

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

New England Ratepayers Association) Docket No. EL20-42-000
)
) **June 15, 2020**
)

PROTEST OF THE STATES

Pursuant to Rule 211 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. ¶ 385.211, Maura Healey, the Attorney General of the Commonwealth of Massachusetts, together with the state attorneys general of California, Connecticut, Delaware, the District of Columbia, Illinois, Maryland, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Rhode Island, Washington, and Wisconsin, the California Energy Commission, the California Public Utilities Commission, and the Rhode Island Division of Public Utilities and Carriers (the States) respectfully submit the following protest, with attachments,¹ of the New England Ratepayers Association’s² (NERA) Petition for Declaratory Order, filed on April 14, 2020 in this proceeding (Petition).³

The Commission may issue a declaratory order to terminate a controversy or remove uncertainty under Section 554(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e) (APA), and Rule 207 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. ¶ 385.207(a)(2).

¹ The attachments provide additional detail on net metering programs in Massachusetts, Minnesota, Washington, and California, respectively, for benefit of the record in this proceeding.

² Petitioner’s use of the name “New England Ratepayers Association” is inaccurate and could result in substantial ratepayer confusion. NERA does not represent ratepayer interests in any state, New England or elsewhere. Such duties are reserved for each state’s attorney general or consumer advocate, pursuant to state law. *E.g.*, Conn. Gen. Stat. § 16-2a (2020); Me. Stat. tit. 35-A, § 1702 (2019); Mass. Gen. Laws ch. 12, § 11E (2020); N.H. Rev. Stat. Ann. § 363:28 (2020); R.I. Gen. Laws § 39-1-17 (2020); Vt. Stat. Ann. tit. 30, § 2 (2020); Wash. Rev. Code §§ 80.01.100, 80.04.510 (2020).

³ By separate filing in this docket, the undersigned attorneys general also joined an additional, multi-state protest letter of NERA’s Petition, signed by the attorneys general of 31 states, including the District of Columbia.

Here, no controversy or uncertainty exists, and the Commission must deny the Petition to avoid an arbitrary and capricious result. The States urge the Commission to reject NERA's request to overturn nearly two decades of precedent, under which the Commission has consistently found that the retail billing practice of net metering is not a "sale of electric energy at wholesale in interstate commerce" under the Federal Power Act, 16 U.S.C. § 791a *et seq.* (FPA). 16 U.S.C. § 824(b)(1). Rather, this well-established retail billing practice, which measures the amount of power used by a retail customer, fits squarely within the states' jurisdiction under the FPA and the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (EPAAct).

Over the past nineteen years, states have relied on the Commission's precedent in developing retail net metering programs. Reversal of that established position will result in nationwide uncertainty regarding existing net metering programs and undermine states' clean energy initiatives, many of which are required by state law. Millions of retail customers who relied on existing net metering programs when making substantial investments in rooftop solar will be financially harmed and thousands of solar industry jobs will be placed at risk, all the result of an unlawful infringement on state authority to regulate the retail power sector.

NERA asks the Commission to cause such disruption and uncertainty based on two decisions by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) from nearly a decade ago. Yet, as addressed below, after the issuance of those decisions, and as recently as 2018, the Commission reaffirmed both its description of net metering and that it would assert federal jurisdiction only if a facility operating under a state net metering program produces more power than it consumes over the state-determined billing period.⁴ Moreover, the

⁴ See Order No. 841, *Elec. Storage Participation in Markets Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, 162 F.E.R.C. ¶ 61,127 at P 30 n.49 (2018).

D.C. Circuit opinions cited by NERA in fact undermine the petitioner’s claim, as the court found in those matters that the Commission *lacks* jurisdiction to set netting intervals for retail charges.

Even if the FPA contemplates Commission jurisdiction over the retail billing practice of net metering, which it does not, NERA provides no credible legal argument and cites no facts allowing the Commission to articulate a detailed justification for the policy change, as required by the APA. However, the Commission need not even reach those issues, and should reject the Petition based on its substantial procedural flaws.

BACKGROUND ON NET METERING

Since 1981, states have permitted owners of small-scale generation, including rooftop solar, to offset electricity usage with excess power generated behind the meter, allowing the customer’s meter to “spin backwards.”⁵ Also since 1981, states have enacted laws assessing retail service charges that reflect the customer’s net energy usage during a billing period. *E.g.*, Act of May 19, 1981, ch. 237, 1981 Minn. Sess. Laws 1022, 1023 (codified as amended at Minn. Stat. § 216B.164, subd. 3 (2020)) (“[T]he customer shall be billed for the net energy supplied by the utility according to the applicable rate schedule for sales to that class of customer.”).⁶

Over the subsequent four decades, states across the country have exercised their

⁵ Order No. 52345, *In the Matter of Consideration by the Comm’n of Design of Rates and Policies for Cogeneration and Small Power Prod. as Set Forth in Sections 201 and 210 of the Pub. Utils. Regulatory Policies Act of 1978 (PURPA)*, Ariz. Corp. Comm’n Docket No. 81-045 (July 27, 1981) (providing for net metering for qualifying facilities of 30 kW or less); *Regulations Promulgated by the Dep’t of Pub. Utils., to Establish Rules by Which a Rate or Rates May Be Calculated for Sale of Elec. Energy by Small Power Producers or Cogenerators to Elec. Util. Cos. Under the Dep’t’s Ratemaking Jurisdiction; & Other Rules Determined Necessary to Carry out the Purposes of the Pub. Util. Regulatory Policies Act (“PURPA”), Title II, Sections 201 and 210*, Mass. Dep’t Pub. Utils. Docket No. 535 at 7–8 (July 23, 1981) (providing for net metering for qualifying facilities of 30 kW or less); *see also* Wash. Rev. Code 80.60.030.

