**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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| **Petition for Declaratory Order of New England Ratepayers Association** | **)**<br>**)**<br>**)** | **Docket No. EL20-42-000** |

# COMMENTS OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW

Pursuant to Rules 211 and 214 of the Federal Energy Regulatory Commission (FERC or the Commission)'s Rules of Practice and Procedure,[1] the Institute for Policy Integrity at New York University School of Law (Policy Integrity)[2] respectfully submits these comments encouraging the Commission to reject the New England Ratepayers Association (NERA)'s Petition for Declaratory Order (the Petition). Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity's staff, including its Faculty Director and Energy Policy Director, have published several articles and reports on issues of net metering, valuing distributed energy resources (DERs), and retail electricity rate design,[3] and have participated for years in various proceedings on the subject.[4] Policy Integrity remains actively engaged in efforts to improve the approaches taken by various institutions, including state regulators, to the valuation and compensation of DERs.[5]

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[1] 18 CFR 385.211, 385.214 (2019).

[2] These comments do not necessarily reflect the views of NYU School of Law.

[3] See, e.g., Richard L. Revesz & Burcin Unel, *Managing the Future of the Electricity Grid: Modernizing Rate Design*, 44 HARV. ENVTL. L. REV. 44 (2020); Richard L. Revesz & Burcin Unel, *Managing the Future of the Electricity Grid: Distributed Generation and Net Metering*, 41 HARV. ENVTL. L. REV. 44 (2017); JUSTIN GUNDLACH & BURCIN UNEL, INST. FOR POL'Y INTEGRITY, GETTING THE VALUE OF DISTRIBUTED ENERGY RESOURCES RIGHT: USING A SOCIETAL VALUE STACK (2019); JEFFREY SHRADER ET AL., INST. FOR POL'Y INTEGRITY, VALUING POLLUTION REDUCTIONS: HOW TO MONETIZE GREENHOUSE GAS AND LOCAL AIR POLLUTANT REDUCTIONS FROM DISTRIBUTED ENERGY RESOURCES (2018).

[4] *See, e.g.*, Policy Integrity Comments, In the Matter of Implementation of § 40-3-117, C.R.S. Regarding an Investigation into Performance-Based Ratemaking, Colo. Pub. Serv. Comm'n Proceeding No. M19-0061EG (June 5, 2020); Policy Integrity Comments (three rounds), Connecticut Dep't of Energy & Envtl. Pol'y & Pub. Utils. Reg'y Auth'y Joint Proceeding on the Value of Distributed Energy Resources, Docket No. 19-06-29 (Aug. 21, 2019; Sept. 18, 2019; Feb. 14, 2020); Policy Integrity, Environmental Value of Distributed Energy Resources in New York State, presentation to Value of Distributed Energy Resources Value Stack Working Group (July 11, 2018).

[5] *See, e.g.*, Justin Gundlach, Arkansas PSC Docket 16-028-U, DER Workshop Presentation: "Getting the Value of DERs Right," May 8, 2020, http://www.apscservices.info/DER/upcoming/; Comments of Policy Integrity on

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## Overview

NERA's Petition for Declaratory Order asks FERC to "declare that there is exclusive federal jurisdiction over wholesale energy sales from generation sources located on the customer side of the retail meter," and to "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."[6] FERC has answered this jurisdictional question definitively twenty years ago and has not disturbed it since—but has instead affirmed it and relied upon it. NERA's Petition asserts without evidence that controversy over this question still persists, and urges FERC to take up the Petition "promptly" so that the pricing of electricity injected into the grid by distributed energy resources (DERs) "becomes settled."[7] NERA's Petition relies on leaps of logic and mischaracterizations of key facts. FERC should deny it, if for no other reason than that it fails to substantiate the fundamental premise that there is a live controversy for FERC to resolve.

Policy Integrity's comments focus on what NERA presents as factual support for its argument. Importantly, we *agree* with NERA that compensation paid to DERs through net metering programs tends to be discrepant from the value those DERs add by making it possible for

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Proposed Clean Peak Energy Portfolio Standard, Mass. Dep't of Energy Resources (Oct. 30, 2019), https://policyintegrity.org/documents/Policy_Integrity_WattTime_Comments_on_Clean_Peak_Standard.pdf.

