UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Karen Schedler, Jeremy Helms, Solar United Neighbors and Vote Solar	)))	Docket No. EL24-54

MOTION TO LEAVE TO ANSWER AND ANSWER OF NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), the National Association of Regulatory Utility Commissioners ("NARUC") submits this Motion for Leave to Answer and Answer to the Answer filed by Karen Schedler, Jeremy Helms, Solar United Neighbors, and Vote Solar (together, "Petitioners") on March 6, 2024.[1]

I. MOTION FOR LEAVE TO ANSWER

The Commission's rules generally do not provide for answers to protests. However, the Commission will allow answers where an answer will assist the Commission in its decision-making.[2] NARUC's Answer responds to the answer submitted by Petitioners and provides additional information as to why the Commission should reject Petitioners' request for the Commission to initiate an enforcement action against the Salt River Project ("SRP") under the

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[1] Petitioners do not object to NARUC's out-of-time intervention in this proceeding, and no other party submitted a response to NARUC's submission. Therefore, the Commission should grant NARUC's motion to intervene out-of-time.

[2] *See Edenton Solar, LLC*, 175 FERC ¶ 61,194 P 21 (2021); *see also Advanced Energy Econ.*, 161 FERC ¶ 61,245 at P 56 (2017) (accepting answers not otherwise provided for in the Commission's rules "because they have provided information that assisted us in our decision-making process."), order clarified by 163 FERC ¶ 61,030 (2018); *Harbor Cogeneration Co., LLC*, 169 FERC 61,067 P 35 (2019) (same); *Midwest Indep. Transmission Sys. Operator, Inc.*, 126 FERC ¶ 61,144 at P 8 (2009) (same).

Public Utility Regulatory Policies Act of 1978 ("PURPA"). Therefore, NARUC requests that the Commission accept this Answer.

II. ANSWER

Petitioners fail to persuasively respond to NARUC's arguments that the Commission lacks jurisdiction to consider their petition.

A. Petitioners Make an As-Applied Challenge That Must Be Brought in State Court.

Petitioners' challenge is not an implementation challenge over which the Commission has jurisdiction. Instead, it is an as-applied challenge that belongs in state court. Petitioners fail to grapple with the basic distinction between the two types of challenge. As the Tenth Circuit has explained, that distinction is straightforward: "[F]ederal courts are understood to have jurisdiction over facial, or 'as-implemented,' claims regarding the implementation of federal agency rules by individual utilities or state utility commissions, while state courts hear individual 'as-applied' claims regarding the application of those implementations to individual parties."[3] A facial challenge succeeds when the challenged rule is invalid in every potential application.[4] For example, a state rule that caps the amount of energy that utilities must purchase from QFs is facially invalid because it is inherently and in every potential application inconsistent with PURPA's must-take provision.[5] By contrast, an as-applied challenge alleges that a rule is invalid when it is applied to particular facts or circumstances.

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3 *Vote Solar v. City of Farmington*, 2 F.4th 1285, 1286 (10th Cir. 2021).

4 *Cf. United States v. Salerno*, 481 U.S. 739, 745 (1987) (a facial challenge is one in which the "challenger must establish that no set of circumstances exists under which the [challenged rule] would be valid.").

5 *See Winding Creek Solar LLC v. Peterman*, 932 F.3d 861, 865 (9th Cir. 2019).

Petitioners' challenges are not facial challenges. Petitioners contend, first, that "[t]he higher fixed charge in the tariffs available for solar customers, compared to tariffs available to non-solar customers discriminates."[6] But that pricing structure does not on its face violate any PURPA rule. It is not inherently discriminatory, because one can envision circumstances that would justify imposing a higher fixed charge on solar customers than non-solar customers. For example, such a difference could be justified if the demands solar customers place on the system are different from those of non-solar customers, such as appears to be the case with Salt River Project's customers. Petitioners are instead making an as-applied challenge: they are arguing that the pricing structure is invalid under the factual circumstances they allege, because those circumstances do not justify differential treatment. That as-applied challenge belongs in state court.

Petitioners next claim that SRP "preclude[s] solar customers from the most beneficial time-of-use tariff available to all non-solar customers," and that this discriminates.[7] Once again, this is not a facial claim. Solar customers are not inherently or in all circumstances entitled to the most beneficial time-of-use tariff available to all non-solar customers. Rather, one can conceive of factual circumstances in which it is reasonable to treat the two types of customers differently in this regard—for example, when solar customers have a load shape different than that of non-solar customers, and thus different usage characteristics. Indeed, SRP argued exactly this in its Protest,[8] and Petitioners did not respond. Petitioners' challenge, again, is an as-applied challenge that under the factual circumstances here, there is no basis for treating solar customers differently from non-solar customers.

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6 Petitioners' Ans. at 1.
7 *Id.*
8 SRP Protest at 10-23.

Petitioners' final claim is that a purchase price of $0.028/kilowatt hour for electricity is less than the utility's full avoided cost.[9] Once more, this is an as-applied challenge. A purchase price of $0.028/kilowatt hour is not inherently invalid. There is no facial inconsistency between that numerical rate and an avoided cost rate. Rather, Petitioners' argument depends on various factual assertions that, in these particular circumstances, the purchase price of $0.027/kilowatt hour is less than the avoided costs. That is a paradigmatic as-applied challenge. Indeed, Petitioners have no answer to the Eighth Circuit's statement in *Swecker* that "claims challenging the calculation of a specific avoided costs rate" are "'as-applied' claims" over which "[s]tate courts exercise jurisdiction."[10]

Swecker itself, meanwhile, involved a facial challenge to an Iowa Utility Board rule, which corresponded to FERC's, regarding how to calculate the avoided cost of an all-requirements utility. The Commission's rule was that, when a utility is supplied by an all-requirements supplier, the utility's avoided cost is the avoided cost of its supplier. The plaintiffs claimed that this rule was facially inconsistent with the text of FERC's own PURPA regulations, and the court rejected that claim.[11] The plaintiffs were not challenging the specific dollar amount that was calculated to be the avoided cost rate—but that is exactly what Petitioners here seek to do, and that is why their claim is as-applied rather than facial.