⁶ Minnesota’s well-established net metering program remains popular with ratepayers. More than 9,000 customers in the state deployed distributed energy resources in 2019, with a combined nameplate capacity surpassing 1,000 megawatts (MW). Attachment B: Addendum of the State of Minnesota at 1 (Attach. B).

sovereign jurisdiction over retail sales to adopt state-specific net metering programs in furtherance of a wide variety of state retail energy policies. States adopted these programs in order, among other goals, to provide savings to ratepayers on their retail electricity bills, to reduce demand on the power system, to encourage development of distributed generation, to diversify state energy resource mixes, and to derive environmental, health, and economic benefits through the expansion of indigenous renewable fuel sources.

Such policy priorities differ from state to state and are inherently local in their economic impacts. For example, in Massachusetts alone, the clean energy industry employs more than 110,000 people, contributes \$13.2 billion to the Commonwealth's economy, and includes more than 500 small businesses that manufacture, develop, or service solar generation equipment, one of the primary net metered sources of renewable generation.⁷ In Minnesota, the solar industry has created more than 4,300 jobs at 187 different companies, and attracted investments of more than \$2 billion to the state. Attach. B at 1–2. Likewise, more than 70 solar operators do business in Washington, providing jobs, additional tax base, and revenues for the local economy.

Attachment C: Addendum of the State of Washington at 2–3 (Attach. C). In California, the solar industry alone employs approximately 86,000 individuals, saying nothing of the additional jobs provided by manufacturing, installing, and servicing other forms of distributed generation.

Attachment D: Addendum of the California Energy Commission at 2 (Attach. D). All told, spurred in considerable part by the availability of net metering, the solar industry has created more than 240,000 jobs nationwide.⁸

⁷ Mass. Exec. Office of Energy & Env't Affairs, *Global Warming Solutions Act 10-Year Progress Report* 13 (2019), <https://www.mass.gov/files/documents/2019/04/02/GWSA-10-Year-Progress-Report.pdf> (last visited June 14, 2020); Solar Energy Indus. Ass'n, *Solar State by State: Massachusetts Solar*, <https://www.seia.org/states-map> (last visited June 8, 2020).

⁸ See The Solar Found., *Nat'l Solar Jobs Census: Am. Solar Jobs in 2019*, <https://www.thesolarfoundation.org/national/> (last visited June 14, 2020).

Net metering is also a key component of state initiatives to reduce greenhouse gas (GHG) emissions by encouraging a generation resource mix that is cleaner and less dependent on fossil-fuels.⁹ Such state efforts are intended to yield substantial community and public health benefits by curtailing fossil fuel reliance and reducing criteria and hazardous air pollutant emissions. By consistently recognizing that net metering is a retail energy policy within state jurisdiction, the Commission has confirmed the states' authority to use net metering to encourage additional investment in distributed generation by all ratepayers, including homeowners, small and large business owners, municipalities, and industrial customers, and to achieve each state's individual clean energy goals. In California, for example, ratepayers net meter nearly 10,000 MW of installed distributed generation capacity, facilitating that state's efforts to achieve carbon neutrality by 2045. Attach. D at 2.

LEGAL STANDARD

When interpreting a statute, the Commission, just like any court, “must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The Commission first looks to the text of the statute to determine whether it is plain and unambiguous. Op. No. 559, *Confederated Salish & Kootenai Tribes Energy Keepers, Inc.*, 162 F.E.R.C. ¶ 61,125 at P 53 (2018). “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). “[I]f the language [of the statute] is not plain and

⁹ See, e.g., Mass. Gen. Laws ch. 21N, § 3; Mass. Exec. Office of Energy & Env't Affairs, *Determination of Statewide Emissions Limit for 2050*, (Apr. 22, 2020), <https://www.mass.gov/doc/final-signed-letter-of-determination-for-2050-emissions-limit/download> (establishing binding statewide limit of net-zero GHG emissions by 2050, defined as 85 percent below 1990 levels); Attach. B at 2; Attach. C at 2–3.

unambiguous, the Commission will consider the legislative history and other material that may clarify the legislative intent of Congress.” 162 F.E.R.C. ¶ 61,125 at P 53.

