BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

PROTEST OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
TO THE PETITION FOR DECLARATORY ORDER
OF THE NEW ENGLAND RATEPAYERS ASSOCIATION

The Pennsylvania Public Utility Commission (PAPUC) herein files this Protest to the Petition for Declaratory Order of the New England Ratepayers Association Concerning Unlawful Pricing of Certain Wholesale Sales filed on April 14, 2020 (Petition or Petitioner). The Petitioner requests that the Federal Energy Regulatory Commission (FERC or Commission) declare that there is exclusive federal jurisdiction over wholesale energy sales from generation sources located on the customer side of the retail meter whenever the output of such generation sources exceeds the customer's demand or where the energy from such generators is designed to bypass the customer's load and is not used to serve demand behind the customer's meter. The Petitioner further requests that, in these circumstances, the Commission 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").

I. SUMMARY OF THE PAPUC'S PROTEST

The PAPUC's Protest to NERA's Petition is summarized in the following three main points:

A. The Petition for Declaratory Order fails to present a proper controversy for the Commission's review.

B. Net metering is a retail billing practice within the States' exclusive jurisdiction.

C. Net metering transactions are not wholesale sales in interstate commerce.

For these reasons, the PAPUC urges the Commission to dismiss NERA's Petition.

II. PROTEST

A. The Petition for Declaratory Order fails to present a proper controversy for the Commission's review

The Commission has discretion to issue a declaratory order to terminate a controversy or remove uncertainty.[1] Such discretion is by no means mandatory, and the Commission commonly dismisses petitions for failure to present a proper controversy or uncertainty. "The Commission does not adjudicate policy questions outside of concrete

[1] Administrative Procedure Act, 5 U.S.C. § 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); 18 C.F.R. § 385.207(a)(2) ("A person must file a petition when seeking…[a] declaratory order or rule to terminate a controversy or remove uncertainty.").

cases, with limited exceptions."[2] Particularly common are dismissals based on a premature, purely speculative question,[3] or petitions which are academic or generic.[4]

In this case, Petitioner's request involves a purely speculative question or one that is academic and generic in nature as Petitioner did not identify a specific state net metering scheme. It is also significant that Petitioner relies on a nearly decade-old precedent to bring a challenge to the well-established practice of state jurisdiction over the regulation of retail rate treatment for behind the meter generation, known as net metering. The Petitioner essentially relies on the cases of *Southern Cal. Edison Co. v. FERC*,[5] and *Calpine Corp. v. FERC*,[6] for their entire jurisdictional argument. However, *Calpine* reaffirms the reasoning in *Edison*, as further discussed below, thereby strengthening this already decade-old precedent. That this Petition does not remove uncertainty or terminate a controversy is well-illustrated by the settled regulatory treatment that it seeks to upset.

1. Congress has left the adoption of net metering practices to the states

Congress endorsed state jurisdiction over net metering in the amendments to PURPA set forth in the Energy Policy Act of 2005 (EPAct 2005), codified at 16 U.S.C.

[2] *Southern Co. Services, Inc.*, 108 FERC ¶ 61,139, ¶ 8 (2004).
[3] *Camille E. Held, Walter B. Held, A. W. Stuart Tr., W. Titus Nelson, & Dale E. Grenoble, & Sierra Hydro, Inc.*, 57 FERC ¶ 61,080, 61,293 (1991) ("The petition before us does not present sufficient facts on which to formulate a legal determination, and the controversy alleged is purely speculative. The petition does not identify any particular body of water at issue, nor does it allege any contest or disagreement over any particular rights to the use of such water.").
[4] *Phillips Petroleum Co. & Marathon Oil Co.*, 58 FERC ¶ 61,290, 61,932 (1992) (Describing that the petition would present no immediate regulatory impacts on petitioner and dismissing the petition as purely academic.).
[5] 603 F.3d 996 (D.C. Cir. 2010) (*Edison*).
[6] 702 F.3d 41 (D.C. Cir. 2012) (*Calpine*).