[6] Petition at 1.

[7] Petition at 2.

utilities, customers, and society overall to avoid particular electricity system and emissions-related costs. Our agreement, however, ends there.

NERA misdiagnoses what causes that discrepancy and puts forward "solutions" that would not actually reduce or eliminate it. NERA also ignores that states are even now pursuing viable solutions that could reduce that discrepancy—solutions that would be severely disrupted and constrained if FERC were to grant NERA's petition. By clarifying some of these points and correcting others, we emphasize that FERC lacks the tools and authority needed to develop and implement solutions to the problem of inaccurate DER compensation.

Specifically, these comments make the following three points.

*First*, it is the retail rate design underlying net metering programs, and not net metering itself, that creates discrepancies between the value of electricity exported to the grid by DERs and the compensation paid to DER owners for those exports.[8] As such, the best solution would be to reform retail rates; and the next best would be for a program of DER compensation to better approximate the value DERs can add in spite of unreformed retail rates. The Value of Solar and Value of DER tariffs that support this next-best solution are not "highly subjective and readily manipulated,"[9] and state public utility commissions have the authority to pursue these solutions.

*Second*, the discrepancies between the value of DER exports to the grid and compensation paid for them would not be reduced or eliminated if FERC priced them "at the utility's avoided cost of energy" under the Public Utility Regulatory Policies Act (PURPA) or "pursuant to a just and reasonable wholesale rate" under the Federal Power Act (FPA). Such approaches would ignore important benefits of DER use, would introduce other distortions to DER compensation, and would prevent states from making headway in their ongoing efforts to better align DER value and compensation.

*Third*, NERA's Petition fails—again, for lack of a factual basis—to meet the standard imposed by Commission Rule 207 and Administrative Procedure Act section 554(e). As explained in part III of these comments, NERA does not substantiate its assertion that there is a controversy for FERC to resolve.

For all these reasons, FERC should reject the Petition.

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[8] *See* Petition at 9–11 (referring to attached Brown Report).

[9] *Id.* at 31.

## I. Outcomes of Net Metering Policies Depend on Underlying Retail Electricity Rate Designs

Net metering programs, which currently exist in over 40 states and territories,[10] vary in their particulars, but broadly conform to the generic description contained in the Energy Policy Act of 2005.[11] Under net metering, each kilowatt-hour (kWh) of electricity injected into the grid from a DER is compensated based on the underlying retail rate design.[12]

This framework is grounded in the basic economic idea that the DER's injection is valuable because it avoids the cost of providing electricity to a given location and time, which is best approximated by the price the consumer pays for electricity at that location and time.[13] After all, in perfectly competitive markets with no capacity constraints or externalities, the market price equals both the social marginal cost of production and the social marginal benefit of consumption at the market equilibrium. Therefore, the market price is the best estimate for the value of that product to society, as well as its costs to society.

Retail electricity markets, however, are not perfectly competitive, and, consequently, retail electricity rates reflect neither the marginal cost of electricity provision, nor its benefit to society. State utility commissions determine both the design and the level of rates in utility rate cases, in the context of which they try to balance the revenue sufficiency needs of a regulated utility to ensure its financial stability and the consumer interests. Resulting tariffs generally have a fixed charge per customer and a flat volumetric charge per kWh used that is uniform in a given utility's service territory, with the volumetric component roughly reflecting the average – and not the marginal – cost of electricity provision.[14] Furthermore, there are externalities associated with electricity provision, such as air pollution, which are not fully reflected in prices. As a result, the retail electricity rates consumers face differ significantly from the social marginal cost of electricity provision.

Multiple inefficiencies result from this discrepancy. A flat volumetric price cannot capture the hourly variations in the marginal cost of producing electricity that result from grid operations, or locational variations in network congestion. [15] Therefore, this type of rate design cross subsidizes

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[10] DSIRE & N.C. Clean Energy Tech. Ctr., *Net Metering, June 2020* (2020), https://perma.cc/WWR8-94Q2 (identifying states with programs).

[11] 16 U.S.C. § 2621(d)(11): "[S]ervice to an electric consumer under which electric energy generated by that 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."