Under the APA, a reviewing court shall hold unlawful and set aside agency findings and conclusions that are contrary to law, including where such agency action is in excess of statutory jurisdiction or unsupported by substantial evidence. 5 U.S.C. § 706(2). Accordingly, when acting on any petition, the Commission must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” to meet the APA standard of review. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). Courts will invalidate actions where the Commission has “failed to consider an important aspect of the problem” before it. *Id.* Those principles apply with equal force when the Commission revises or repeals existing policies. Although the Commission need not show that a new policy is “better” than the policy it replaced, it must demonstrate that the new policy is “permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2008) (emphases omitted).

Furthermore, the Commission must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” when “its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” *Id.* at 515; *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Where such reliance interests exist and the Commission fails to provide a more detailed justification of the policy change, the Commission’s action is arbitrary, capricious, an unlawful violation of the APA, and not the result of reasoned decision-making. *Fox*, 556 U.S. at 515–16.

ARGUMENT

I. NET METERING IS A RETAIL BILLING PRACTICE SUBJECT TO STATE JURISDICTION UNDER THE FPA AND EPACT.

NERA asks the Commission to expand its authority over wholesale sales in interstate commerce and unlawfully impose federal rates on all flows of power from retail customers to their local electric utility. Petition at 7, 44–45. Under the FPA, however, the Commission has jurisdiction over only “the sale of electric energy at wholesale” and transmission. 16 U.S.C. § 824(b)(1).¹⁰ All other authority, including regulation of retail sales (as well as intrastate wholesale sales) is unambiguously reserved to the states. *Id.* § 824(b); *New York v. FERC*, 535 U.S. 1, 17 (2001) (holding that the FPA restricts the Commission’s jurisdiction for electricity sales to those at wholesale). The Commission may not take any action that exceeds that jurisdictional limit, “no matter how direct, or dramatic, its impact on wholesale rates.” *FERC v. Elec. Power Supp. Ass’n*, 136 S. Ct. 760, 775 (2016) (*EPSA*). To “specif[y] terms of sale at retail” is “a job for the States alone.” *Id.* at 775.

Net metering is a retail billing practice. As such, the Commission must leave its regulation to the states to “give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842–43. Fundamentally, an electric utility and its customer are engaged in a retail transaction: the utility delivers energy for end-use at the customer’s home or facilities. That transaction must be measured by some time interval, and the energy and delivery services used in that transaction must be given some value. Pursuant to their authority over retail sales under the FPA, states set both the interval that measures the transaction—the billing period—and the amount of compensation the local electric utility receives for the energy and delivery services

¹⁰ The term “sale of electric energy at wholesale” when used in Part II of the FPA, means “a sale of electric energy to any person for resale.” 16 U.S.C. § 824(d).

it provides to the customer.

Thus, net metering is simply an accounting convention used to determine the compensation that a local electric utility may receive for the retail services it provides when the end-use customer also engages in self-supply behind the meter. At times, customers engaged in self-supply behind the meter produce more energy than they consume. When that occurs, due to the construction of the electric grid and the relative difficulty of storing excess electric energy, energy flows back from the customer into the distribution system. To promote and account for self-generation, often from renewable energy sources, states have allowed these customers to offset the services they receive from the local electric utility by way of a credit against their retail bill for the applicable billing period. *E.g.*, Mass. Gen. Laws. ch. 164, §§ 139(a)(1), (b)(1); N.H. Rev. Stat. Ann. §. 362-A:9; 220 Mass. Code Regs. 18.04 (2020); N.H. Code Admin. R. Ann. PUC ch. 901 *et seq.* (2020). In this way, net metering simply reduces the amount owed to the utility for its energy and delivery services during the applicable billing period and is a pricing methodology for determining how much a retail customer that also engages in self-supply must pay for retail energy services. *E.g.*, Mass. Gen. Laws. ch. 164, §§ 139(a), (b).

A. The Commission Has Consistently Recognized State Authority over Net Metering Under the FPA.

The Commission has consistently recognized that the FPA reserves to the states jurisdiction over the retail billing practice of net metering. Indeed, *nearly twenty years ago*, the Commission denied a petition for declaratory order similar to NERA's current request, finding that federal law did not preempt a state's net metering program. *MidAmerican Energy Co.*, 94 F.E.R.C. ¶ 61,340 (2001). Specifically, the Commission held that "no sale occurs when an individual homeowner or farmer (or similar entity such as a business) installs generation and accounts for its dealings with the utility through the practice of netting." *Id.* at 62,263. Three

years after *MidAmerican*, the Commission reiterated that position in Order No. 2003-A.¹¹ In 2009, the Commission again described net metering as “a method of measuring sales of electric energy” and clearly stated that “where there is no net sale over the applicable billing period” to the local load-serving utility, there is no sale. *Sun Edison LLC*, 129 F.E.R.C. ¶ 61,146 at P 18 (2009).¹² A net sale *only* occurred where the “end-use customer participating in the net metering program produces more energy than it needs over the applicable billing period.” *Id.* at P 18.