§ 2621(d)(11).[7] Specifically, the EPAct 2005 states that "[e]ach State regulatory authority … shall consider each standard established by subsection (d) and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this chapter."[8] Congress, through the EPAct 2005, added net metering to this list of state-focused policies:

> (11) 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.[9]

Notably, Congress used the term "offset" rather than any recognition that the flow of electricity from the customer to the distribution company constitutes a sale. An "offset" is a billing practice that provides a credit applied to charges on a retail bill, not a sale of any kind, including a wholesale sale. In fact, the EPAct 2005 implicitly empowers states to consider and adopt net metering policies and practices for retail customers. As such, it is clear that Congress intended to leave to the states the exclusive authority to offer and regulate net metering service to retail electric customers.

Accordingly, it is the U.S. Congress, not the Commission, that should address the merits of the policy questions raised by the Petitioner, because it is the U.S. Congress that

[7] Public Law No. 109-58.
[8] 16 U.S.C. § 2621(a).
[9] 16 U.S.C. § 2621(d)(11).

determines how to regulate interstate commerce. As the U.S. Congress has determined that states should regulate the retail billing practice known as net metering service, the Commission should not engage in this unnecessary debate.[10]

2. Granting NERA's Petition will unsettle more than fifteen years of validly-enacted net metering laws and regulations in Pennsylvania, as well as the investment decisions made in reliance of state laws and Commission precedent

To illustrate the level of uncertainly that a Commission ruling would introduce should this petition be granted, in Pennsylvania alone, the existing framework of net metering regulation has resulted in more than 26,000 customer-generators installing 403,927 kilo-Watts of generation nameplate capacity as of mid-2019,[11] in reliance on Pennsylvania's Alternative Energy Portfolio Standards Act of 2004 (AEPS Act) and the PAPUC regulations implementing that Act.[12] As the PAPUC Net Metering Report shows, the 2019 cumulative data represents a 16% increase of the associated generating capacity relative to 2018.[13] The customer interconnection requests for the 2019 reporting year were 5,820, further indicating the high level of customer interest in our state programs and the

[10] *Advanced Energy Econ. Sustainable FERC Project*, 167 FERC ¶ 61,032, ¶ 18 (2019) ("[B]ecause ISO-NE has not proposed a change to its M&V standards, there is no concrete proposal for the Commission to evaluate to determine whether a Tariff filing is required. As such, there is no controversy or uncertainty necessitating a declaratory finding at this time."); *New York State Elec. & Gas Corp.*, 6 FERC ¶ 61,103, 61,192 (1979) ("[D]efinitive consideration by the Commission of the applicability of the Federal Power Act to the interconnection envisioned in the petition should be deferred until the operational details associated with these plans become definite and all of these facts are made available to us in a new submittal.").

[11] *See* PAPUC BUREAU OF TECHNICAL UTILITY SERVICE, NET METERING & INTERCONNECTION REPORT 2017-2019 at 4 (2019), *available at* http://www.puc.pa.gov/Electric/pdf/AEPS/Net_Metering-Interconnection_Report_2017-19.pdf. (PAPUC Net Metering Report).

[12] 73 P.S. §§ 1648.1—1648.8. *See also* 52 Pa Code §§ 75.1—75.72.

[13] PAPUC Net Metering Report at 2.

investment decisions made by Pennsylvanians.[14] These retail customers in Pennsylvania have relied upon this long-established regulatory scheme in making these large personal investments in behind the meter generation to meet their energy needs that should not be so cavalierly discarded as the Petitioner requests, without express authority from the U.S. Congress.

B. Net metering is a retail billing practice within the States' exclusive jurisdiction

Perhaps the largest failing of the Petition is the mischaracterization of the *Calpine* and *Edison* holdings. Petitioner uses these cases to disrupt the decisions of the Commission in *MidAmerican*[15] and *Sun Edison.*[16] To begin, the Commission described the ordinary net metering circumstance in *MidAmerican* as follows:

> In essence, MidAmerican is asking this Commission to declare that when, for example, individual homeowners or farmers install small generation facilities to reduce purchases from a utility, a state is preempted from allowing the individual homeowner's or farmer's purchase or sale of power from being measured on a net basis, i.e., that PURPA and the FPA require that two meters be installed in these situations, one to measure the flow of power from the utility to the homeowner or farmer, and another to measure the flow of power from the homeowner or farmer to the utility.[17]

This description in *MidAmerican* demonstrated that the Commission recognized that no sale occurs when the customer-generator complies with netting practices set forth by the state regulator of what is a retail transaction, and saw no reason to interfere with the state's regulation of this retail billing practice.[18]