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9 Pet. Ans.at 2.

10 *Swecker v. Midland Power Co-op*, 807 F.3d 883, 886 (8th Cir. 2015).

11 *Id.* at 886-87.

Because Petitioners make an as-applied challenge over which the Commission lacks jurisdiction, the petition must be dismissed.

B. Petitioners' Claims Involve Matters of State Jurisdiction.

Not only are Petitioners' claims as-applied challenges that belong in state court, but they also fail on the merits because they concern matters committed to state jurisdiction. Petitioners complain that various retail tariffs discriminate against them, but this Commission has no jurisdiction over retail tariffs.

Petitioners assert that they are qualifying facilities entitled to PURPA,[12] but PURPA concerns sales of power by small power production facilities to utilities. If a small power production facility is not selling any electricity to the utility, PURPA does not apply. Petitioners have not alleged that any such sale takes place here. Petitioners' residences are connected to SRP's distribution grid, and their roof-top power production facilities are located behind the distribution meter. The Commission has long held that the utility does not engage in any purchase of electricity from a generator that is connected behind the customer's meter so long as the customer is an overall net consumer of electricity during a billing period.

The Commission first so held in the *MidAmerican* case, decided in 2001. There, MidAmerican "argue[d] that every flow of power constitutes a sale, and, in particular, that every flow of power from a homeowner or farmer to MidAmerican must be priced consistent with the requirements of either PURPA or the [Federal Power Act]."[13] The Commission found "no such

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12 Pet. Ans. at 2-3.

13 *MidAmerican Energy Co.*, 94 FERC ¶ 61,340, 62,263 (2001).

requirement" in either PURPA or the Federal Power Act.[14] As the Commission recognized, MidAmerican,"[i]n essence," had asked the 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 Federal Power Act] 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."[15] But, as the Commission explained, utilities could permissibly treat one as netting the other in determining the customer's retail usage.[16] Accordingly, the Commission held that "*no sale occurs* when an individual homeowner or farmer (or similar entity…) installs generation and accounts for its dealings with the utility through the practice of netting."[17]

The Commission reaffirmed that holding eight years later in *Sun Edison LLC*.[18] The Commission again explained that "[w]here there is no net sale over the applicable billing period to the local load-serving utility, there is no sale."[19] The Commission elaborated: "Where there is no net sale over the billing period, the Commission has not viewed its jurisdiction as being implicated; that is, the Commission does not assert jurisdiction when the end-use customer that is also the owner of the generator receives a credit against its retail power purchases from the selling utility."[20] That is so, moreover, even if a customer has two separate meters, one that measures inflows and one that measures outflows—and it is so even if the state determines that outflows

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14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.* (emphasis added).
18 129 FERC ¶ 61,146 (2009), *modified on reh'g*, 131 FERC ¶ 61,213 (2010).
19 *Id.* at P 19.
20 *Id.* at P 18.

should be valued differently from inflows (for example, by applying a buyback rate) because inflows depend upon use of the distribution grid, while outflows do not. These are questions of retail rate design. They do not change the underlying principle that, when a customer is a net consumer of electricity, the occasional outflow of electricity from the customer to the utility is not a "sale."

Thus, Petitioners are simply wrong when they assert that "[a] customer whose electricity flows are accounted for through net metering is still a QF entitled to the rights afforded by PURPA."[21] Such a customer engages in no sale of electricity, and PURPA therefore does not apply. And although a sale may occur if the customer's net outflows exceed its net inflows, Petitioners do not allege that they satisfy this condition, nor do they provide any indication of how many customers might. The Commission should not entertain a petition for enforcement raising a hypothetical issue, in the absence of any actual injury suffered by the Petitioners.

Finally, even if Petitioners did have net outflows, such outflows would still be state jurisdictional and fall outside PURPA's scope. PURPA was enacted pursuant to Congress's Commerce Clause power, but any outflow of power from a behind-the-meter generator connected to the utility's distribution system occurs solely in intrastate commerce and is not subject to congressional regulation. The Supreme Court has explained that Congress may regulate even intrastate electricity sales when the electricity being sold is commingled with electricity generated by out-of-state sources.[22] But electricity outflows from a behind-the-meter generator connected to

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[21] Pet. Ans. at 7.

[22] *FPC v. So. Cal. Edison Co.*, 376 U.S. 205 (1964); *Pa. Water & Power Co. v. FPC*, 343 U.S. 414 (1952); *see also Fla. Power & Light Co. v. FERC*, 404 U.S. 453 (1972) (FERC jurisdiction over transmission over commingled power).

the distribution grid do not meet this test. Such energy output is not commingled with out-of-state power before the point of sale, because there is no power upstream from the retail customer's behind-the-meter generator. At the moment of discharge onto the local distribution network, the electricity is purely intrastate in character, and therefore is not subject to regulation under the Federal Power Act or PURPA.

III. CONCLUSION

For the foregoing reasons, NARUC respectfully requests that the Commission accept this Motion for Leave to Answer and Answer to the Petitioners' Answer and issue an order dismissing the First Amended Petition for lack of subject-matter jurisdiction.

Respectfully submitted,
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Dated: March 20, 2024

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 in these proceedings.
Dated this 17th day of March 2024.

/s/ James Bradford Ramsay

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