That Commission precedent remains good law. In fact, as recently as 2018, the Commission reaffirmed that “injections of electric energy back to the grid do not necessarily trigger the Commission’s jurisdiction,” which arises only “when a facility operating under a state net metering program produces more power than it consumes over the relevant netting period” (*i.e.*, no Commission jurisdiction when the net metering customer remains a net consumer of power during the local electric utility’s netting period). Order No. 841, 162 F.E.R.C. ¶ 61,127 at P 30 n.49 (citing *MidAmerican* and *Sun Edison*).

B. Congress Recognized State Authority over Net Metering in the EPAct.

The EPAct also confirms Congressional intent regarding state jurisdiction over the retail billing practice of net metering. Contrary to NERA’s self-serving characterization, state authority over net metering is no “dead letter.” Petition at 18. It is the law.

Section 1251 of the EPAct amended the Public Utilities Regulatory Policies Act of 1978,

¹¹ Order No. 2003-A, *Standardization of Generator Interconnection Agreements and Procedures*, 106 F.E.R.C. ¶ 61,220 at P 744 (2004) (recognizing retail net metering does not implicate the Commission’s jurisdiction where the customer is a net consumer of energy produced by the utility).

¹² The Commission went on to conclude that “[w]here 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. Only if the end-use customer participating in the net metering program produces more energy than it needs over the applicable billing period, and thus is considered to have made a net sale of energy to a utility over the applicable billing period, has the Commission asserted jurisdiction.” 129 F.E.R.C. ¶ 61,146 at P 18.

codified generally at 16 U.S.C. §§ 824a-3 *et seq.*, and 2601 *et seq.* (PURPA), to require states to consider implementation of several retail policies, including “net metering,” defined as:

[S]ervice 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(c)(11).¹³

Congress required that “each State regulatory authority (with respect to each electric utility for which it has ratemaking authority)” begin consideration of net metering within two years, and determine whether to implement net metering within three years. *Id.* §§ 2621(b)(5)(B), (C). The new requirements did not apply where the state, the state regulatory authority, or state legislature had implemented or considered net metering “or a comparable standard.” *Id.* § 2622(d).

The EAct directs the states—not the Commission—to consider implementation of net metering. This confirms Congress’s intent, consistent with the FPA, to reserve authority over such retail billing matters to the states. *See id.* § 2622(a) (requiring action by “each state regulatory authority” regarding “each electric utility for which it has ratemaking authority”). If Congress deemed net metering as subject to federal jurisdiction, it would not have required each state to consider its implementation.

Also telling is Section 1251’s provision that “prior state actions” to consider or adopt net metering service or “a comparable standard” exempted states from the new PURPA requirements. *Id.* § 2622(d). The law explicitly contemplates a deciding role for state

¹³ As noted above, some states had implemented net metering program long before Congress enacted the EAct in 2005. *See supra* 3–4; Attach. A at 1; Attach. B at 1; Attach. C at 1.

legislatures and public utilities commissions in setting net metering policy and rates, consistent with the states' jurisdiction over retail sales of electricity.¹⁴

NERA misreads Section 1251 of the EPAct to claim that net metering participants may only be compensated for “electric energy” and not the “full retail electric rate” that includes other charges. *See* Petition at 35. Congress mandated no such limitation. As NERA admits, Congress contemplated net metering service as offsetting customer usage based on the retail rate, and explicitly left the consideration and terms of net metering programs for retail consumers to state commissions. *See id.* And PURPA is clear that any state definition of net metering that deviates from the definition in Section 1251 is entirely appropriate. *See* 16 U.S.C. § 2627(b) (“Nothing in this title prohibits any State regulatory authority or nonregulated electric utility from adopting, pursuant to State law, any standard or rule affecting electric utilities which is different from any standard established by this subchapter.”). NERA attempts to bolster its misreading of Section 1251 by citing to Ohio court precedent concerning the interpretation of an Ohio statute defining net metering. Petition at 36–37. Yet, NERA’s reliance on Ohio law rather than federal law inadvertently demonstrates exactly what Congress had in mind when it enacted

¹⁴ Public utilities commissions in subsequent state proceedings considered net metering as subject to state authority to regulate retail sales of power. That fact underscores Section 1251’s clear authorization of state regulation of net metering. For example, the Alaska Regulatory Commission concluded that Section 1251 “predetermined certain disputed net metering components, such as the offset rate for customer-generated power that is less than or equal to” a net metering customer’s total charge, and particularly that “consumer-produced energy be offset at the utility’s retail rate.” Order No. 7, *In the Matter of Consideration of Adoption of Regulations to Implement Amendments to the Pub. Utils. Regulatory Policies Act of 1978 by the Energy Policy Act of 2005*, Alaska Regulatory Comm’n, Docket No. R-06-5 at 11:18–12:2 (Aug. 27, 2008) (Order Declining to Adopt Federal Net Metering, Fuel Diversity, and Fossil Fuel Generation Efficiency Standards). The contemplated offset amount was a retail rate, and states concluded that the final determination of such rates was within their authority under the FPA and PURPA. States could adopt Congress’s definition of net metering service and value offsets at the retail rate, implement comparable net metering based on other offset values, or take no action. For example, following receipt of public comments in a Section 1251 follow-on proceeding, the North Dakota Public Service Commission took no further action, as the state had already “considered and adopted a net metering requirement for jurisdictional electric utilities to implement net metering service” that calculated the value of offsets based on utility avoided costs. Order, *Pub. Serv. Comm’n Fed. 2005 Energy Policy Act Standards Investigation*, N.D. Pub. Serv. Comm’n Docket No. PU-06-290 at 5 (Aug. 8, 2007). The authority to design, implement, and administer net metering programs fell to the states alone.

