homeowners, create needless administrative complexities, and raise difficult or impossible to resolve jurisdictional conflicts and gaps between state regulation of retail sales and federal oversight of retail generation. NERA’s Petition is both baseless and counterproductive, and should be rejected.

IV. The Petition’s Policy Arguments Against Net Metering Are Inappropriate for this Commission as Well as Factually Incorrect.

As set forth above, retail net metering is firmly within the retail ratemaking jurisdiction of states. Policy arguments for and against net metering are typical issues in ratemaking proceedings before state regulators. NERA’s witness, Ashley Brown, regularly makes various statements and arguments in those proceedings against net metering. The Ashley Brown Report submitted with NERA’s Petition provides a general rebuke of retail rate design. The overall theme of the criticism of retail rate design is that it is not dynamic or reflective of cost causation. The Report goes on to argue that net metering, in particular, “exacerbated a fundamental tariff flaw, namely the failure to align cost recovery with cost causation” and should be abandoned.  

Mr. Brown asserts that “...demand characteristics of rooftop solar customers are different from those of non-solar customers,” and that they therefore should be charged different retail rates in order to collect more money from them.  

Those arguments have been largely unsuccessful and are typically rejected by state

96 Report at 8.
regulators. However, the NERA Petition attaches Mr. Brown’s Report and now attempts to make the same arguments to this Commission that Mr. Brown typically makes to state regulators. This Commission is not the right forum for those arguments. NERA and Mr. Brown should be directed back to the state and local regulators which have jurisdiction to determine retail ratemaking policy.

Moreover, the arguments made in the Report are misleading or factually incorrect as set forth below.

A. Allegations of Cross Subsidies Are Unfounded and Overstated.

The Report asserts that, although “customers who generate their own electricity on premises purchase, in the aggregate, less energy than conventional customers, they consume at least the same level of fixed and demand service.”\(^{98}\) Such assertions ignore the fact that the costs of the electric system are not fixed; all future costs are variable. For instance, in 2018 the California ISO cancelled or modified $2.6 billion in planned transmission upgrades as a result of energy efficiency and rooftop solar.\(^{99}\) A study by Wisconsin Electric in 2009 concluded that anticipated substation upgrades could be delayed by distributed solar generation along with transmission, generation capacity, and energy savings.\(^{100}\) Experience by

\(^{98}\) Report at 15.


\(^{100}\) Benjamin L. Norris, et al., *Clean Power Research, PV Value Analysis for WeEnergies* (Oct. 2009).
states analyzing non-wires alternatives similarly find that distributed generation can avoid utility costs.

Moreover, to the extent the Report means that previous investments, or sunk costs, are not avoided by current customer choices to install distributed generation, such argument is misplaced. Sunk costs are sunk costs. By definition they do not change when any customer behaviors change. Yet states typically design rates to incent customer behaviors that decrease long-run marginal costs as a policy choice intended to reduce long-term costs. Furthermore, it is not true that net metered customers consume the “same level of fixed and demand service” when consumption is measured by the same traditional retail cost of service methodologies applied to all other customers. Net metered customers often reduce their own loads and system loads during the cost-causing peak hours used to allocate costs of retail service, meaning they consume less of the fixed and demand services as measured by cost of service analysis.

Because net metered customers typically consume less retail service, as measured by cost of service analysis, they typically cover the same amount, or more, of their costs of service than other customers with similar levels of volumetric consumption. Therefore, the Report’s unsubstantiated assertion of a “substantial” subsidy is incorrect.101 Furthermore, the scale of net metering belies the allegation that there could be any “substantial” subsidies. According to a 2017 report by the Lawrence Berkeley National Laboratory, the relative impacts of net metering are

101 Report at 15.
not only low, but are also miniscule when compared to other rate impacts; Figure 1 below is from the report.\footnote{102} Thus, as the figure demonstrates, not only are the impacts from net metering small, they are potentially negative (i.e., they reduce retail rates).