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[14] *Id*.
[15] *MidAmerican Energy Co.*, 94 FERC ¶ 61,340 (2001).
[16] *Sun Edison LLC*, 129 FERC ¶ 61,146 (2009).
[17] *MidAmerican* at 62,263.
[18] *Id.*

The Commission expounded its *MidAmerican* conclusions eight years later in *Sun Edison*. The *Sun Edison* petition relied on very similar facts as *MidAmerican* describing net metering as follows:

> [A]t a small number of locations, during certain temporary periods of peak electrical production and low demand for electricity, the solar photovoltaic facility's production electrical output may temporarily exceed SunEdison's customer's retail load. SunEdison states that in each of the states where it operates, however, the state has authorized "net metering" programs. SunEdison states that each of the programs address circumstances in which electric energy generated within an end-use customer's premises temporarily exceeds that customer's electric demand; in that circumstance, electric energy is allowed to flow back through the interconnection to the grid, with these deliveries netted against the customer's electrical purchases from the local utility. SunEdison also states that these state net metering programs uniformly prescribe either size limitations on the on-site generation capacity, or require that the generation be sized for the primary purpose of supplying the end-use customer.[19]

One main difference between these two cases, that the Commission found immaterial, was that the solar generation at issue in Sun Edison was not owned directly by the customer of the electric distribution company, but was owned by the Sun Edison Retail Operations, who then sold the electricity to the retail customer at an agreed-upon price.[20] In essence, this offset a portion of the retail customer's purchases from the distribution company, and as described above, only on rare occasions did the output from Sun Edison's facilities exceed the served customer's load. In spite of these facts, the Commission held that "[i]n these circumstances, Sun Edison's sales of electric energy to end-use customers are not subject to the Commission's jurisdiction under Part II of the FPA."[21]

[19] *Sun Edison* ¶ 9.
[20] *Sun Edison* ¶ 6.
[21] *Sun Edison* ¶ 19.

Calpine refers to net metering programs as "a kind of billing convention".[22] The Petitioner even recognizes this, and yet, it stumbles in understanding that the billing convention prescribed by the state does not reflect on wholesale energy sales in interstate commerce. Indeed, the Petitioner even notes that in some states these purported "sales" roll over as a bill credit from month-to-month.[23] The Petitioner characterizes this as a violation of PURPA's Avoided Cost standard but misses the jurisdictional affects. Because these are bill credits, they are properly understood more as part of a retail billing convention, not less.

Like the customers in *MidAmerican* and *Sun Edison*, Pennsylvania customer-generators who participate in Pennsylvania's net metering program as established by the Pennsylvania AEPS Act receive full retail value for all excess generation on an annual basis, making the netting period in essence, over one year.[24] During the program year, excesses from month-to-month are credited against that customer's monthly usage on the customer's subsequent monthly retail bills until they are used up.[25] At the end of the program year, the customer may receive a payment equal to the utility's default electric supply rate[26] for any unused credits.[27] Accordingly, as in *MidAmerican* and *Sun*

[22] *Calpine Corp. v. FERC*, 702 F.3d 41, 49 (D.C. Cir. 2012).
[23] NERA's Petition at 3, n.5.
[24] 73 P.S. § 1648.5.
[25] *See* 52 Pa. Code § 75.13.
[26] This default electric supply rate is known as the "price-to-compare" and primarily consists of the electric utility's cost to purchase generation and transmission service to serve the utility's default service customers and does not include any profit for the utility. *See* 52 Pa. Code § 54.187(e).
[27] 52 Pa. Code § 75.13(e).

Edison, Pennsylvania's AEPS Act net metering program does not fall under FERC's jurisdiction and remains strictly within Pennsylvania's jurisdiction.

Calpine recognized that retail billing conventions are within the jurisdiction of the states. In fact, it described the netting involved as "truly local charges."[28] As in Calpine's station power holding, here, the net metering policies of the states "simply determine[] under what conditions generators will be assessed … retail charges."[29] Regulating retail charges is not within the Commission's jurisdiction.[30]

Sun Edison did not err in its treatment of net metering. In fact, following its factual description of net metering as explained in FERC Order 2003-A,[31] the Commission properly understood the net metering process as "a method of measuring sales of electric energy."[32] When it described the mechanism of compensation, the Commission properly characterized the arrangement as a bill credit.[33] Taken together, the Commission correctly recognized net metering as a state billing arrangement, in precisely the same way as *Calpine* referred to the netting practice for station power.