[12] Not all DERs can generate electricity and export it to the grid. Those that can are sometimes referred to as "distributed generation." GUNDLACH & UNEL, *supra* note 3, at 6 tbl.1. Other DERs, which enable a customer to avoid consuming grid-based electricity, are "compensated" through their direct reduction of a customer's bill.

[13] Revesz & Unel, *Net Metering*, *supra* note 3, at 71–72.

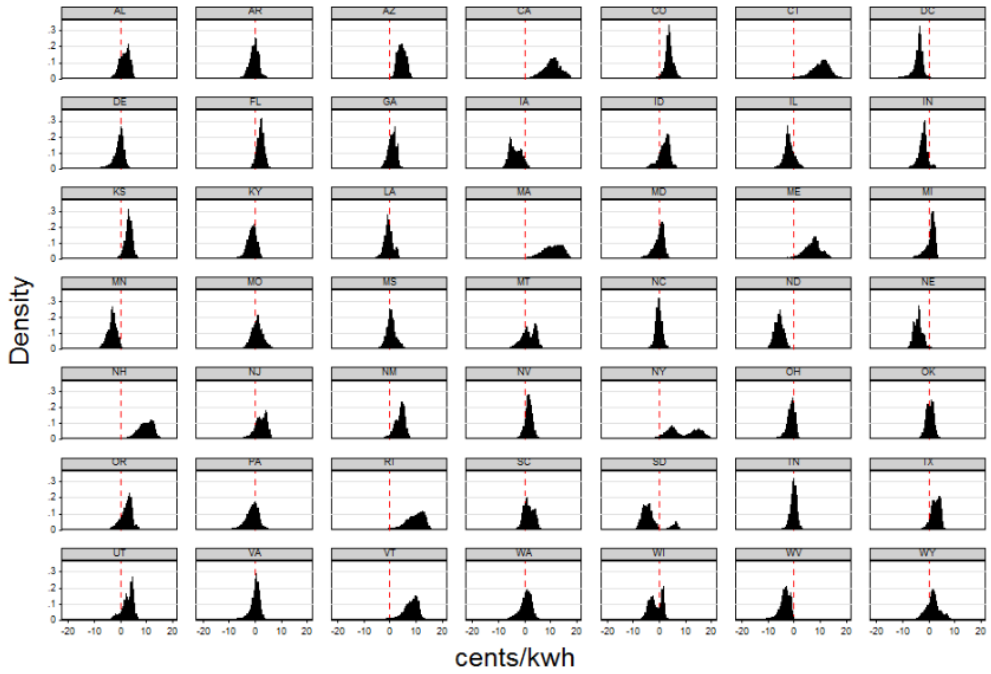
[14] Revesz & Unel, *Rate Design*, *supra* note 3, at 46–47.

[15] *Id.* at 83–84

consumption at peak times or at congested locations. [16] In addition, even if there is a high enough emissions price, this type of flat, volumetric rate design mutes the signal sent by that price, preventing it from communicating the emissions-related costs of electricity consumption at particular times and locations.[17]

A recent working paper from the University of California Berkeley's Energy Institute at Haas provides an estimate of the discrepancies between the retail rates and hourly social marginal costs.[18] Figure 1 below shows the histograms of the hourly differences between the marginal price a retail customer faces and the social marginal costs of electricity provision in different states. Even though the paper focuses only on short-run social marginal costs, and ignores capacity costs, the figure highlights the stark differences between the retail electricity rates and the hourly social marginal costs of electricity provision across states. Given these differences, a compensation framework that rewards resources based on retail rates would leave compensation disconnected from the value of reducing social marginal costs, causing inefficiencies.

**Figure 1. Marginal price minus hourly social marginal cost, by state.[19]**




It is important to note that these inefficiencies go both ways. Depending on the time and location of the injection, it may be the case that the combined features of a net metering program and the

[16] *Id.*

[17] *Id.*

[18] Severin Borenstein & James Bushnell, *Do Two Electricity Pricing Wrongs Make a Right? Cost Recovery, Externalities, and Efficiency* (Working Paper 2019), https://haas.berkeley.edu/wp-content/uploads/WP294.pdf.

