

of the Federal Energy Regulatory Commission (“FERC” or “Commission”), Southern Maryland Electric Cooperative, Inc. and Choptank Electric Cooperative, Inc., (collectively, the “Cooperatives”) filed a petition for a declaratory order requesting that the Commission review regulations promulgated by the Public Service Commission of Maryland (“MD PSC”) regarding community solar energy generation systems (“CSEGSs”)³ and issue a declaratory order finding that the MD PSC's CSEGSs Regulations do not comply with federal law, including the Public Utility Regulatory Policies Act (“PURPA”)⁴ and the Federal Power Act (“FPA”).⁵ The Cooperatives are concerned that while CSEGSs may have characteristics similar to QFs, they have not been required by the regulations to achieve QF status; the Cooperatives argue QF status is necessary for the “sales” by CSEGSs to Maryland electric companies to comply with federal law.⁶ The Cooperatives contend that the language in the CSEGSs Regulations that allows an electric company to record subscriber credits as kilowatt hours, instead of limiting payment to the subscriber in a dollar amount, violates PURPA because that could mean that CSEGSs are compensated at prices higher than the utility’s avoided costs.⁷ The Cooperatives claim this “injects ambiguity into the standard applied for electric company purchases of excess generation from CSEGSs that are QFs.”⁸ Their Petition asks FERC to determine that: “(i) to the extent that CSEGS regulations require Maryland electric companies to purchase energy from CSEGS at a

³ Community Solar Energy Generation Systems, MD. CODE REGS. §§ 20.62.01.00-20.62.05.20 (2016) (“CSEGSs Regulations”).

⁴ See generally 16 U.S.C. §§ 2601, *et seq.* (2016).

⁵ See generally 16 U.S.C. §§ 824, *et seq.* (2016); Petition for Declaratory Order of Southern Maryland Electric Cooperative, Inc. and Choptank Electric Cooperative, Inc., Docket No. EL16-107-000 (August 23, 2016) (“Petition”).

⁶ Petition at 8-9.

⁷ Petition at 10. “An electric company shall pay a subscriber a dollar amount of excess generation as reasonably adjusted to exclude the distribution, transmission, and non-commodity portion of the customer's bill *unless the electric company records subscriber credits as kilowatt hours.*” CSEGS Regulations, *supra* note 3, at § 20.62.02.07A; Petition at 10 (emphasis added).

⁸ Petition at 10.

particular price, Maryland regulations are preempted by federal law unless such CSEGSs are [Qualifying Facilities (“QFs”)] under PURPA; and (ii) CSEGS regulations that require payment to CSEGSs at prices higher than avoided costs violate, and are preempted by, PURPA.”⁹

III. MOTION TO INTERVENE

NARUC is the national organization of State commissions responsible for economic and safety regulation of utilities. Our members in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands have the obligation under State law to ensure the establishment and maintenance of such energy utility services as may be required by the public convenience and necessity, as well as ensuring such services are provided at just and reasonable rates. Both Congress and the federal courts¹⁰ have long recognized NARUC as the proper party to represent the collective interests of State regulatory commissions.

In this case, two electric cooperatives are trying to undermine the ability of a State commission to conduct a pilot program by limiting its design options. Many States are experimenting with different approaches to community solar programs and net metering. Granting the Cooperatives’ petition would infringe on the State commissions’ jurisdiction over retail rates and undermine States’ ability to implement important and innovative pilot programs.

⁹ Petition at 5.

¹⁰ See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Boards to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns); Cf. 47 U.S.C. § 254 (1996) (describing functions of a joint board). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “Carriers, to get the cards, applied to . . . [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the ‘bingo card’ system”). See also, *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff’d* 672 F.2d 469 (5th Cir. 1982), *aff’d en banc on reh’g*, 702 F.2d 532 (5th Cir. 1983), *rev’d on other grounds*, 471 U.S. 48 (1985).

NARUC has a direct and substantial interest in the Commission decision in this proceeding. No other party can adequately represent NARUC's and the State commissions' interests. Accordingly, it is in the public interest to permit this intervention.

NARUC respectfully requests it be permitted to intervene with all the rights that attend to such status, and files, *infra*, comments urging FERC to dismiss the Cooperatives' petition.

IV. COMMENTS

The Cooperatives have filed a motion pursuant to Rule 207(a)(2) of the Commission's Rules of Practice and Procedure, which a party files when seeking a "declaratory order or rule to terminate a controversy or remove uncertainty."¹¹

NARUC supports the MD PSC's motion to dismiss on the basis that the issues are not ripe. It is also, as the MD PSC protest confirms, far from clear if there is even a violation of federal law. Certainly at this stage of this experimental program, any FERC action is premature.

