UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISION

New England Ratepayers Association	)	Docket No. EL20-42-000

MOTION TO DISMISS PETITION AND COMMENTS OF THE ORGANIZATION OF MISO STATES, INC. AND THE ORGANIZATION OF PJM STATES, INC.

Pursuant to Rule 211 and 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. §385.211 and 18 C.F.R. §385.212, the Organization of MISO States ("OMS") and the Organization of PJM States ("OPSI") (together the "Joint Committees") submit this *Motion to Dismiss Petition and Comments* in response to the *Petition for Declaratory Order*[1] filed by the New England Ratepayer's Association ("NERA" or "Petitioner") in this docket.

The OMS is a non-profit, self-governing organization comprised of representatives from the seventeen regulatory bodies with jurisdiction over entities participating in MISO and serves as the regional state committee. The purpose of the OMS is to coordinate regulatory oversight among its members, to make recommendations to MISO, the MISO Board of Directors, the Commission, and other relevant government entities and state commissions as appropriate, and to intervene in proceedings before the Commission to express the positions of the OMS member agencies.[2]

OPSI is a non-profit, self-governing organization comprised of representatives from the fourteen regulatory bodies with jurisdiction over entities participating in the P.J.M. Interconnection, L.L.C ("PJM") and serves as the regional state committee. The purpose of OPSI

[1] *New England Ratepayers Association*, "Petition for Declaratory Order of New England Ratepayers Association Concerning Unlawful Pricing of Certain Wholesale Sales," Docket EL20-42 at 1-3 (April 14th, 2020) ("Petition").

[2] The Minnesota Department of Commerce, an associate member of the OMS, joins these comments.

is to coordinate regulatory oversight among its members, to make recommendations to PJM, the PJM Board of Managers, the Commission, and other relevant government entities and state commissions as appropriate, and to intervene in proceedings before the Commission to express the positions of the OPSI member agencies.

Service of pleadings, documents, and communications in this proceeding should be made on the following:

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I. BACKGROUND

On April 14th, 2020, NERA filed a Petition pursuant to rule 207 of the Commission's Rules of Practice and Procedure[3] asking the Commission to (1) "declare that there is exclusive federal jurisdiction over wholesale energy sales from generation sources located on the customer side of the retail meter, and (2) order that the rates for such sales be priced in accordance with the Public Utility Regulatory Policies Act of 1978 ("PURPA") or the Federal Power Act ("FPA"), as applicable."[4] NERA asks the Commission to "reject state net metering laws which assert

[3] 18 C.F.R. §385.207.
[4] Petition at 1-3.

jurisdiction over such wholesale sales and establish a price in excess of what PURPA or the FPA allows for wholesale sales subject to this Commission's exclusive jurisdiction."[5]

II. MOTION TO DISMISS

The Commission should dismiss this Petition because, as will be discussed below, NERA has incorrectly asserted that appeals court precedent[6] requires the Commission to substantially modify its station power policy[7] as applied to net-metering, when these precedents require no such thing. The Commission has historically viewed station power and net-metering practices similarly.[8] NERA claims that the D.C. Circuit reversed the Commission's station power cases[9] and argues that this eliminates FERC's discretion to approve a net-metering netting interval that determines when a wholesale sale has taken place.[10] Because of this, NERA asserts that FERC has no choice but to intrude on state retail jurisdiction and preempt any state laws that compensate net-metered resources at retail for any excess power production measured on an hourly or shorter interval.[11]

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[5] *Id.* at 45.

[6] *See Southern Cal. Edison v. FERC*, 603 F.3d 996 (D.C. Cir. 2010) ("SCE") and *Calpine Corp. v. FERC*, 702 F.3d 41 at 43-44 (D.C. Cir. 2012) ("Calpine").

[7] *Calpine* 702 F.3d at 997 (Station power is energy a generator uses "for their own heating, lighting, air conditioning and office equipment needs.") Currently FERC allows these generators to net their consumption against their wholesale production. Under FERC's current station power rules, if a generator's consumption exceeds its generation, it is charged a rate determined by the retail regulator for that excess consumption. Net-metering, on the other hand, is a billing mechanism in which a consumer's generation is netted against its retail consumption. If a consumer's net-metered generation exceeds its consumption, it is paid a rate determined by FERC, subject to the provisions of PURPA or the FPA.

