July 17, 2020

Dismissed: FERC Declines on Procedural Grounds to Act on Petition Seeking Assertion of FERC Jurisdiction Over Net Metering Sales

In a unanimous decision issued yesterday,[1] the Federal Energy Regulatory Commission (FERC) rejected on procedural grounds the petition by the New England Ratepayers Association (NERA) effectively to invalidate state net metering programs around the country.[2] The decision leaves in place for now state net metering programs that NERA had sought to invalidate.

As described further below, NERA specifically asked FERC to declare that FERC has exclusive jurisdiction over any injection of power onto the grid from behind-the-meter generation and to price such sales in accordance with federal rather than state law (a result that would produce significantly lower prices). Rather than address the issues raised by NERA in the petition, FERC exercised its broad discretion not to address the issues on the merits, finding "the issues presented in the Petition do not warrant a generic statement from the Commission at this time" and finding no specific controversy or harm to be addressed.[3] In so doing, FERC left for another day a decision on the jurisdictional issues underlying the petition and another potential milestone in the ever-evolving boundary between federal and state jurisdiction.

The NERA Petition

In its April 14, 2020 petition, NERA asked FERC to assert jurisdiction over any energy transfer from facilities located on the customer side of the retail meter—rooftop solar and other distributed generation (DG)—(i) whenever the DG output exceeds customer demand or (ii) where the energy from the DG is designed to bypass the customer's load and therefore is not used to serve demand behind the customer's meter, and to ensure the output is priced accordingly.[4] At the highest level, NERA asserted that any amount of energy exceeding the customer's usage is delivered for compensation to the local utility for resale, regardless of duration of the excess, and accordingly is a wholesale sale in interstate commerce subject to the exclusive jurisdiction of FERC under the Federal Power Act. NERA argued that net metering priced such sales at the same rate retail customers pay for their power rather than at the local utility's avoided cost, which is the statutorily required price under federal law.[5] While FERC had rejected these very arguments in 2001, finding that no wholesale power sale occurs when the DG output over a monthly billing cycle is less than the customer's load for that billing cycle,[6] NERA argued that case law and developments since that determination required a different outcome. NERA asserted that FERC is statutorily required to exercise its exclusive jurisdiction in those circumstances.

Overwhelming Industry Response

Given its potential implications, the petition engendered a notable level of national interest and was overwhelmingly opposed by bipartisan groups of state legislators, regulators, attorneys general, governors and other state officials. Advocacy groups, legal experts and academics also filed comments in opposition to the petition. On substance, the opposition essentially argued that FERC precedent was well decided and still good law. On process, opponents argued that this was not a case properly decided through a declaratory order and that NERA had failed to demonstrate that it might be harmed by or had an identifiable interest in the proceedings. Several groups also urged that NERA's membership be publicly disclosed. A few groups did register support for the petition, arguing that the requested outcome promoted fair competition, avoided windfalls

or overcompensation to or cost shifting from net metering participants, reduced rates for other ratepayers, and respected FERC's exclusive jurisdiction.

Net Metering Is Still Threatened

Although FERC unanimously dismissed the petition on procedural grounds, the threats to net metering from the arguments in the petition remain. The *NERA Order* did not address any of the substantive issues underlying the petition, a point that was expressly confirmed in separate concurring opinions issued by Commissioners Bernard McNamee and James Danly. Indeed, Commissioner Danly noted that the rate and jurisdictional issues raised by the petition eventually will have to be addressed. He was concerned that the *NERA Order* could well result in a "patchwork quilt of conflicting decisions" if the jurisdictional issues are addressed by federal district courts across the country. "Confusion, delay and inconsistent rules—some of which will apply to individual states or parts of states—will be the inevitable result."[7]

Day Pitney will continue to monitor these developments. Please feel free to contact any of our Energy lawyers to discuss this decision.

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[1] *New England Ratepayers Ass'n*, 172 FERC ¶ 61,042 (July 16, 2020) (*NERA Order*).

[2] Net metering is the practice of offsetting, typically on a monthly basis, the amount of energy a customer consumes against the amount of energy that the customer produces from some form of DG (often rooftop solar) that is on the customer's side of the retail meter.

[3] *Id.* at PP 35-36.

[4] Petition at 1.

[5] 16 U.S.C. 824a-3(b).

[6] *See MidAm. Energy*, 94 FERC ¶ 61,340 (2001); *see also Sun Edison LLC*, 129 FERC ¶ 61,146 (2009).

[7] Danly, Commissioner, concurring at P 4.

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