The Cooperatives' focus is on the phrase "unless the electric company records subscriber credits as kilowatt hours" in the CSEGSs Regulations, which allegedly "injects ambiguity" into the standard for compensating the CSEGSs.¹² They contend this language *may* result in payments to the CSEGSs at prices higher than avoided costs.¹³ But even if the Cooperatives and the MD PSC agreed on how to calculate avoided costs, assuming that in fact calculating avoided costs was necessary, their argument necessarily concedes that payments *may not* exceed the avoided costs. If there was any validity to this argument, it would turn on information that is not before this Commission – a level of compensation that has yet to be determined. Indeed, the

¹¹ 18 C.F.R. § 385.207(a)(2) (2016).

¹² CSEGS Regulations, *supra* note 3, at § 20.62.02.07A; Petition at 10.

¹³ Petition at 11.

very purpose of these types of State experimental programs is to gather useful data about this and other aspects of the design and the impacts of the pilot program.

Moreover, the Cooperatives do not have to endure any “uncertainty” because they have the option to not participate in this *voluntary* program. In fact, their Petition fails to indicate if they will be voluntary participants in the program.¹⁴

Not participating certainly resolves any uncertainty for the Cooperatives without Commission action. Unless the Cooperatives confirm their voluntary participation, their petition does not demonstrate a harm to their interests. Indeed, even if they do confirm their *voluntary* participation in a limited *voluntary* pilot program, the very act of *volunteering* undermines any claim of harm. Moreover, in tandem with the complete absence of any concrete evidence of injury in their Petition, this indicates, at best, that the Petition is premature. Routinely, the Commission has dismissed similar petitions that contain only speculative allegations and insufficient evidence of harm.¹⁵

What is most important is the chilling impact of FERC action on this petition on State experimentation in this area. The ability to illuminate crucial issues by trying a variety of approaches is vital to the continued development of and innovation in the electricity sector. If FERC does not dismiss the Petition, whatever decision the Commission makes with regard to this complaint will set the tone for other States’ community solar programs. Fifteen States and

¹⁴ The MD PSC has stated in its Protest that the Cooperatives have not notified the MD PSC of their intention to participate as of the time of the MD PSC’s filing. Motion to Dismiss and Protest of Maryland Public Service Commission at 1, FERC Docket No. 16-107-000 (Oct. 7, 2016).

¹⁵ *Mich. Elec. Transm. Co., LLC v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,025 at PP 15-16 (July 8, 2016), *citing ConocoPhillips Transportation Alaska, Inc.*, 112 FERC ¶ 61,213, at PP 26-28 (2005) (denying a complaint due to the speculative nature of the complainant’s claims of injury); *CSOLAR IV South, LLC*, 142 FERC ¶ 61,250 (2013) (dismissing a complaint, without prejudice, as unripe).

the District of Columbia have adopted community solar legislation or rules and in about another ten States there are community solar projects that regulated and non-regulated utilities have initiated and developed.¹⁶ The community solar programs in these States vary over a number of characteristics, such as project size, project location requirements, and basis for bill credits.¹⁷ If the Commission acts on this complaint, it will immediately have a chilling effect on State experiments not only in Maryland, but in other jurisdictions as well. And this chilling effect will extinguish FERC and State access to empirical data from ongoing State experiments – data unavailable elsewhere. Experimentation is crucial to the development of these projects: many of these projects started out as pilot programs or full programs which then led to additional State legislative or regulatory actions after they were initially launched, some with multiple adjustments.¹⁸

State experimentation in the energy industry with smart meters, demand response, energy efficiency, renewable portfolio standards, the Regional Greenhouse Gas Initiative experiment with carbon markets, and other policies has only benefited markets, industry and the U.S. consumer. The nation as a whole and other States individually gain when States act as laboratories of democracy.¹⁹ Community solar programs are still in the beginning stages and

¹⁶ Tom Stanton & Kathryn Kline, *The Ecology of Community Solar Gardening: A ‘Companion Planting’ Guide*, National Regulatory Research Institute, Report No. 16-07 (August 2016) at 13. Community Solar Hub, a website powered by the U.S. Department of Energy’s SunShot, counts the total number of community solar projects as 89 spread over 25 states (<https://www.communitysolarhub.com/>) (accessed on Oct. 5, 2016).

¹⁷ Stanton & Kline at 15-18.

¹⁸ Stanton & Kline at 13.

¹⁹ *New State Ice Co. v. Leibmann*, 285 U.S. 262 at 272 (1932) (“Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”) (Brandeis, J., dissenting).

many of the details need further development, development which will come best through experimentation such as the pilot program developed by the MD PSC.

V. CONCLUSION

In conclusion, NARUC urges the Commission to dismiss the Cooperatives' Petition.

Respectfully submitted,

/s/ Jennifer M. Murphy

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Dated: October 7, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: October 7, 2016

Respectfully submitted:

/s/ Jennifer M. Murphy