Section 1251. States would evaluate net metering and implement it as they saw fit. Federal law would not set the terms of retail net metering.

NERA insists that Section 1251 did not “redefine the jurisdictional line” between the Commission and state jurisdiction. *Id.* at 37. The States agree. Consistent with its clearly-expressed intent in the FPA, Congress, in the EPAct, contemplated no intrusion on traditional, preexisting state authority to regulate retail sales of electricity and associated billing and metering practices, including net metering.

C. The D.C. Circuit’s Opinions in *Southern California Edison* and *Calpine* Raise No Controversy or Uncertainty Regarding State Jurisdiction over Net Metering but Instead Reinforce the Commission’s Earlier Net Metering Decisions.

NERA’s mischaracterization of two D.C. Circuit opinions regarding the Commission’s authority to determine netting periods for retail sales of power does nothing to change what Congress made clear both through the FPA and the EPAct. States alone decide the terms of a retail sale and the billing practices applicable to retail transactions, including the netting period. *See EPSA*, 136 S.Ct. at 776; *Calpine Corp. v. FERC*, 702 F.3d 41, 50 (D.C. Cir. 2012); *S. Cal. Edison Co. v. FERC*, 603 F.3d 996, 1002 (D.C. Cir. 2010). NERA provides no basis for a different conclusion.

Southern California Edison and *Calpine* form the entire basis of NERA’s claim that the Commission must reconsider its decisions in *MidAmerican* and *SunEdison*. But neither *Southern California Edison* nor *Calpine* support NERA’s claim that the Commission must begin interfering with the states’ determination of the netting period for net metering programs and that netting using a monthly interval is impermissible and should be replaced by an interval of an hour or less. Neither decision concludes *what* the appropriate netting interval is, but rather *who* determines that netting period. And, both decisions affirm that it is the states, not the

Commission, that decide how to measure retail sales for net metering purposes, including establishing the netting interval for determining those sales.

In *MidAmerican* and *Sun Edison*, the Commission left the determination of whether a sale of energy takes place in a retail transaction to the states and their public utilities commissions. 129 F.E.R.C. ¶ 61,146 at P 19; 94 F.E.R.C. ¶ 61,340 at 62,263–62,264. Within the applicable billing period at issue in those cases, the Commission saw only one transaction and explicitly rejected the idea “that PURPA and the FPA 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.” 94 F.E.R.C. ¶ 61,340 at 62,263. Finding that no sale of electricity occurs during this transaction if the amount of energy produced behind the meter does not exceed the amount of energy consumed, the Commission found no wholesale sale, or sale for resale, that is subject to the FPA or the Commission’s regulations promulgated under PURPA. *Id.*; *see also* 16 U.S.C. §§ 824(b), 824a-3(a). As explained above, the Commission’s decision to defer to the netting period set by the states was entirely consistent with Congress’s intent that the states retain exclusive jurisdiction over retail billing and metering matters and the operation of net metering in a retail transaction. *See* 16 U.S.C. § 2621(a).

Contrary to NERA’s arguments, *Southern California Edison* and *Calpine Corporation* affirm exclusive state jurisdiction over the determination of netting intervals in order to measure retail transactions. The two cases resulted from a lengthy dispute between utilities and wholesale generators over how much electric generators must pay for station power, which is the “electricity used at a generating facility’s site to power things such as heating, air conditioning, lighting, and office equipment.” *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 825

(D.C. Cir. 2006). Independent system operators (ISO) and regional transmission operators (RTO) had modified their open-access transmission tariffs to allow generators to net the station power delivered to them by utilities against the energy they supplied to the grid, which often resulted in the generator avoiding any retail charges for their station power. *See id.* Under these tariffs, where station power (*i.e.*, the generator’s usage) exceeded its generation, the generator’s payment to its station power supplier for the net power “would be a retail sale subject to both retail transmission rates and state-jurisdictional local distribution charges.” *Id.* at 826. Because the transmission tariff provisions at issue allowed generators to avoid retail charges as long as their net contribution of power to the grid exceeded their station power, the question of the appropriate netting period—and who decides the appropriate netting period—became the center of the dispute over what generators pay for station power. *See, e.g., id.* at 823, 828–29 (rejecting a challenge to the Commission’s determination that monthly netting, rather than hourly, was appropriate, where the petitioners, including a state commission, had conceded that the Commission could set hourly netting for station power transactions without violating the FPA).¹⁵

In *Southern California Edison*, the D.C. Circuit determined that the states, not the Commission, determine the netting period for these retail sales of station power to generators. The Commission had ordered the California Independent System Operator (CAISO) to change the netting provision in its tariff from hourly netting to monthly netting for the determination of