Calpine's treatment of netting transactions as a billing arrangement presents one final stumbling block for the Petitioner's reasoning: Even if the *Sun Edison* and *MidAmerican* reasoning is no longer precisely accurate, it would not matter, as the Commission still would not have jurisdiction over retail ratemaking, and thus would be

[28] *Calpine*, 702 F.3d at 50.
[29] *Id.*
[30] *Id.*
[31] Standardization of Generator Interconnection Agreements & Procedures, 106 FERC ¶ 61,220 (Mar. 5, 2004) (Order 2003-A).
[32] *Sun Edison* ¶ 18.
[33] *Id.*

unable to upset state net metering compensation structures. *Calpine* explicitly understood that the state jurisdictional billing practices and FERC jurisdictional charges, even on the same energy, need not be calculated using the same methodology. States have the authority to dictate rates charged to retail customers. The net metering services provided by states are not impermissibly compensating net metering customers for wholesale sales; states are merely using relevant information to calculate retail rates using bill credits.

Not every circumstance where FERC and States have abutting or concurrent jurisdiction leads to preempted state law. While Congress intended to occupy the field of wholesale sales of electricity in interstate commerce,[34] it did not intend to completely cut out state authority over matters which affect FERC-nonjurisdictional sales as well as jurisdictional sales. The Supreme Court has "repeatedly stressed, the Natural Gas Act was drawn with meticulous regard for the continued exercise of state power, not to handicap it or dilute it in any way."[35] "[W]here … a state law can be applied to nonjurisdictional as well as jurisdictional sales, we must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field."[36]

In determining whether a state law is preempted when it affects both jurisdictional and nonjurisdictional matters, the target at which the state law aims is probative.[37] In the

[34] *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015); "The Supreme Court has held that the Natural Gas Act and the Federal Power Act are in all material respects substantially identical, and constructions of one are authoritative for the other." *Tennessee Gas Pipeline Co., a Div. of Tenneco Inc. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988) (Internal citations omitted.)
[35] *Oneok*, 575 U.S. at 385 (Internal quotations omitted.) Analogous provisions of the NGA and FPA are to be read *in pari materia*. *See, e.g., Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).
[36] *Oneok*, 575 U.S. at 385.
[37] *Id.*

case of retail net metering law, the targets are the parts of electric service regulation over which the states have exclusive preserved jurisdiction.

By way of example, the generation of electricity by a customer for that customer's own use is wholly in the jurisdiction of the states. Should a residence engage in the production of electricity for itself, without interconnection, the Commission is without jurisdiction under 16 U.S.C. § 824(b)(1). Extrapolating, when a customer-generator interconnects to the grid and precisely matches its generation to its load, and its generation never exceeds that load, the Commission is without jurisdiction. Retail net metering is merely a retail-targeted state policy that recognizes the reality that load and generation do not precisely match in every moment. Significantly, net metering service is provided by the state electric utility to that utility's own customers at the distribution level, involving only retail charges. In *Calpine,* the Court has already recognized that states may use any just and reasonable netting interval to regulate the "truly local charges" that netting practices target, and that state jurisdiction is not preempted even if the Commission establishes separate netting rules for practices within its jurisdiction.[38] Practices affecting retail rates are firmly on the states' side of the jurisdictional dividing line.[39]

C. Net Metering transactions are not wholesale sales in interstate commerce

Petitioner claims that "to the extent that energy so produced is not sold to specific retail customers pursuant to a lawful retail direct access program, or is greater than the

[38] *Calpine*, 702 F.3d at 50.
[39] *Oneok*, 575 U.S. at 386.

retail customers' consumption, then the energy delivered to the interconnected utility is sold at wholesale, and must be priced in accordance with federal, not state, law."[40] The Petitioner mischaracterizes the transactions involved in state established net metering services.

In a brief, but critical, discussion lasting a single page,[41] the Petitioner attempts to conflate all electric sales where interconnection between a retail customer along any circuit path would extend between states as a wholesale sale in interstate commerce subject to the Commission's jurisdiction. In reality, connection to an interstate electrical system is not enough to make the sale of that energy count as a wholesale transaction in interstate commerce. As the Supreme Court observed, "[m]ere connection determines nothing."[42] While the Petitioner is correct in asserting that there is no *de minimis* standard for electricity travelling in interstate commerce to reach the Commission's jurisdiction, it errs when it assumes the converse, that *any* amount of electric energy circulating in *any* part of an interconnected grid implicates interstate commerce of electric energy.