Figure 1: Indicative ranges for potential effects on average retail electricity prices\footnote{103}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{Indicative ranges for potential effects on average retail electricity prices.}
\end{figure}

\footnotesize{
\textbf{Net-Metered PV:} Impact at \textit{current} penetration levels, across a range of VoS assumptions, with purely volumetric rates (U.S. average)

\textbf{Net-Metered PV:} Impact at \textit{projected} 2030 penetration levels, across a range of VoS assumptions, with purely volumetric rates (U.S. average)

\textbf{Net-Metered PV:} Impact at \textit{10\% penetration}, across a range of VoS assumptions, with purely volumetric rates (high-pen. utility, U.S. avg. price)

\textbf{Energy Efficiency:} Impact of projected 2015-2030 EE savings, if avoided costs are valued at the same rate as solar (U.S. average)

\textbf{Natural Gas:} Range in retail electricity price across 10\%90\% percentile gas price confidence intervals for 2030 (U.S. average)

\textbf{RPS:} Impact in 2030 across low and high cost scenario assumptions (U.S. average, among RPS states)

\textbf{Carbon:} Impact of CPP in 2030 across multiple studies, each considering multiple implementation scenarios (U.S. average)

\textbf{CapEx:} Gross impact of electric-industry CapEx through 2030, across range of CapEx trajectories and WACC (U.S. average)

Notes: Current net-metered PV penetration equal to 0.4\% of total U.S. retail electricity sales, as of year-end 2015. Projected 2030 net-metered PV penetration is 3.4\%, based on Cole et al. (2016). VoS assumptions range from 50\% to 150\% of average cost-of-service. Please refer to the main body of the report for further details on how the ranges shown here were derived.


\footnote{103} \textit{Id.}
B. Net Metered, Distributed Solar Has Predictable Production.

The Report and Petition incorrectly and repeatedly refer to solar as intermittent and unpredictable.\textsuperscript{104} Solar is predictable, especially on a system-wide basis.\textsuperscript{105} For instance, since March 2019 the ISO-NE has integrated a daily load-forecast model that integrates expected production of behind-the-meter solar production after taking into account the weather forecast.\textsuperscript{106} When solar generation is distributed, as it is with net metering programs, it is even more reliable because the risk of localized weather or equipment failures is minimized when generation occurs from thousands of geographically dispersed generating systems, compared to large generating resources. The introduction of smart inverters in response to IEEE 1547-2018 will add balancing services provided by net metered solar customers.\textsuperscript{107}

\textsuperscript{104} \textit{E.g.}, Report at 17; Pet. at 16-17.

\textsuperscript{105} While an individual solar system may experience fluctuations due to weather, these impacts are minimized (\textit{i.e.}, smoothed) as projects are aggregated. As such, the generating profile of solar is actually very predictable and reliable on a system-wide basis.


\textsuperscript{107} Mr. Brown also states that “[m]aintaining reliability on a distribution system where market penetration of rooftop solar has increased significantly requires a substantial investment in more modern control and monitoring technology.” Report at 19. Smart inverters—and the utility control capabilities associated with smart inverters—can be integrated into the communication network established for smart meters. As such, the investment necessary to use the capabilities of smart inverters is primarily operational.
The Report also refers to the so called “duck curve,”\textsuperscript{108} the mismatched timing between load and generation as the sun sets. That is a matter of state resource planning and load management, including through the price signals in retail rate design. For instance, Massachusetts has recently implemented a Clean Peak Energy Standard in order to motivate clean energy resources to operate during peak demand. In New York, the Value of Distributed Energy Resources program compensates projects based on when and where they provide electricity to the grid. Another way for states to address the “duck curve” once solar penetration reaches sufficient levels to actually produce such a load profile, is to adjust the price signals in retail rates to shift load to earlier and behind-the-meter production to later (via energy storage) through time-of-use rates and/or critical peak pricing.

\textbf{C. Solar Installers Operate in a Competitive Marketplace.}

Contrary to the Report’s unsupported assertion that distributed solar installers have “no incentive to pass on to consumers some or most of the cost reductions in their supply chain, and typically do not do so,”\textsuperscript{109} installers operate in a competitive market and must pass along savings to remain competitive. Unlike monopolist regulated utilities, the thousands of solar installers across the country have to provide better value than full-requirements utility service as well as better value than competing installers. That inherently drives down prices and passes

\textsuperscript{108} It is surprising that Mr. Brown uses a 2013 CAISO resource to discuss the implications of the duck curve when so work has been done in the intervening seven years to address the issue.