¹⁵ NERA misleadingly characterizes *Southern California Edison* as “revers[ing]” *Niagara Mohawk*. Petition at 12. The D.C. Circuit took pains in *Southern California Edison* to explain that it only had accepted the Commission’s jurisdiction over netting with regard to retail station power sales because petitioners had “conceded that [the Commission] could, within its authority, dictate an hourly netting period for retail sales; petitioners only objected to the tariff’s monthly netting period.” 603 F.3d at 999. Contrary to NERA’s assertion, *Niagara Mohawk* never held “that netting was appropriate in the context of station service” such that *Southern California Edison* reversed that holding. Petition at 12. Rather, *Niagara Mohawk* held that the ISOs’ monthly netting, as approved by the Commission, was just as permissible as hourly netting, assuming that the FPA allowed the Commission to determine any netting period for station power sales at all. 452 F.3d at 828. *Southern California Edison* later held that the Commission did not have the authority to determine any netting period for retail station power sales—because that authority belongs to the states. 603 F.3d at 1000–02.

station power charges. *S. Cal. Edison*, 603 F.3d at 998. Hearing for the first time a challenge to the Commission’s jurisdictional authority to set the netting period for retail charges for station power, the D.C. Circuit found that the Commission had failed to justify its authority to determine the netting period for station power transactions by failing to identify the station power “transaction . . . [as] a wholesale sale or a transmission.” *Id.* at 1000. The court stated, “Unless a transaction falls within [the Commission’s] wholesale or transmission authority, it doesn’t matter how [the Commission] characterizes it.” *Id.* at 1001. The court was unconcerned by the fact that the Commission might “conclude that no transmission for station power took place in a month in which California would recognize retail sales of that power.” *Id.* at 1002. In conclusion, the D.C. Circuit held that any such difference of opinion was not “grounds to preempt the state’s authority to set the netting period for station power—*i.e.*, the pricing mechanism—in the retail market or to allow utilities to impose consumption charges.” *Id.* The court condemned the Commission’s attempt to usurp state authority over the netting period : “[The Commission’s] order does not just sideswipe state jurisdiction; it attacks it frontally.” *Id.* at 1001.

In *Calpine*, the D.C. Circuit confirmed that states alone determine netting with regard to retail charges. There, petitioners challenged the Commission’s determination on remand from *Southern California Edison* that “it lacked a jurisdictional basis to determine when the provision of station power constitutes a retail sale and . . . that the netting interval in the CAISO tariff could only govern Commission-jurisdictional transmission charges, not retail charges.” *Calpine*, 702 F.3d at 45. The court rejected petitioners’ theory that the Commission’s authority over wholesale transactions would have allowed the Commission to set the netting period for retail station power transactions and described the issue as one of “FERC’s authority to regulate truly

local charges.”¹⁶ *Id.* at 50.

NERA’s petition altogether ignores the key holdings of these two cases that states have authority over retail charges and the netting intervals that determine those charges. It also ignores the fact that, unlike station power transactions, net metering participants that do not produce more electricity than they need during a state-established netting or billing period are engaged only in retail transactions with no connection to wholesale markets or transmission.¹⁷ Net metering participants, unlike generators, are not participants in wholesale power markets when they produce less than their consumptions during the netting period. Within this billing period, they are neither bidding into regional power markets nor using regional transmission service. They are not receiving compensation from ISOs and RTOs for any energy contributions to the grid. They are not generating power in order to help a utility or a competitive supplier meet the needs of other retail customers. Conversely, utilities and competitive suppliers do not rely on the excess power generated by net metering participants during the netting period to meet their load-serving needs, or for re-sale. Net metering participants are simply end-users of energy engaged in self-supply.¹⁸ As explained above, the excess energy they produce flows back to the utility because it is the only place for that energy to flow. They are engaged in one transaction

¹⁶ *Calpine* also emphasized that the petitioner could seek relief from perceived grievances from the state public utilities commission. 702 F.3d at 50. Though NERA expends substantial effort asserting an unsuccessful jurisdictional claim, many of its arguments raise policy issues much more appropriate for state-level adjudication (*i.e.*, alleged ratepayer impacts of net metering, GHG and carbon emissions reduction efforts). Indeed, NERA has participated in such state administrative proceedings with regard to net metering. *See, e.g.*, New England Ratepayers Ass’n Pet. to Intervene, *Dev. of New Alternative Net Metering Tariffs and/or Other Regulatory Mechanisms & Tariffs for Customer-Generators*, N.H. Pub. Utils. Comm’n Docket No. DE 16-576 (June 6, 2016).

¹⁷ NERA argues only that the Commission’s authority over wholesale sales in interstate commerce supports its request that federal rates apply to all flows of power from the net metering participant to the local electric utility. *See, e.g.*, Petition at 7, 18–21. It does not argue or otherwise posit a theory based on the Commission’s authority over transmission in interstate commerce.