[8] *MidAmerican Energy*, 94 FERC ¶ 61,340 at p. 6 (2001) ("MidAmerican") (internal citations omitted.) (This case "[P]resent[ed] an issue similar to that in our recent decision addressing the netting of station power used at a generating station against certain wholesale sales from the generating station. In that case, in the context of the FPA, the Commission found that there is no sale (for end use or otherwise) between two different parties when one party is using its own generating resources for the purpose of self-supply of station power, and accounting for such usage through the practice of netting. In the case before us we find likewise 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.

[9] *MidAmerican* and *Sun Edison LLC*, 129 FERC ¶ 61,146 (2009) ("Sun Edison").

[10] Petition at 12.

[11] Petition at 26-30.

This interpretation is a misreading of *Southern California Edison* ("*SCE*") and *Calpine Corp. v. FERC* ("*Calpine*"),[12] and NERA bases the rest of its arguments on the misreading that FERC's station power policy as used to determine when a wholesale sale has taken place has been reversed. The D.C. Circuit has not reversed FERC's station power policy. The D.C. Circuit in *SCE* vacated FERC's approval of a tariff provision that required "the same method used for calculating transmission charges for station power be used to calculate retail charges."[13] In its *Order on Remand*,[14] FERC acknowledged it had overreached and retreated, and the D.C. Circuit upheld FERC's determination that it did not have jurisdiction to determine when a retail sale had not taken place.[15] These decisions do not require FERC to shorten its netting period for net-metering to an hour or less and assert jurisdiction over actions that historically have been and should be regulated at the retail level. If anything, the decision appropriately pushes back the Commission's involvement in defining what constitutes a retail sale.

Further, petitioners claim that energy transfers from Full Net-Metered ("FNM") resources are both wholesale (i.e., a sale for resale) and in interstate commerce.[16] FNM is neither wholesale nor interstate in character. These actions are not wholesale because the Commission has permissibly interpreted the FPA by using netting intervals to determine when a wholesale sale has taken place, and the courts have stated that there is no conflict when retail netting periods and wholesale netting periods differ.[17] And these energy transfers are not in interstate commerce because although connections between station power and FNM have been used by the

[12] See *SCE and Calpine*.
[13] *SCE*, 603 F.3d at 997
[14] *Duke Energy Moss Landing LLC v. California Indep. Sys. Operator*, 132 FERC ¶ 61,183 at P 2 (2009) ("Order on Remand")
[15] *Calpine*, 702 F.3d at 42.
[16] Petition at 20.
[17] *Calpine*, 702 F.3d at 48.

Commission in the past, there are important electrical differences that further remove FNM resources from producing energy transfers in interstate commerce, namely their location on state-regulated distribution systems. Particularly, the standard the petitioner cites from *FPC v. Florida Power and Light* ("FP&L") regarding an interstate sale would not necessarily apply to net metering transactions.[18]

Finally, when net-metered transactions take place within bundled retail products, the Commission's jurisdiction is not implicated because the Commission has permissibly disclaimed jurisdiction over bundled retail transmissions, and the Supreme Court has upheld this disclaimer.[19] The Joint Committees urge FERC to continue to leave the regulation of these transactions to the states. For these reasons, this Petition should be dismissed.

III. COMMENTS

A. The Courts Have Not Limited FERC's Use of Netting Intervals to Determine When a Wholesale Sale Has Taken Place

NERA claims that the D.C. Circuit Court "found it 'arbitrary and unprincipled' to rely on netting intervals to determine jurisdiction" and that this constitutes a reversal of FERC's station power policy. NERA argues that this reversal "removes the foundation upon which the Commission rested its disclaimer of jurisdiction in *MidAmerican* and *Sun Edison*."[20] However, what the court actually found arbitrary and unprincipled was FERC's use of a netting interval to modify retail jurisdiction:

[18] *FPC v. Florida Power & Light Co.*, 404 U.S.453 (1972) ("FP&L") (The standard of an interstate sale used in this case is identified as "energy [that] is delivered to a utility that merges and comingles the energy with other energy sources on the interstate electric grid." If the Commission were to apply this standard, this could create a high burden for utilities to identify within their footprint what could be considered interstate versus intrastate.)