[19] *Id.* at 22, fig.10.

underlying retail rates might overvalue that injection, incentivizing more distributed generation at particular times and locations than is economically efficient.[20] Undervaluation can just as easily result.[21] Whether the divergence between costs and compensation leads to over or undervaluation of injections from distributed generation resources—and it can be expected to lead to one or the other—the result is economic inefficiency.

### A. The Best Solution to Address Concerns About Net Metering Is to Reform Retail Electricity Rate Designs

As the petitioners also recognize,[22] the only durable solution that would address this inefficiency is the reform of underlying rate designs to make retail electricity rates more cost-reflective. An economically ideal, cost-reflective rate design would have multiple components to take account of the underlying energy and capacity cost drivers, as well as externalities.[23] It would have temporal and spatial variation, and would be forward looking based on costs that can truly be avoidable in the future. Net metering, coupled with this sort of cost-reflective retail rate design, would compensate injections only to the extent that they truly avoid costs.[24] Adopting such a retail rate design would resolve many of the concerns the petitioners mention in their affidavit about the potential perverse effects of "full net metering":[25]

- **Cross-subsidies:** Cost-reflective rates would create a technology-neutral basis for compensation for on-sit demand reductions as well as injections from DERs. With cost-reflective rates, which would include a coincident-peak demand charge, customers would pay the network costs they cause, eliminating the potential for cross-subsidies between solar PV owners and others. At the same time, these types of rates would eliminate the inherit cross-subsidies that flat volumetric rates cause, such as between off- and on-peak customers.
- **Intermittency:** With cost-reflective rates, owners of solar panels would get compensation for reducing capacity needs only to the extent that their system reduces their coincident-peak demand, alleviating the concerns that the petitioners highlight under intermittency.
- **Anti-Competitiveness:** Because the price signals under these rates reflect the true social value for not just solar PV, but for any DER, they would lead to efficient allocation of

[20] Revesz & Unel, *Rate Design*, *supra* note 3, at 89.

[21] *Id.*

[22] Brown Report at 12, 14

[23] Revesz & Unel, *Rate Design*, *supra* note 3, at 54–64.

[24] *Id.*

[25] Brown Report at 7–30.

resources, whether the decision is between utility scale and distributed, or between a rooftop PV and energy storage, and hence competition.[26]

- **Inefficiency:** Cost reflective rates would induce efficient behavior at the investment stage, including the orientation of the solar panels.[27]
- **Regressive Effects:** As the same paper the petitioners cite to highlight the distributional effects of net metering shows, the efficient tariffs can also help solve any potential regressive cost shifting.[28]

In other words, even though the petitioners highlight valid concerns about the potential inefficiencies related to net metering, those concerns do not stem from the inefficiency of the net metering framework itself. Rather, they stem from retail rate design. As such, the best way to address these concerns is to reform retail electricity rates, which unequivocally lie outside of the Commission's jurisdiction.[29]

### B. The Next-Best Solution Is to Move to Value-Stack Style Tariffs for DERs

If cost-reflective rates cannot be implemented due to other policy constraints, the next-best solution for addressing the problems highlighted by the petitioners is still in the hands of state public utility commissioners. It involves aligning compensation paid to DER owners for electricity they export to the grid with the sum of the costs those exports avoid—a "value stack."[30] This approach catalogues the potential benefits of DERs, including avoided bulk power system costs like energy and capacity, avoided distribution system costs like line losses and congestion, and avoided emissions of greenhouse gases and local pollutants.[31] It then translates them on a marginal basis into compensation so that a DER is paid for costs it actually avoids based on the timing and location of its exports of electricity to the grid.[32]

NERA claims that the "value" in Value of Solar and Value of DERs tariffs is "vague" compared to the avoided cost concept embodied in PURPA, which, NERA says, employs an "economic notion of marginal cost."[33] Because these tariffs require "so many inputs, assumptions, estimates,

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[26] Revesz & Unel, *Rate Design*, *supra* note 3, at 110–13.

[27] Revesz & Unel, *Net Metering*, *supra* note 3, at 103.

[28] Scott P. Burger, Rate Design for the 21st Century: Improving Economic Efficiency and Distributional Equity in Electricity Rate Design 207 (Aug. 9, 2019) (unpublished Ph.D. dissertation), https://perma.cc/H5ZR-ZYG6 ("This cost shift does not occur under tariffs with efficient network cost allocation and residual cost recovery.").