\textsuperscript{109} Report at 19.
savings onto customers. Thus, while net metering may subject monopoly utilities to much needed price competition, it does not shield rooftop solar installers from competition.

D. **Solar is for Everyone, Not Just for High-Wealth Families.**

Contrary to the Report, the benefits of net metering are not limited to “wealthier customers at the expense of less affluent customers.”\(^{110}\) Mr. Brown has been making that claim for almost a decade. To the extent the claim ever had a factual basis, it no longer does. Historical analyses —published in 2013 and 2015 based on data predating the reports—found customers installing solar at that time had higher income than the median, and that they “skewed towards wealthy.”\(^{111}\) However, the market has changed and prices have declined significantly since those data were collected. Early adopters of any technology are often higher income, but as the industry matures the price declines and the relative income of the typical customer approaches the median.\(^{112}\) That is true of distributed solar. As the market matures, more families with moderate incomes have access to solar.

Ending net metering now, as NERA proposes, will freeze the price declines of rooftop solar and deprive the very segments of the population it purports to care about from the benefits of distributed solar. If NERA is really concerned about low

\(^{110}\) Report at 22.

\(^{111}\) Report at 23.

income communities, it should not seek to end net metering, but instead to expand program accessibility.

Moreover, the policy prescription in the Report—ending net metering—will exacerbate, rather than alleviate, the current inequalities in America’s energy system and prevent low income and other environmental justice communities from accessing renewable energy.\(^{113}\)

Net metering and increased use of distributed solar provides investment across communities while reducing the environmental and health impacts on low income communities and communities of color, who are disproportionately burdened by current forms of energy production.

To be clear, the deployment of distributed solar to lower-wealth families can and must be improved.\(^{114}\) But, ending the most effective mechanism leading to the


\(^{114}\) This is an evolving area, but many states and organizations are working on improving access and equity in the deployment of solar. See e.g., http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=19-E-0735&submit=Search (New York’s NY-SUN initiative, including a framework for Solar Energy Equity to expand solar access for low and moderate income and environmental justice communities); https://doee.dc.gov/solarforall (District of Columbia’s Solar for All Program providing incentives for income-qualified residents (both homeowners and renters) to receive solar installations at no cost, provide the benefits of solar electricity to 100,000 low-income households (at or below 80% Area Median Income), and reduce their energy bills by 50% by 2032); https://ctgreenbank.com/sharing-solar-benefits-in-communities-of-color/ (Connecticut program to accelerate adoption of solar in communities of color and low-to-moderate income households); https://www.illinoissfa.com/ (Illinois Solar For
growth of the technology and therefore lower costs, as NERA seeks to do, will have the opposite effect.

E. Avoided Cost and Value of Generation

The Report and the Petition make multiple references to the value of electricity generated by behind the meter distributed resources as limited to the short term wholesale energy market price, explicitly or implicitly omitting the other avoided cost values provided by distributed generation.115 This is simply false. Net metered facilities (such as solar) provide capacity value by avoiding otherwise required generation, transmission and distribution capacity. They also provide ancillary services. For reference purposes, the Electricity Innovation Lab of the Rocky Mountain Institute (RMI) developed an excellent categorization of the benefits and costs of solar in A Review of Solar PV Benefit & Cost Studies, attached here as Figure 4.116 Those additional avoided costs can, and in fact, must be considered by states when setting avoided cost rates.117

Ultimately, value of solar studies are a tool that is commonly used by states to understand (and possibly even implement) appropriate retail electric policy. As

All Program providing $56.25 million to for low-to-moderate income families to subscribe to community solar projects, and $37.5 million for innovative low-to-moderate income community solar pilot projects in partnership with community organizations).

115 Report at 28; Pet. at 9.
117 18 C.F.R. § 292.304(e)(1)-(4).
the Report correctly notes, the inputs and the results have varied widely from state to state. Thus, contrary to the Petition’s attempt to limit avoided costs to only short term energy value, the value of the costs avoided by distributed generation can approach or exceed the retail rate. There is no basis for the Petition’s incorrect assertion that retail rate overstates the value of distributed generation. The most important point is that it is a resource planning and retail rate design question that is appropriately left to the states.

CONCLUSION

For the foregoing reasons, Public Interest Organizations request that the Commission summarily reject the Petition.

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