[19] *See New York v. FERC*, 535 U.S. 1 (2002) ("NY v. FERC").

[20] Petition at 13.

> [W]hether a ***retail sale*** occurs depends, in [FERC's] view, on the length of the netting period, which seems rather arbitrary and unprincipled— certainly as a jurisdictional standard.
>
> Perhaps of even greater difficulty, we do not understand why FERC is empowered to conclude that a retail sale ***has not*** taken place unless it can claim the transaction is, instead, a wholesale sale or a transmission. To simply declare that the state lacks jurisdiction because FERC believes no retail sale has taken place really begs the jurisdictional question. Unless a transaction falls within FERC's wholesale or transmission authority, it doesn't matter how FERC characterizes it.[21]

Petitioners assert that, "[T]he D.C. Circuit reversed the Commission's rules for the monthly netting of station power. In so doing, the court rejected the principle that the existence of a sale, for jurisdictional purposes, may be determined based on the length of a netting interval."[22] This is not true. What the D.C. Circuit found "arbitrary an unprincipled" was FERC's attempt to determine when a retail sale has occurred – something it concluded "doesn't matter" because it's not in FERC's jurisdiction.[23]

Further, the D.C. Circuit did not reverse FERC's order. It vacated FERC's order, and

> [T]he Commission issued a new order on remand, acknowledging that it lacked a jurisdictional basis to determine when the provision of station power constitutes a retail sale and indicating that the netting interval in the CAISO tariff could only govern Commission-jurisdictional transmission charges, not retail charges."[24]

On remand, FERC wrote, "the states determine the amount of station power that is sold in state-jurisdictional retail sales[25] and summarized *SCE* as such:

[21] *Calpine*, 702 F.3d at 45.
[22] Petition at 15.
[23] *SCE*, 603 F.3d at 1000-01.
[24] *Calpine*, 702 F.3d at 45.
[25] Order on Remand at P 16.

> [The] D.C. Circuit found that the Commission exceeded its statutory authority. While the D.C. Circuit recognized the Commission's "undeniable right… to determine how much electricity generators deliver to and take from the grid for transmission purposes," it found that this authority did not "empower" the Commission to "conclude that a retail sale has not taken place."[26]

And in *Calpine,* the D.C. Circuit upheld FERC's jurisdictional retreat.[27] *SCE* and *Calpine* do not require the Commission to modify its station power policy in any way, and these precedents do not require FERC to end the use of monthly netting periods to determine when a wholesale sale has taken place in the station power or net-metering context. These cases, along with *N.Y. v. FERC*[28], which upheld FERC's authority to not assert jurisdiction over bundled retail sales, and *Niagara Mohawk Power Corp. v. FERC* ("*Niagara Mohawk*"), [29] in which the Court found it difficult to conclude that FERC could set an hourly netting period but not a monthly netting period,[30] do not require FERC to modify its current net-metering framework in any way, much less fundamentally alter the current state and federal framework applicable to net-metered resources. This alone provides the Commission ample support to dismiss this Petition, and the Joint Committees urge the Commission to do so.

B. FERC's Net-Metering Policy Has Not Exceeded its Jurisdiction, Therefore, FERC is not Required to Preempt State Laws That Assert Jurisdiction Over These Transactions

Next, NERA claims that anytime a generator produces more power than it consumes that a wholesale sale has taken place and that FERC has no discretion in disclaiming jurisdiction over these sales.[31] NERA cites *FPC v. Southern California Edison Co.* ("Colton")[32] and argues that

[26] *Duke Energy Moss Landing v. CAISO,* "Order Denying Rehearing," 134 FERC ¶ 61,151 at P 8 citing *SCE* 603 F.3d at 1000.
[27] *Calpine*, 702 F.3d at 50.
[28] *See New York v. FERC*.
[29] *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006) ("Niagara Mohawk").
[30] *SCE*, F. 3d at 999 citing *Niagara Mohawk*, 452 F.3d at 828.
[31] Petition at 24-26.
[32] *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964) ("Colton").

this case requires FERC to exercise jurisdiction once jurisdiction has been established under the FPA. However, FERC has not successfully exercised jurisdiction over retail sales and bundled retail transmission, rendering this point irrelevant.