[29] 16 U.S.C. § 824(b)(1); Electric Power Supply Ass'n v. FERC, 136 S. Ct. 760, 775 (2016) ("FERC cannot take an action transgressing that limit [on the regulation of retail electricity sales] no matter how direct, or dramatic, its impact on wholesale rates.").

[30] Revesz & Unel, *Net Metering*, *supra* note 3, at 93–95, GUNDLACH & UNEL, *supra* note 3, at 3–4.

[31] GUNDLACH & UNEL, *supra* note 3, at 11–16.

[32] *Id.* at 16–23, 29.

[33] Brown Report 31–33.

etc., all of which are highly contestable," NERA argues that they are "highly subjective and readily manipulated."[34] However, this description is misleading for at least three reasons.

First, as states have worked to reform their net metering programs, they have developed and refined methodologies and parameters for calculating the costs that DERs can avoid. Their efforts reflect substantial convergence. For instance, California's Avoided Cost Calculator and New York's VDER Value Stack both compile very similar lists of time-and-location-specific avoided costs, and do so in similar ways—even making use of similar combinations of project-specific data for short-term distribution system cost calculations and utility-wide data for the longer-term.[35]

Second, calculations used for several of these tariffs, contrary to NERA's characterization, do capture the *marginal* costs that use of a DER can avoid. Here again, California and New York are leaders,[36] but other states are exploring options for imitating and improving on those models.[37]

Finally, although NERA cites to PURPA's definition of "avoided cost" to suggest that PURPA-based calculations are somehow "directly related to the marginal cost of supply" and "not based on subjective determinations of value,"[38] NERA elides that at least six different methodologies are in use across the U.S. for calculating avoided costs in compliance with PURPA,[39] and that these are not immune to manipulation. Some states use the "proxy unit" method, which assumes

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[34] *Id.*

[35] *Compare* CALIFORNIA ENERGY DIVISION WHITE PAPER ON AVOIDED COST AND LOCATIONAL GRANULARITY OF TRANSMISSION AND DISTRIBUTION DEFERRAL VALUES (2019), https://perma.cc/4E59-USD9, *with* Order Regarding Value Stack Compensation, N.Y. Pub. Serv. Comm'n Case 15-E-0751, at 16–22 (Apr. 18, 2019), https://perma.cc/L5X4-67SV.

[36] California's Avoided Cost Calculator employs marginal or incremental values for several factors, including energy, line losses, emissions, and subtransmission-level distribution system costs. To access the 2020 version of the Avoided Cost Model that informs that tool, as well as explanatory materials, visit https://www.ethree.com/public_proceedings/distributed-energy-resources-der-avoided-cost-proceedings/ and click on the "2020 Avoided Cost Model and Documentation" link. New York's VDER Value Stack relies on the wholesale market to provide incremental inputs that reflect marginal bulk power system costs, and approximates the marginal avoided costs for generation capacity and the distribution system by tying compensation to local coincident peak periods. *See* NYSERDA, Summary of Updated Value Stack Order 10–11, 13–15 (Apr. 25, 2019), https://perma.cc/KCA5-7Q5B (describing calculations).

[37] *See, e.g.*, Connecticut: Conn. Dep't of Energy & Envtl. Prot. and Conn. Pub. Utils. Reg'y Auth'y Joint Proceeding on the Value of Distributed Energy Resources, Docket No. 19-06-29 (carrying out statutory directive to assess value of DERs and suggest compensation program options); Illinois: A.C. ORRELL ET AL., PACIFIC NW. NAT'L LAB'Y, ILLINOIS DISTRIBUTED GENERATION REBATE CALCULATION CONSIDERATIONS, at iii (2018) (investigating data inputs and analyses required to integrate "geographic, time-based, and performance-based benefits of distributed generation in Illinois" into a valuation rubric).

[38] Brown Report at 32.

