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 INTERVENE OUT-OF-TIME AND MOTION TO DISMISS OF NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. §§ 385.212 and 385.214, the National Association of Regulatory Utility Commissioners ("NARUC") respectfully moves to intervene out-of-time in this matter and urges the Commission to dismiss the First Amended Petition for Enforcement ("Petition") filed January 22, 2024 by Karen Schedler, Jeremy Helms, Solar United Neighbors, and Vote Solar (together, "Petitioners") in this proceeding.

I. COMMUNICATIONS

All pleadings, correspondence, and other communications related to this proceeding should be addressed to the following person:

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II. MOTION TO INTERVENE OUT-OF-TIME

NARUC is the national organization of the state commissions responsible for economic and safety regulation of the retail operations of utilities. NARUC's members 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 that those services are provided at just and reasonable rates. NARUC's members include the government agencies in the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the rates, terms, and conditions of service associated with the intrastate operations of electric,

natural gas, water, and telephone utilities. Both Congress[1] and the federal courts[2] have long recognized NARUC as the proper party to represent the collective interests of state regulatory commissions.

Petitioners have asked the Commission to initiate an enforcement action against Salt River Project ("SRP") for alleged violations of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Petitioners raise claims that would require a Commission determination impacting the applicability of PURPA to retail rate design, particularly for residential customers with rooftop solar photovoltaic ("PV") panels. Granting the relief requested by Petitioners would infringe on matters that Congress placed squarely within the exclusive jurisdiction of state utility commissioners—retail rates.

Good cause exists to accept NARUC's motion to intervene out-of-time. Due to recent staff departures, as well as additional approval procedures required by the association's bylaws for this docket, NARUC was unable to submit its filing by the February 12, 2024 deadline. However, intervention at this early stage will not disrupt or delay the proceedings, especially when there has been no Commission ruling on this matter. Moreover, NARUC is willing to accept the record as it stands. NARUC's late intervention will not unduly burden or prejudice other parties to this case. In addition, NARUC has a direct and substantial interest in the outcome of this proceeding, and no other party can adequately represent the collective interests of NARUC and the state commissioners. Accordingly, it is in the public interest to permit NARUC's late intervention. NARUC respectfully requests that the Commission grant this request to intervene out-of-time with all the rights that attend to such status.

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[1] *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 the Joint Federal-State Board on Universal Service). Cf. NARUC, et al. v. ICC, 41 F.3d 721 (D.C. Cir. 1994) (where the Court explains "[c]arriers, 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").

[2] *See 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).

III. MOTION TO DISMISS

Petitioners' claims are matters clearly outside FERC's jurisdiction. Petitioners raise as-applied challenges to SRP's rates that are subject to exclusive state jurisdiction—not PURPA implementation challenges. Petitioners challenge SRP's rate design as applied to *retail* customers with rooftop solar PV panels located behind-the-meter. Such challenges to retail rates are subject to exclusive state jurisdiction. Moreover, Petitioners have not established that they are entitled to PURPA rights for their behind-the-meter rooftop solar panels. Petitioners take service from SRP as residential customers, and there is no evidence in the record of this proceeding that they ever asked SRP to purchase from, or sell power to, them as qualifying facilities ("QF") under PURPA.

Accordingly, the Commission must dismiss the Petition. Rather than simply issuing a Notice of Intent to Not Act as the Commission often does when presented with PURPA enforcement petitions, NARUC respectfully requests FERC instead explain that it is dismissing the Petition for lack of subject matter jurisdiction and that state regulators (and self-regulated entities such as SRP) and state courts have exclusive jurisdiction over such challenges to residential utility rates.

1. FERC Should Dismiss the Petition for Lack of Subject Matter Jurisdiction Because "As-Applied" Challenges under PURPA are Subject to Exclusive State Jurisdiction.

PURPA section 210(a) directs FERC to promulgate "broad, generally applicable rules" to encourage small power production by, among other things, requiring utilities to sell power to and buy power from such facilities at favorable rates. *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 695 (D.C. Cir. 2017). In turn, Section 210(f) requires state public utility commissions and nonregulated utilities to implement FERC's rules. *Id*.

With PURPA claims, federal courts have universally concluded that "implementation" challenges fall under federal jurisdiction, while states have exclusive jurisdiction over "as-applied" challenges. *See, e.g*., *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 388 (5th Cir. 2014); *Allco Renewable Energy Ltd. v. Mass. Elec. Co*., 875 F.3d 64, 68 (1st Cir. 2017). An implementation challenge considers whether a state agency or nonregulated utility failed to implement a FERC rule promulgated pursuant to PURPA. 16 U.S.C. § 824a-3(f). An as-applied claim argues that the state or utility implementation of such rule is unlawful as it applies to or affects individual parties. *Exelon Wind*, 766 F.3d at 388; *City of Farmington*, 2 F.4th at 1286.