Even the cases cited by the Petitioner do not stand for the precise propositions for which they are characterized. For example, Petitioner cites a 1945 Supreme Court case, *Connecticut Light & Power Co. v. FPC*, for the statement: "We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not think it would be appropriate to

[40] NERA's Petition at 5, n.11.
[41] NERA's Petition at 20–21.
[42] *Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 61, 72 (1943).

supply such a jurisdictional limitation by construction."[43] The Petitioner cites to this language for the proposition that all interconnected electric sales are interstate wholesale sales no matter the actual travel of interconnection. However, the Supreme Court in *Florida Power and Light*,[44] decided 27 years later, stated that engineering realities are incredibly important in determining jurisdiction under the Federal Power Act, and FERC must have substantial evidence for its chosen method of engineering analysis.

Both the Courts in *Connecticut Light & Power* and *Florida Power and Light* recognized the necessity of "an engineering and scientific, rather than a legalistic or governmental, test."[45] In *Florida Power and Light*, the Court stated the FPA only allows jurisdiction if there was substantial evidentiary support that the relevant power flowed between Florida to Georgia or Georgia to Florida. While this amount need not be overwhelming for FERC to assert jurisdiction, there must be substantial evidentiary support.

The Petitioner's justification for concluding that outflows from net metering customers flow in interstate commerce is that the electricity generated commingles with other electricity which at one point flowed in interstate commerce. This justification is again unavailing. Electricity delivered to electric distribution companies as part of a retail net metering service is not delivered beyond the local utility's distribution network. While the electrical grid operates as "an electromagnetic unity",[46] no appellate Court has ever

[43] Petition at 20, n.41; *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 536 (1945).
[44] Cited in NERA's Petition at 20, n.40; *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972).
[45] *Florida Power & Light Co.*, 404 U.S. at 455, citing *Conn. Light & Power Co.*, 324 U.S. at 529.
[46] *Florida Power & Light Co.*, 404 U.S. at 460.

explicitly adopted this approach as a jurisdictional test. To do so would erase the established jurisdictional line in the Federal Power Act preserving significant jurisdiction to the states. Lest we forget, the Federal Power Act does not merely preserve jurisdiction to the states over retail sales, but it endeavors at every step to preserve state authority over "any other sale" beyond wholesale interstate sales.[47]

The Court of Appeals for the District of Columbia explored this point succinctly in 1968:

> Congress did not, however, in formulating the proscriptive provisions of the Power Act, undertake to exhaust its constitutional prerogatives. While by no means confined in its coverage to areas legally immune from state control, the Act's major emphasis is upon federal regulation of those aspects of the industry which—for reasons either legal or practical—are beyond the pale of effective state supervision. A federal-state balance of authority, by which this general objective was to be achieved, was not only a characteristic solemnly declared when the legislation was proffered for enactment, but is also a feature evident from many sections of the Act, of which perhaps two contain the most vivid expression.
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> Section 201(a) declares the necessity in the public interest for federal regulation in the electric utility field, partially of "matters relating to generation" and wholly "of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." But with a congressional purpose to impose "Federal regulation only over those matters which cannot effectively be controlled by the States," that section further provides that "such Federal regulation, however, (is) to extend only to those matters which are not subject to regulation by the States." Thus emerging, said one of the Act's draftsmen, was the underlying legislative policy "that matters largely of a local nature, even though interstate in character, should be handled locally and should receive the consideration of local men familiar with the local conditions in the communities involved."[48]

[47] 16 U.S.C. § 824(b); *see also* 16 U.S.C. § 824(a).
[48] *Duke Power Co. v. FPC*, 401 F.2d 930, 935–36 (D.C. Cir. 1968).

The Commission has already determined that not all injections onto the grid implicate Commission jurisdiction.[49] The Second Circuit similarly implied that not all injection which commingles in interstate commerce became interstate in character.[50] The "flick of a light" theory[51] of interconnected jurisdiction hasn't yet been rejected by the Courts, but Courts have also always required substantial evidentiary support of the interstate nature of a transaction.[52] The Petitioner presents none.