Nonetheless, NERA argues that FERC must establish at a minimum an hourly netting interval to determine when wholesale sales have taken place and preempt any state set retail rates that compensate FNM resources via the use of a different netting interval.[33] The D.C. Circuit has stated that the use of different netting intervals to determine when wholesale sales and retail sales occur does not create a conflict,[34] and the Supreme Court has held that FERC has permissibly disclaimed jurisdiction over the transmission component of bundled retail sales.[35]

Further, FERC has historically approved RTO and ISO tariffs that use a monthly netting period to determine when a generator's consumption exceeds its generation for the purposes of station power, but, nonetheless, the Commission had approved an hourly netting period before standardizing its policy to use a monthly interval.[36] NERA claims that it would be arbitrary and capricious for the Commission to set a netting interval for net-metered resources at longer than an hour despite the fact that the D.C. Circuit has written, "[I]f hourly netting is perfectly consistent with the statute, we see no principled reason why monthly netting violates the [FPA]."[37] As will be shown below, the Commission's ability to determine an appropriate netting interval remains firmly in its discretion and in no way affects the states' ability to determine the netting period for retail sales.

[33] Petition at 26.
[34] *Calpine*, 702 F.3d at 48.
[35] *See NY v. FERC.*
[36] *Calpine*, 702 F.3d at 43-44.
[37] *SCE*, F. 3d at 999 citing *Niagara Mohawk*, 452 F.3d at 828.

1. Regardless of the Netting Interval Net Metered Transactions Remain State Jurisdictional

Net metering programs are part of the retail service provided by the local electric utility or alternative retail electric supplier, and netting is a manner of measuring and billing for that retail service. A retail customer does not enter into a "sale" when it participates in that retail service.[38] If it were a sale, it would be an intrastate retail sale.

Power netted from an end-user's rooftop solar panel is likely to be relatively small and limited to local distribution facilities. FERC has a 7-factor test used to determine if a facility is a distribution facility. The first factor is that "any facility with an operating voltage at or exceeding 100 kilovolts ("kV") is presumed to be part of the nation's bulk electric system, while any facility with a lower operating voltage is presumed to be engaged in local distribution."[39] In assessing whether a sale is in interstate commerce for purposes of determining state versus federal regulation, the United States Supreme Court said "[t]he test of the validity of a state regulation… is whether the particular business which is regulated is essentially local… in character…."[40] Rooftop solar participation in a state net metering retail service program can hardly get more local in character.

In Order No. 2003-A, FERC indicated that "[o]nly if the Generating Facility produces more energy than it needs and makes a net sale of energy to a utility over the applicable billing period would the Commission assert jurisdiction."[41] However, regardless of the applicable billing

[38] *MidAmerican* at p. 6 (". . .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.").

[39] See Revisions to Electric Reliability Organization of Bulk Electric System Rules of Procedure, Order No. 773, 141 FERC ¶ 61,236, at P 67 (2012) ("this threshold will remove from the bulk electric system the vast majority of facilities that are used in local distribution, which tend to be operated at lower, sub-100 kV voltages").

[40] Pub. Utilities Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927);" Federal Power Act, 16 U.S.C. § 824 (a, b) (the Commission "shall not have jurisdiction . . .over facilities used in local distribution,").

[41] Standardization of Generator Interconnection Agreements and Procedures, Order 2003-A, 69 Fed. Reg. 15,932, at P 747 (Mar. 26, 2004).

period, FERC cannot assert jurisdiction over a retail sale or service charge. Section 201 of the Federal Power Act precludes FERC "jurisdiction… over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce."[42]

As such, regardless of the netting interval, the retail charge for this service remains state jurisdictional.[43] Even assuming it were a wholesale sale, FERC has the burden of proving it is interstate commerce.[44] FERC cannot now override states' regulation of the retail market, including states' use of netting to establish retail charges. As such, the question of bundled versus unbundled transmission is irrelevant here. As the D.C. Circuit explains in affirming that FERC lacks authority to regulate charges to an independent generator for use of electricity necessary to operate, light, heat, air conditioning, etc., "[w]hile the regulation of transmission charges is undoubtedly within FERC's jurisdiction, retail charges are not."[45]