[39] Victor B. Flatt, Seth Yeazal & Miles Wobbleton, *Federal Parameters on the Definition of Avoided Cost Under PURPA and Legal Methods Currently Used and Acceptable Under PURPA Application for States to Encourage or Discourage Distributed Generation* 9–10 (Working Paper 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3225396.

that a utility avoids capacity costs and energy costs based on avoiding building a proxy generator. Others use a "differential revenue requirement," which calculates the differences in cost for a utility with and without a Qualifying Facility. Still other states rely on "market-based" pricing. Each of these PURPA-compliant methods has weaknesses. An avoided cost calculation using the proxy unit methodology, for instance, hinges on the type of the proxy generator, and might overstate costs.[40] The differential revenue requirement method is complex, not transparent, and assumes that the qualifying facility is the marginal resource.[41]

In sum, the best solutions for addressing the problem of discrepant DER value and compensation are available to states under state law. NERA's suggestion to the contrary is incorrect.

## II. NERA's "Solution" Would Not Address the Problems It Blames on Net Metering

NERA suggests that using PURPA's avoided cost parameters or wholesale market rates to determine compensation for injections from DERs would address the problems it blames on net metering. As explained below, this is incorrect—most obviously, these approaches would fail to capture several of the large and significant costs that DERs can avoid, such as system congestion, line losses, and emissions.[42] Further, NERA's suggestions would introduce new inefficiencies as well as failing to address existing ones.

### A. Compensating DER Exports Using PURPA Is Not a Solution

Regardless of which methodology is used, compensating DER exports using PURPA avoided cost rates would not address the discrepancy between DERs' compensation and the value they actually deliver. Depending on which methodology a state uses, PURPA rates can reflect avoided energy and capacity costs, or other costs that are reflected in state integrated resource planning or revenue requirement calculations. Some states can even have technology-specific avoided cost options for renewable resources.[43] Furthermore, if states are not using market-based rates, these rates are usually simple averages.

Assigning exports the same value for avoided energy and capacity regardless of when and where the injection occurs leads to inefficiencies. Avoided energy costs vary with time and location. And, as the petitioners also recognize,[44] only injections that are coincident with the system-wide

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[40] Carolyn Elefant, LOCE PLLC, *Avoided Cost Ratemaking Methodologies under the Public Utility Regulatory Policies Act (PURPA)* 13 (Dec. 2015), https://perma.cc/F65R-28JN.

[41] *Id.*

[42] *Compare* GUNDLACH & UNEL, *supra* note 3, at 11, tbl. 4 (listing costs DERs can avoid), *with* Petition at 42, *and* Brown Report at 34–37 (suggesting that because DERs *can* but do not necessarily avoid costs other than wholesale energy, it should not be credited a "generic value" for avoiding those other costs).

[43] Elefant, *supra* note 40, at 18.

[44] Brown Report at 16.

peak demand avoid capacity costs.[45] So, compensating all injections with the same PURPA rates that reflect average avoided costs would undervalue injections that happen during high demand times and overvalue injections that happen during other times, and lead to cross subsidies similar to what the petitioners caution against. And, because PURPA rates might not reflect other costs such as externalities, they would still not be able to accurately value DER exports.

### B. Compensating DER Exports Using Wholesale Rates Is Not a Solution and Would Conflict with NERA's Other Suggested Approach

Compensating DER injections with real-time wholesale rates would lead to accurate valuation of energy benefits of DERs. However, because wholesale rates would cover only avoided energy costs, this type of compensation would not lead to accurate valuation of all the other benefits DERs can bring such as avoided capacity costs and avoided line losses.

Furthermore, it is at odds with NERA's suggested use of PURPA-compliant compensation. As we explained above, avoided costs under PURPA usually include a component that reflects avoided capacity costs, whereas wholesale rates mostly reflect avoided energy costs. The discrepancies between these two alternatives only highlights the inefficiencies and uncertainties that could result from different states using different methodologies to value the product. Notably, although NERA purports to be concerned about discrepant approaches to compensating DERs, that concern evidently does not extend to the discrepancies that would result from implementing both of NERA's proffered solutions.

### C. Usurping States' Role Would Effectively Shut Down Their Ongoing Efforts to Address the DER Compensation Problems that NERA Identifies

State legislators and regulators have not only been aware for years of what the Brown Report describes as the "perverse effects" of net metering,[46] they have been engaged actively in efforts to improve the calculation of DERs' benefits and costs,[47] and to improve the efficiency and fairness of the programs that compensate DERs for electricity they export to the grid.[48] In

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[45] Revesz & Unel, *Rate Design*, *supra* note 3, at 60.

