State Power Project: Policymaker Summary

Net Metering and Federal / State Jurisdiction

Policymaker Summary of: Jim Rossi, *Federalism and the Net Metering Alternative*, THE ELECTRICITY JOURNAL (January-February 2016)[1]

Key Takeaways:

Issue: Net metering programs allow customers generating electricity (typically with rooftop solar) to provide energy that they don't use to the distribution grid. State public utility commissions regulate these programs, which typically compensate customers for excess energy by crediting their power bills. As net metered rooftop solar continues to grow, some argue that the Federal Energy Regulatory Commission (FERC), and not states, must regulate retail customer resources.

Challenge: The Federal Power Act (FPA) was enacted in 1935, when power flowed in one direction, typically from vertically-integrated utilities to consumers. On its face, the FPA (which give FERC jurisdiction over sales for resale of energy) appears unclear on whether the federal government or states may regulate energy provided by a retail customer to the distribution utility.

FERC has consistently disclaimed jurisdiction over net metering, arguing that the mere flow of power from a customer to the distribution grid does not provide a basis for it to assert authority. However, as retail customer resources provide an increasing share of power, operators of FERC-regulated wholesale power markets may seek Commission approval to allow retail customer resources to participate in wholesale energy markets.

Conclusion: FERC has authority to enable and facilitate the participation of retail customer resources in wholesale markets. However, any FERC's regulation of retail customer energy resources would operate alongside state programs, and would not uniformly preempt state policies. The customer decides whether to participate in FERC jurisdictional markets, and FERC has no authority to compel a particular state policy.

Legal Discussion

Statutory Guidance:

Federal authority covers rates for "wholesale sales of electric energy in interstate commerce" and "practices . . . affecting" those rates. States have jurisdiction over "any other sale of electric energy" and "over facilities used for the generation of electric energy or . . . in local distribution." The FPA further limits FERC jurisdiction "only to those matters which are not subject to regulation by the States."

Retail customer net metering falls squarely within the purview of authority reserved for state regulators. The FPA clearly does not provide FERC with jurisdiction over retail billing practices.

Congress affirmed this conclusion in the Energy Policy Act of 2005. Specifically, Congress amended the Public Utilities Regulatory Policy Act of 1978 (PURPA) to include net metering among a list of retail policies that states and non-regulated utilities are directed to consider implementing.[2] Had Congress intended that net metering be subject to FERC regulation, there would have been no reason to direct states to consider these policies. PURPA's definition of net metering provides that energy delivered from the customer to the distribution grid "may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period." To the extent that these billing credits are related to a "sale" of energy by a retail customer, such a sale would be "any other sale" under the FPA and left to the states.

Past FERC Decisions:

FERC has consistently rejected opportunities to regulate net metering, holding that energy flowing from a customer to the distribution grid is not a wholesale sale. In its *MidAmerican* order, FERC found that "no sale occurs" when a retail customer "installs generation and accounts for its dealings with the utility through the

[1] Jim Rossi, *Federalism and the Net Metering Alternative*, THE ELECTRICITY JOURNAL, January/February 2016, available online at http://authors.elsevier.com/a/1Sg5K3ic-~mEFJ.

[2] Section 1251, Energy Policy Act of 2005 (amending 16 U.S.C. § 2621(d)).

practice of" net metering. Therefore, FERC concluded there is no requirement "that every flow of power from a homeowner or farmer to MidAmerican must be priced consistent with the requirements" of federal law.[3]

FERC affirmed this conclusion in its *SunEdison* order under a slightly different set of facts. While the *MidAmerican* order presumed that the customer owned the generating equipment, in *SunEdison* FERC analyzed a sale from a third party to a customer that participates in a net metering program. FERC held that "where the net metering participant . . . does not, in turn, make a net sale to a utility, the sale of electric energy by SunEdison to the end-use customer is not a sale for resale, and our jurisdiction under the FPA is not implicated."[4] FERC reiterated that the test for its jurisdiction was whether there was a "net sale over the applicable billing period to the local load-serving utility."

Two recent D.C. Circuit Court of Appeals decisions affirm FERC's "net sale" jurisdictional test.[5] These cases address FERC's regulation of the rate public utilities charge to independent generators for "station power," or electricity to operate a generator's lights and equipment. Their reasoning recognizes that states, and not FERC, have authority to determine the billing period.

In *MidAmerican*, FERC also held that PURPA's requirement that sales be priced at the local utility's "avoided cost" do not extend to transactions that are not net sales.[6] Thus a utility's avoided costs do not serve as a price cap on net metering arrangements. Moreover, when Congress amended PURPA in 2005, four years after *MidAmerican*, it did not endorse a specific pricing regime for net metering.

Policy Guidance

The Supreme Court has recognized FERC's jurisdiction to craft market-wide policies to enhance competition in wholesale energy markets,[7] and has allowed FERC to do so using its broad remedial authority to address "practices . . . [directly] affecting" interstate power markets.[8] As it did in its demand response regulations, upheld by the U.S. Supreme Court in 2016,[9] FERC could use this authority to enable retail customer resources to participate in wholesale energy markets.

FERC's demand response regulations require wholesale market operators to permit aggregators to bid demand response into wholesale markets on behalf of retail customers unless a state forbids it.[10] In explaining why it was allowing retail customer resources to participate in wholesale markets absent a state prohibition, FERC found that it was appropriately balancing its mandate to ensure just, reasonable, and not unduly discriminatory wholesale rates with state authority over its retail customers. In this sense, FERC's demand response policies complement, but do not preempt, state regulation.

Similarly, if FERC were to opt to regulate some aspects of customer net energy to enhance competition in wholesale power markets, it should continue to recognize states as the primary fora for net metering policies. FERC's overlapping jurisdiction with states over compensation for retail customer resources does not require a single uniform approach to participation of retail customer resources or the elimination of state and utility programs.

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[3] MidAmerican Energy Company, 94 FERC 61,340 at 62,263 (2001).
[4] SunEdison, LLC, 129 FERC 61,146 at P 19 (2009).
[5] So. Cal Edison v. FERC, 603 F.3d 996 (D.C. Cir. 2010); Calpine Corp. v. FERC, 702 F.3d. 41 (2012); *But see* David B. Raskin, *Getting Distributed Generation Right: A Response to "Does Disruptive Competition Mean a Death Spiral for Electric Utilities?",* 35 ENERGY L.J. 263 (2014) (arguing that these decisions overturn FERC's "net sale" jurisdictional test).
[6] MidAmerican, at 62,263 (2001); *see also* CPUC, 132 FERC 61,047(2010), at P 71.
[7] New York v. FERC, 535 U.S. 1 (2002); FERC v. Electric Power Supply Association, et al., 577 U.S. __ (2016).
[8] 16 U.S.C. 824d(a); 16 U.S.C. 824e(a); FERC v. Electric Power Supply Association, et al., 577 U.S. __ (2016).
[9] Demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy. 18 CFR 35.28(b)(4) (2010).
[10] Order No. 719, 125 FERC 61,071 (2008), at PP 154-156; Order No. 745, 134 FERC 61,187 (2011), at PP 112-115.