2. FERC's use of Monthly Netting Intervals to Determine When a Wholesale Sale Has Taken Place is a Statutorily Permissible Policy Choice and Does Not Restrict States' Jurisdiction Over Retail Sales

NERA argues that *"all* deliveries of energy from FNM generators to interconnected utilities for resale are governed exclusively by federal law" and that any state law that encroaches upon FERC's jurisdiction should be preempted. [46] NERA argues that, "When the energy is sold to a utility for resale, then the sale is at wholesale."[47]The Court in *Calpine* defined FERC's jurisdiction more precisely and framed the issue running through *Niagara Mohawk, SCE, and Calpine*:

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[42] 16 U.S.C. § 824(b)(1).

[43] The Illinois Commerce Commission notes that Illinois enacted net metering in 2008, 220 ILCS 5/16-107.5, in response to the Energy Policy Act of 2005, which encouraged each state to include net metering service as part of their regulatory policies and among the local utility services that they regulate. 16 U.S.C. § 2621(d)(11).

[44] *FP&L*, 404 U.S. at 455 and 459; Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 532 (1945).

[45] *Calpine*, F.3d at 41, 42, 50.

[46] Petition at 19.

[47] *Id.*

> The legal issue that triggered this series of cases is how the authority to set netting intervals for different purposes meshes with the Federal Power Act's division of jurisdiction between federal and state authorities. Section 201(b) of the Act gives FERC jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce," as well as "all facilities for such transmission or sale." States, however, retain jurisdiction over "any other sale of electric energy" and "facilities used in local distribution" of electricity.[48]

The court also provided a brief background on the origin of net-metering itself:

> Order 888 was successful in causing major utilities nationwide to divest most of their generating facilities, but it raised questions as to how independent generators would be charged for their use of station power. Under what circumstances could a generator be charged retail rates for either drawing from the grid or self-supplying its station power? FERC answered this question by devising "netting intervals."[49]

NERA argues incorrectly that the court in *Calpine* determined that "netting intervals do not determine the existence of jurisdictional sales" and argues that "it would be arbitrary and capricious for the Commission to use a different interval to measure and determine the compensation for or value of wholesale sales from FNM generators merely on the basis that the generator is located on the customer side of a meter and is eligible for a state FNM program."[50] NERA cites a Fifth Circuit Opinion in support of this idea, "Consistency in the application of its rules is a governing principle of administrative law. As the Fifth Circuit stated: 'There may not be a rule for Monday, and another for Tuesday, a rule for general application, but denied outright in a specific case.'"[51]

As has been discussed above, the D.C. Circuit Court has not rejected the Commission's use of netting intervals to determine when a wholesale sale has taken place, and the Court in *Calpine* noted that this consistency is exactly what FERC is trying to achieve with the use of a

[48] *Calpine*, 702 F.3d at 43 citing 16 U.S.C. § 824(b)(1).
[49] *Id.*
[50] Petition at 26.
[51] Petition at 29 citing *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1160 (5th Cir. 1977).

monthly netting interval:

> FERC did not mandate a one month netting period; it only approved NYISO's choice. And it had cautioned that its approval of an hourly netting tariff in the adjacent Pennsylvania-New Jersey-Maryland market did not establish a required approach. Indeed, as we noted, FERC subsequently approved a modification to that tariff providing for monthly netting. FERC observed, in later approving the NYISO tariff, that a monthly netting period in New York would have the benefit of creating uniformity with the adjacent PJM energy market to the south.[52]

FERC is not required to assert jurisdiction of wholesale sales as determined by an hourly netting interval as NERA claims. FERC has the discretion under the Administrative Procedures Act ("APA") to interpret the FPA and apply a range of reasonable netting periods. Similar to NERA, the petitioners in *Niagara Mohawk* asserted that FERC was required to set an hourly netting interval.[53] The D.C. Circuit Court did not agree writing, "In sum, we simply do not see, on these arguments, how we could determine that a one-hour, a one-month, or for that matter a one-week netting period is unreasonable."[54]

NERA's arguments that FERC must set its netting period consistent with its other transactional periods is at odds with precedent. The D.C. Circuit was unable to identify how it could find a range of netting intervals unreasonable and clearly said so. The Commission can and has set multiple netting intervals in various cases, but it tries to achieve consistency where possible, and it should continue to do so.