[46] Scholarship has traced the initial source of widespread concern about these effects among stakeholders and their presentation to state utility commissions to a 2013 briefing paper published by the Edison Electric Institute: PETER KIND, DISRUPTIVE CHALLENGES: FINANCIAL IMPLICATIONS AND STRATEGIC RESPONSES TO A CHANGING RETAIL ELECTRIC BUSINESS (2013). *See* Michael Wara, *Competition at the Grid Edge: Innovation and Antitrust Law in the Electricity Sector*, 25 N.Y.U. ENVTL. L.J. 176, 179–80 (2017); Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Electric Utility Rates and the Campaign Against Rooftop Solar*, 11 TEX. J. OIL GAS & ENERGY L. 101, 108–10 (2016).

[47] *See* ICF (for U.S. Dep't of Energy), REVIEW OF RECENT COST-BENEFIT STUDIES RELATED TO NET METERING AND DISTRIBUTED SOLAR 5 (2018); *see also id.* at 47–50 ("Appendix B," listing 44 relevant studies from which authors selected a representative sample in November 2017). For a compilation of studies broken down by the state they examined, see Solar Energy Industries Ass'n, *Solar Cost-Benefit Studies*, https://www.seia.org/initiatives/solar-cost-benefit-studies, accessed June 8, 2020, (listing studies specific to each of 24 states and seven meta-studies).

[48] TOM STANTON, NAT'L REG'Y RES. INST., REVIEW OF STATE NET ENERGY METERING AND SUCCESSOR RATE DESIGNS E1-E2 (2019) (tabulating seven categories of actions related to net metering or successor programs and

particular, some states are reforming their rate designs, others are changing elements of their net metering programs, and still others are developing and implementing plans to shift to successor programs.[49]

Granting NERA's Petition would severely disrupt these efforts, leaving states a markedly reduced policy space within which to act on their burgeoning understanding of options for improving the alignment of DERs' compensation to their value. Because, as explained above, FERC could, at best, supplant states' flexibility with a rigid and narrow approach to DER valuation, this confinement of states to the margins of this policy area would *prevent* the development and implementation of effective solutions to the problem of discrepant DER value and compensation.

## III. NERA's Petition Does Not Make the Showing Required for FERC to Issue a Declaratory Order

NERA has filed its Petition pursuant to Commission Rule 207(a)(2), which provides that "[a] person must file such a petition when seeking . . . (2) . . . to terminate a controversy or remove uncertainty."[50] As FERC has explained, "[w]here [it] finds, for example, that a purported dispute is speculative, or that insufficient facts have been presented to support a meaningful analysis of an existing dispute, a declaratory order will not be issued."[51]

NERA's Petition presents no evidence that the question of FERC's jurisdiction over electricity exports by DERs is unsettled. Indeed, the Petition acknowledges that FERC disclaimed such jurisdiction over in its *MidAmerican* decision in 2001,[52] and affirmed that disclaimer in its *SunEdison* decision in 2009.[53] Instead of evidence that this question has been the subject of controversy or a cause of uncertainty, NERA puts forward a legal analysis of *Southern*

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identifying instances of such actions from 2015 to 2018 in 48 states and the District of Columbia); *see also* North Carolina Clean Energy Technology Center, *News & Updates: The 50 States of Solar: Net Metering Reforms Dominate State Policy Activity in Q3 2019* (Oct. 23, 2019), https://perma.cc/5KXN-7J2R; North Carolina Clean Energy Technology Center, The 50 States of Solar: Q3 2019 Quarterly Report--Executive Summary 5 tbl.1 (2019) (identifying over 50 policy actions in 27 states over just a three-month period, all of them focused on distributed generation compensation rules).

[49] *See* STANTON, *supra* note 48, at 2–3 (listing categories of reform), 10 (listing legislative and regulatory directives to develop and adopt net metering successor tariffs).

[50] 18 CFR § 385.207(a); *see also* 5 U.S.C. § 554(e) ("agency, . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty").