¹⁸ Generators are specifically excluded from the retail net metering programs NERA addresses in its Petition. *See, e.g.*, 220 Mass. Code Regs. 18.06(1) (“Distribution Companies shall not provide Net Metering services to a Host Customer who is an electric company, generation company, aggregator, supplier, energy marketer, or energy broker, as those terms are used in M.G.L. c. 164, §§ 1 and 1F and 220 CMR 11.00 . . .”).

only, and that transaction is at retail. How a local electric utility accounts for that transaction, including the netting period, is a term of a retail sale subject exclusively to state regulation. *See EPSA*, 136 S.Ct. at 776.

In contrast, generators like those in the station power cases are ultimately engaged in two transactions. First and foremost, generators are engaged in wholesale market transactions, in which they use transmission facilities that they either own or have access to by way of open-access transmission tariffs. As *Southern California Edison* points out, the netting period used for measuring station power transactions for the purpose of determining credits or charges under open-access transmission tariffs fits within the Commission’s jurisdiction under the FPA. 603 F.3d at 998 (“[The Commission] has the undeniable right to approve the netting methodology to determine how much electricity generators deliver to and take from the grid *for transmission purposes . . .*”) (emphasis added). Allowing states to determine netting periods for station power for the purpose of determining retail charges creates no conflict with how those transactions may be treated under transmission tariffs. *Id.* at 1001–02. The state’s public utilities commission appropriately determines compensation for the retail service of providing station power.¹⁹ *Id.*

Thus, *Southern California Edison* and *Calpine* simply reaffirm that states alone have the authority to determine netting intervals to account for and price retail transactions, even for retail transactions involving power generators that also participate in wholesale markets. With regard

¹⁹ Separate treatment of station power for retail charge purposes makes sense, as some generators physically cannot self-supply. *See Niagara Mohawk*, 452 F.3d at 825 (describing generators where “produced power goes out to the grid on one set of power lines, and the facility’s offices and electrical equipment are connected to a separate set of lines coming in from the grid”). In those circumstances, the provision of station power is, as a physical matter, a retail transaction entirely divorced from the generator’s delivery of energy into the grid. The fact that system operators may want to incorporate into their tariffs some accounting for generators’ station power should not affect what compensation local electric utilities are entitled to receive for these wholly retail transactions. *See S. Cal. Edison*, 603 F.3d at 1002.

to net metering participants, however, NERA's assertion that the flow of excess power during the retail netting period is a "wholesale sale[] because the energy is being sold to the utility for resale to the utility's retail load, or for resale by an ISO/RTO" is factually incorrect. *See* Petition at 7. As described above, net metering participants who are netting their usage during the applicable billing period are not entering into supply contracts with these utilities to help those utilities obtain energy to serve their basic service customers, bidding their energy into ISO or RTO markets, or entering into bilateral contracts with competitive suppliers in restructured states. Unlike the generators discussed in *Southern California Edison* and *Calpine*, they are not selling any energy they produce during the billing period for resale. They accrue credits against retail charges pursuant to an accounting convention that is nothing more than a retail "pricing mechanism" subject to state jurisdiction. *S. Cal. Edison*, 603 F.3d at 1002.

NERA makes much of the fact that the court in *Southern California Edison* described the Commission's choice of a one-month netting interval as "arbitrary and unprincipled," especially where it was the basis of the Commission's assertion of jurisdiction. Petition at 15–18. NERA ignores, however, that the court's decision hinged not on the length of the netting period but the Commission's failure to explain "why [it] is empowered to conclude that a retail sale has *not* taken place." *S. Cal. Edison*, 603 F.3d at 1000. The issue in both *Southern California Edison* and *Calpine* was that no party had been able to explain why the provision of station power was either a wholesale transaction or transmission such that the Commission could determine the retail terms of that transaction, including netting. 702 F.3d at 47–50; 603 F.3d at 1000–01. Whether a one-month netting period for determining whether there was a retail sale of station power was arbitrary is irrelevant to the ultimate question of *who* decides the netting period for determining the existence of that retail sale and, thus, retail charges. Ultimately, what the court

found to be arbitrary was the Commission’s use of any netting period to assert its authority where it had failed to establish the transaction was either at wholesale or transmission. *See id.*

NERA also asserts that *Calpine* describes netting as a “billing convention” and states that “the netting interval does not determine how much energy is *actually available* at wholesale.” Petition at 17–18 (quoting *Calpine*, 702 F.3d at 49). But NERA selectively quotes a portion of the court’s decision that explains why a state’s determination of whether a retail sale occurs in a station power transaction does not interfere with wholesale markets. *Calpine*, 702 F.3d at 49. In that portion of the opinion, the court responded to petitioners’ arguments that state determination of netting periods could result in generators experiencing “trapped energy” and thereby interfere with wholesale markets. *Id.* at 48. The court rejected this argument by explaining that the use of a netting interval to determine whether a retail sale occurred affected only retail charges for the station power transaction and costs to the generator, not how much energy the generator had available to bid into the wholesale markets. *Id.* at 49. Consequently, petitioners’ theory did not implicate the Commission’s authority over wholesale transactions.²⁰ *See id.*

In any case, as explained above, net metering customers who produce less than they consume during the netting period are not participating in wholesale markets such that they are making any energy “available” at wholesale. These net metering participants are engaged only in retail transactions. As the holdings in *Southern California Edison* and *Calpine* confirm, the terms of these retail transactions—including the netting period used to determine a “sale”—is a matter within the scope of state authority. Thus, nothing in the law has changed that would call into question the Commission’s determinations in *MidAmerican* and *Sun Edison*.