Even if FERC decided to lower the netting interval to an hour, that would in no way affect states' ability to determine when a retail transaction had taken place. The court in *SCE* wrote,

[52] *Niagara*, 452 F.3d at 829.
[53] *Calpine*, 702 F.3d at 45 citing *Niagara Mohawk*.
[54] *Id.*

> It is, of course, true that under differing netting periods FERC can conclude that no transmission for station power took place in a month in which California would recognize retail sales of that power, but that is hardly a conflict. As we have noted, in an unbundled market, transmission and power are procured through separate transactions. And, as we recognized in *Niagara Mohawk*, the netting periods for power and transmission need not be the same.[55]

And finally, in *FERC v. EPSA*, the Supreme Court noted that the FPA limits "'FERC's sale jurisdiction to that at wholesale,' reserving regulatory authority over retail sales (as well as intrastate wholesale sales) to the States."[56] FNM transactions take place on the distribution system, and if they are considered sales, they should be classified as intrastate sales.

3. FERC Does Not Have to Take Jurisdiction Over Bundled Retail Transmissions

In upholding FERC Order No. 888[57], the Supreme Court upheld the D.C. Circuit's decision that FERC had properly exercised its discretion under *Chevron USA v. NRDC*[58] to interpret the FPA by choosing not to assert jurisdiction over the transmission component of bundled retail sales.[59] The Supreme Court summarized FERC's position as such:

> FERC… rejected the argument that its failure to assert jurisdiction over bundled retail transmissions was inconsistent with its assertion of jurisdiction over unbundled retail transmissions. FERC repeated its explanation that it did not believe that regulation of bundled retail transmissions (i.e., the "functional unbundling" of retail transmissions) "was necessary," and again stated that such unbundling would raise serious jurisdictional questions. FERC did not, however, state that it had no power to regulate the transmission component of bundled retail sales. Rather, FERC reiterated that States have jurisdiction over the retail sale of power, and stated that, as a result, "[o]ur assertion of jurisdiction… arises only if

[55] *Calpine*, 702 F.3d at 48.

[56] *FERC v. Electric Power Supply Ass'n.*, 136 S.Ct. 760 (2016) at 775 citing *NY v. FERC* 535 US 1 at 17 (2002).

[57] *See* Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000) (TAPS), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

[58] *Chevron USA v. NRDC*, 467 U.S. 837 (1984) ("Chevron").

[59] *See NY v. FERC*.

> the [unbundled] retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail program."[60]

NERA claims that this is an unlawful exercise of discretion and cites *Colton*:

> Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.[61]

The problem with this argument is that federal jurisdiction over bundled retail transmissions has never been established, and the Supreme Court has stated this:

> But even if we assume… the FPA gives FERC the authority to regulate the transmission component of a bundled retail sale, we nevertheless conclude that the agency had discretion to decline to assert such jurisdiction… because of the complicated nature of the jurisdictional issues. Like the Court of Appeals, we are satisfied that FERC's choice not to assert jurisdiction over bundled retail transmissions in a rulemaking proceeding focusing on the wholesale market "represents a statutorily permissible policy choice."[62]

In summary, the Commission does not have jurisdiction over the netting interval states use to determine when a retail sale has taken place, it has properly exercised its discretion to interpret the FPA by using a monthly netting interval to determine when a wholesale sale has occurred, and it has properly disclaimed jurisdiction over bundled retail transmissions. For these reasons, the Commission should dismiss the Petition.