Moreover, Petitioner's commingling theory is not used in the way that it suggests. The Supreme Court discussed commingling in *Pennsylvania Water & Power Co. v. FPC.*[53] There, Penn Water sold electricity at retail to customers in Pennsylvania using electricity generated by its own hydroelectric generation, but critically, also using electricity purchased from an out-of-state generator. At other times, Penn Water's hydroelectric electricity production flowed out of Pennsylvania. In the underlying FPC decision, cited by the Court, the FPC described:

> There result times when system energy generated in Pennsylvania is used, mixed or unmixed, in meeting system requirements in Maryland. Similarly, there are occasions when system energy from Maryland is used, mixed or unmixed, in meeting system requirements in Pennsylvania. Energy flows in, across, and out of the system transmission network as the needs of the interconnected members develop from minute to minute and day to day.

[49] Order No. 841, 162 FERC ¶ 61,127, at P 30, n.49 (continuing to positively cite *Sun Edison*).
[50] *Hartford Elec. Light Co. v. FPC*, 131 F.2d 953, 958 (2d Cir. 1942)
[51] *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 694 (D.C. Cir. 2000), *aff'd* sub nom. *New York v. FERC*, 535 U.S. 1 (2002) ("[T]he Court considered two theories by which FP&L's power could be deemed transmitted across state lines. The first posited a cause and effect relationship by which every flick of a light switch would cause every generator on a multi-state interconnected system to produce some quantity of additional electricity to maintain the system's balance, and thus to transmit electric energy throughout the system and across state lines.").
[52] *Florida Power & Light Co.*, 404 U.S. at 464–66.
[53] 343 U.S. 414 (1952) (*Penn Water*).

> "It is accordingly evident that the operations of the unified system enterprise are completely interstate in character, notwithstanding the fact that system energy transactions at some particular times may involve energy never crossing the State boundary."[54]

The Court in *Penn Water* held that the power flow in that case was commingled, and therefore the FPC had jurisdiction. There are two critical distinctions between these cases. First, it was not disputed that Penn Water's power sometimes flowed from its own generation out of state, which is not the case here. What's more, at the Circuit level, the petitioners, a group of municipal and state parties, argued that the energy *lost* its interstate character when it commingled with mainly intrastate retail energy.[55] This is a different circumstance than here, where energy is delivered, entirely intrastate, from a customer-generator to a distributor and then used by nearby customers on the utility's distribution system. Furthermore, it must be noted that neither the customer-generator, nor the local utility, has entered into any sale agreement to provide the power to anyone outside the state, or to anyone beyond the local utility; it merely becomes a load drop on the local utility's distribution system. The Supreme Court's statement that commingling results in federal jurisdiction must be read in terms of the context of the case under review.

In short, interstate wholesale energy doesn't lose its interstate character by commingling with intrastate energy, but neither does a wholly intrastate electric delivery gain interstate character because it intermingles with interstate pool energy at retail, without the energy itself ever being transacted in interstate commerce.

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[54] *Penn Water*, 343 U.S. at 419 (citing 8 F.P.C. 1, 12, 15 (1949)).
[55] *Pennsylvania Water & Power Co. v. FPC*, 193 F.2d 230, 240 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952).

The Petitioner makes no attempt to provide any evidentiary support at all for their proposition that all interconnected sales are wholesale sales in interstate commerce. Nor does the Petitioner provide support for the argument that net metering energy travels beyond even the nearest distribution substation. The Petitioner makes the exact error the *Florida Power and Light* and *Connecticut Light & Power* courts were trying to avoid when they did not adopt a legalistic test like the one Petitioner advances here.

The Commission must have substantial evidence to assert jurisdiction where there is a factual question of the potential flow of electricity in interstate commerce and the true nature of any transaction in electric generation. Without such facts, any determination by the Commission would be speculative and provide little to no guidance. With the lack of a specific challenged net metering service scheme, there can be no tenable declaratory order that would resolve the dispute. As a result, the Petition will neither remove factual nor legal uncertainty that would justify the Commission's resolution of the Petition on its substance.

III. CONCLUSION

For all the foregoing reasons, the PAPUC respectfully requests that its Protest be considered by the Commission and NERA's Petition be dismissed.

Respectfully submitted,

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Dated: June 15, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am on this date serving a copy of the foregoing document upon each person designated on the official service list compiled by the Federal Energy Regulatory Commission in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Respectfully submitted,

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