[51] 88 FERC ¶ 61,262, Fed. Energy Reg. Comm'n Rep. P 61262, 61822 n.18 (1999) (citing Camille E. Held, et al., 57 FERC ¶ 61,081 (1991); Phillips Petroleum Company, et al., 58 FERC ¶ 61,290 (1992); and Susquehanna Power Company, et al., 86 FERC ¶ 61,095 (1999)).

[52] MidAmerican Energy, 94 FERC 61,340 (2001)

[53] SunEdison LLC, 129 FERC 61,146 (2009).

*California Edison v. FERC*,[54] decided in 2010, and *Calpine Corp. v. FERC*,[55] decided in 2012, arguing that those cases undo the basis for FERC's *MidAmerican* and *SunEdison* decisions.[56] But NERA's analysis, which was first published in 2013 and has since been rebutted in the academic legal literature,[57] does not amount to a controversy. NERA identifies no instance of a court or regulator taking it up, nor of any party vying with uncertainty as a result of it being available to stakeholders and would-be litigants for the past seven years.[58]

FERC should reject the Petition, which is speculative and, if granted, would wreak havoc on states' ongoing efforts to address the very problems NERA purports to care about.[59] Most immediately, many if not all states with net metering programs *and net metering successor programs* would need to adopt new legislation and tariffs as quickly as possible—or face lawsuits from utilities challenging the laws and rules underlying existing net programs as preempted by the FPA and PURPA. And states in which net metering or net metering successor programs are entwined with other clean energy programs would likely have to amend the latter as well, in order to adjust their targets and rebalance their costs across utilities and various groups of ratepayers. States and FERC would, over the longer term, also need to adjust to FERC's expanded role in relation to all DERs capable of exporting energy to the grid that were not already registered as Qualifying Facilities under PURPA or interconnected to the bulk power system in accordance with the applicable RTO tariff. In other words, granting the Petition would open the door to profound and widespread regulatory uncertainty, the result that NERA is supposedly trying to correct. Because these results would so clearly follow from granting the Petition, FERC should deny it, on the grounds that it does not meet the standard established by Commission Rule 207.[60]

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[54] 603 F.3d 996 (D.C. Cir. 2010).

[55] 702 F.3d 41 (D.C. Cir. 2012).

[56] David B. Raskin, *The Regulatory Challenge of Distributed Generation*, 4 HARV. BUS. L. REV. ONLINE 38, 44–45 (2013-2014); *see also* David Raskin, *Getting Distributed Generation Right: A Response to "Does Disruptive Competition Mean a Death Spiral for Electric Utilities?,"* 35 ENERGY L.J. 263 (2014).

[57] Jim Rossi, *Federalism and the Net Metering Alternative*, 29 ELECTRICITY J. 13, 14–16 (2016); *see also* Harvey L. Reiter & William Greene, *The Case for Reforming Net Metering Compensation: Why Regulators and Courts Should Reject the Public Policy and Antitrust Arguments for Preserving the Status Quo*, 37 ENERGY L.J. 373, 383 (2016) ("Raskin's jurisdictional argument, [Rossi] says, rests on a misreading of the *Southern California Edison* and *Calpine* cases. * * * Rossi probably has the better of the argument.").

[58] Since 2013, when NERA's legal analysis was first published, and 2018 (the latest year for which data are available), the number of participants in net metering and net metering successor programs has grown from just below 500,000 to just below 2 million. ASHLEY J. LAWSON, CONG. RES. SERV., NET METERING: IN BRIEF 3 fig.1 (2019).

[59] *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126–27 (2016) (rejecting agency's conclusory reasons for reversal of a long-standing policy that engendered "serious reliance interests").

[60] *See* Yale Broad. Co. v. F.C.C., 478 F.2d 594, 602 (D.C. Cir. 1973) ("An administrative agency should not be compelled to issue a clarifying statement unless its failure to do so can be shown to be a clear abuse of discretion. Here the Commission could reasonably conclude that it had said enough . . . ."), *cert. denied*, 414 U.S. 914 (1973).

Respectfully submitted,

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Dated: June 15, 2020

## CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at New York, New York this 15th day of June 2020.

Respectfully Submitted,

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