C. FERC SHOULD NOT DISTURB THE STATUS QUO OR INTRUDE ON STATE POLICY MAKING

The Petition cites a report that states that 41 states have enacted mandatory net energy

[60] *NY v. FERC*, 535 U.S. at 13-14 citing Order No. 888-A, at 30,225-30. (internal citations omitted).
[61] *Colton*, 376 U.S. at 215-216.
[62] *NY v. FERC*, 535 U.S. at 28 citing Transmission Access Policy Study Group v. FERC 225 F.3d 667 (2000).

metering programs.[63] Nearly all states in the MISO footprint have some form of net metering program, and many OMS members have been proactively updating their programs based on local conditions and policy goals. In 2019, every OMS member except for one had some type of action on net metering, rate design, or solar ownership policies, and Arkansas, Michigan, Missouri, Kentucky, Louisiana, Montana, and Wisconsin were particularly active.[64] In first quarter of 2020, every state in the MISO footprint except for two had some type of distributed generation compensation, rate design, and solar ownership policy action, with Arkansas being particularly active.[65] FERC should not disturb the status quo under which states can continue to exercise their jurisdiction over retail ratemaking to adjust their net metering programs based on state policy, utility and stakeholder goals, and/or other considerations under state and retail jurisdiction.

State policies on retail net metering exist to achieve a multitude of policy goals, all within state jurisdiction and are often intended to address the policy questions raised in the Petition related to the value of net metering and intermittent resource, cross-subsidization, and technical considerations of installing distributed generation on distribution systems.[66] The Commission should recognize that long-term investments have been made under the status quo as part of the retail ratemaking process and that a jurisdictional shift at this time would significantly disrupt net-metering as it currently exists and could have significant unintended consequences.

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[63] National Renewable Energy Laboratory, Net Metering (May 29, 2019), https://www.nrel.gov/state-local-tribal/basics-net-metering.html ("NREL Report"). See also Congressional Research Service, Net Metering: In Brief at 2 (Nov. 14, 2019), https://crsreports.congress.gov/product/pdf/R/R46010.

[64] North Carolina Clean Energy Technology Center, The 50 States of Solar: 2019 Policy Review and Q4 2019 Quarterly Report, January 2020 at p. 11 available at: https://nccleantech.ncsu.edu/wp-content/uploads/2020/01/Q4-19-Solar-Exec-Summary-Final.pdf (last accessed June 15, 2020.)

[65] North Carolina Clean Energy Technology Center, The 50 States of Solar: Q1 2020 Quarterly Report Executive Summary, April 2020 at p. 6 available at: https://nccleantech.ncsu.edu/wp-content/uploads/2020/04/Q1-20_SolarExecSummary_Final.pdf (last accessed June 15, 2020).

[66] Petition at 37-43.

IV. CONCLUSION

Wherefore, the Joint Committees respectfully request the Commission dismiss the Petition. The OMS[67] and OPSI[68] submit this *Motion to Dismiss Petition and Comments* because a majority of each committee's members support this filing.[69] Individual OMS and OPSI members reserve the right to file separate comments regarding the issues discussed in these comments.

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Dated June 15th, 2020

[67] The Manitoba Public Utilities Board did not participate in the vote on this filing.

[68] The OPSI Board voted to approve joining this Motion to Dismiss and Comments on June 12, 2020 with the following members supporting: Commissioner Harold Gray (Delaware PSC); Chairman Willie L. Phillips (PSC of District of Columbia); Commissioner D. Ethan Kimbrel (Illinois CC); Commissioner David Ober (Indiana URC); Commissioner Talina R. Mathews (Kentucky PSC); Commissioner Michael T. Richard (Maryland PSC); Commissioner Tremaine L. Phillips (Michigan PSC); Commissioner Herbert H. Hilliard (Tennessee RA); Chairman Charlotte R. Lane (PSC of West Virginia).

The following members abstained: President Joseph Fiordaliso (New Jersey BPU); Chair Charlotte Mitchell (North Carolina UC); Commissioner M. Beth Trombold (PUC of Ohio); Commissioner David Sweet (Pennsylvania PUC); and Commissioner Judith Williams Jagdmann (Virginia SCC).

[69] The Manitoba Public Utilities Board did not participate in the vote on this filing.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list prepared by the Secretary for the above-captioned docket in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.2010.

DATED at Madison, Wisconsin this the 15th of June 2020.

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/s/ Marcus Hawkins

Marcus Hawkins
Executive Director
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