Here, Petitioners plainly raise an as-applied challenge. They argue that SRP's retail rate classifications (referenced by SRP as "price plans") are unfair as applied to residential customers with rooftop solar PV panels (also simply referred to herein as "residential solar customers"). More specifically, the Petition complains about SRP's retail rates that charge residential solar customers for electricity distribution service and that provide credits to such customers for excess energy they may deliver to SRP's distribution network .from their behind-the-meter generation [3] Such issues of retail rate design are left exclusively for state regulatory authorities (or, in cases like SRP, nonregulated electric utilities) and state courts.

Both FERC and federal courts have found that questions concerning rate discrimination and the calculation of avoided costs under PURPA are as-applied issues subject to state jurisdiction. For example, the Commission has recognized that state regulators are charged with implementing PURPA, including issues around net billing arrangements between behind-the-meter customers and their utilities.[4] The First Circuit has affirmed a district court's refusal to make findings as to avoided cost rates, leaving that issue for the state regulator "[b]ecause section 210 of PURPA generally contemplates state agencies implementing FERC's rules for determining avoided cost rates."[5] And the Eighth Circuit has found that challenges to the calculation of specific avoided costs are as-applied claims subject to the exclusive jurisdiction of state courts.[6]

The retail rate classifications SRP makes available to residential solar customers appear to provide for net metering of electricity for participating customers.[7] Net metering has been an established feature of retail electric rates and state energy policy across the nation for decades.

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[3] First Amended Pet. at 9.

[4] *See, e.g., MidAmerican Energy Co.,* 94 FERC ¶ 61,340, at 62,263-64 (2001) (rejecting arguments that a state is preempted by federal law from allowing an individual homeowner's purchase or sale of power from being measured on a net basis and finding no reason to interfere with a state regulator's decision to permit net metering).

[5] *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 875 F.3d 64, 74 (1st Cir. 2017).

[6] *Swecker v. Midland Power Coop.*, 807 F.3d 883, 886 (8th Cir. 2015).

[7] Under the Energy Policy Act of 2005 ("EPAct of 2005"), "net metering service" is defined as "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." 16 U.S.C. § 2621(d)(11)

Nearly every state has enacted a net metering program to promote renewable resources and distributed generation within its boundaries. Federal law recognizes that the decision to allow or require utilities to offer net metering service is one for the states and lies outside the Commission's jurisdiction. Indeed, the Energy Policy Act of 2005 affirmatively encouraged "[e]ach state regulatory authority" to include net metering service among its regulatory policies and as part of the local utility services that it regulates.[8]

In sum, as-applied challenges, like the one here, fall outside FERC's jurisdiction under section 210(h).

As a practical matter, if the Commission were to grant Petitioners' request to initiate enforcement proceedings against SRP, FERC would need to engage in a fact-intensive analysis of SRP's retail rates. In essence, the Commission would be requiring SRP to litigate a retail rate case at FERC. Such an outcome would not only infringe on the exclusive jurisdiction of state authorities to exercise jurisdiction over retail rates, but it will likely spur additional requests for the Commission to engage in retail ratemaking, which are time- and resource-intensive undertakings that would impose significant burdens on the Commission. And, as described above, Congress recognized that such burdens are not for the Commission to carry at all, but rather are left to the exclusive authority of state regulators and courts.

2. FERC Should Explicitly Clarify the Bounds of Its Jurisdiction by Dismissing the Petition

For the foregoing reasons, the Commission should dismiss the Petition. In many cases involving petitions for enforcement under PURPA, the Commission oftentimes issues a "Notice of Intent to Not Act," which typically declines to initiate an enforcement proceeding without detailed reasoning and notes that "[FERC's] decision not to initiate an enforcement action means that [Petitioner] may itself bring an enforcement action against [Respondent] in the appropriate court." In this case, NARUC requests that the Commission issue an order dismissing the Petition and explaining that the dismissal is due to the Commission's lack of jurisdiction over this matter. Specifically, the Commission should note that state regulators (and self-regulated entities such as SRP) and state courts have exclusive jurisdiction over these challenges to residential utility rates. If the Commission were to remain silent about its lack of jurisdiction, it passes a substantial burden

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[8] 16 U.S.C. § 2621(a), (d)(11).

onto state utilities and state regulators, who would then be hauled into time-consuming and intrusive federal court actions. Further, FERC's silence about its jurisdiction risks influencing a federal court judge to decide the jurisdictional issue incorrectly.

CONCLUSION

NARUC respectfully requests that the Commission grant its intervention out-of-time and its motion to dismiss.

Respectfully submitted,

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February 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 20th day of February 2024.

/s/ James Bradford Ramsay

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