²⁰ The court also noted that petitioners’ use of the phrase “trapped energy” was an attempt to invoke the conflict preemption theory in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), but that theory was inapplicable. *Calpine*, 702 F.3d at 48 n.4.

In sum, the Petition mischaracterizes ten- and eight-year-old case law in an attempt to complete an end-run around Congress' express intent in the FPA and the EPA that states maintain sole authority over retail sales and billing practices, including retail net metering. The Commission must not accept NERA's invitation to transgress its statutory authority and manipulate the retail netting period. To do so would gut state net metering programs developed over decades, in some cases forty years, to promote state sovereign interests such as protecting public health and expanding local economies through renewable energy programs.

II. NERA'S PETITION PRESENTS NO BASIS FOR REVERSING COMMISSION POLICY THAT HAS ENGENDERED SUBSTANTIAL RELIANCE BY STATES AND RATEPAYERS.

NERA asks the Commission to adopt a position that is contrary to the FPA and Congress' recognition of state authority as set forth in the EPA, based solely on NERA's erroneous interpretation of *Southern California Edison* and *Calpine*. The Commission must deny the Petition for the reasons discussed above. Moreover, since NERA fails to provide facts or legal basis in this record to support its request, granting the Petition would constitute an unlawful action under the APA, since the Commission cannot provide a "satisfactory explanation . . . including a rational connection between the facts found and the choice made" to justify such a drastic change of position. *Motor Vehicle Mfrs.*, 463 U.S. at 43 (internal quotation marks omitted). NERA's failure in this regard is even more striking, given that granting the Petition would require the Commission to provide a detailed justification for its action, in light of the substantial reliance on existing net metering programs by states and ratepayers. *Fox*, 556 U.S. at 515–16. NERA provides a wholly insufficient record for the Commission to meet that heightened standard of review.

In *Fox*, the Supreme Court held that "when . . . [an agency's] prior policy has engendered serious reliance interests that must be taken into account," an agency must provide a "more

detailed justification than what would suffice for a new policy created on a blank slate.” *Id.* at 515–16. “It would be arbitrary and capricious to ignore such matters.” *Id.* Across the nation, states and customers of all types have relied on the Commission’s disclaiming net metering jurisdiction and non-interference with state programs. At least forty states and the District of Columbia have enacted net metering rules for local electric distribution companies, and approximately two million retail customers, both residential and commercial, participate in state net metering programs. Ashley J. Lawson, Cong. Research Serv., R46010, *Net Metering: In Brief 2* (2019). Customers in those jurisdictions have made substantial outlays of capital to install net metered generation, and rightfully expect to derive benefits from those investments under existing state laws.²¹ Meanwhile, states have enacted a broad array of wide-reaching clean energy laws and policies to reduce GHG emissions and address climate change, in part by encouraging net-metered distributed generation in reliance on the Commission’s repeated confirmation that net metering is a state-jurisdictional retail energy policy. Attach. A at 2; Attach. B at 2; Attach. C at 3–4. The Commission must account for such factors when considering a change in policy. *Fox*, 502 U.S. at 516.

On the record presented by NERA, the Commission has no basis whatsoever to provide a “satisfactory explanation” of the requested change in net metering jurisdiction, the bare minimum required by the APA. *Motor Vehicle Mfrs.*, 463 U.S. at 43. And here, the APA requires more of the Commission than that minimum, due to the substantial reliance interests at work. States exerted their jurisdiction to effectuate state policy goals through their net metering programs. Consumers expected, and continue to expect, to benefit from substantial investments

²¹ In Minnesota, the average amount of customer investment in a 5 kilowatt (kW) net metered generation system is \$15,750, or \$11,655 after application of applicable tax credits. Attach. B at 2; *see* Attach. A at 1–2 (noting installment costs in Massachusetts for 2017 through 2019 as \$3.85/watt for a median-sized solar system).

in net metered generation based on established pricing under state net metering programs. Ultimately, NERA’s entire basis for overturning long-standing Commission policy and ignoring such reliance interests rests on an incorrect interpretation of *Southern California Edison* and *Calpine*. See *supra* 12–20. That is not nearly enough to satisfy the requirements of the APA.

III. THE COMMISSION SHOULD DENY THE PETITION BASED ON ITS SUBSTANTIAL PROCEDURAL DEFECTS.

Setting aside the Petition’s substantive flaws, NERA seeks Commission review of issues that are not suitable for resolution by declaratory order and ignores the enforcement scheme governing state implementation of PURPA.

A. NERA’s Requested Relief Is Not Suitable for Commission Resolution by Declaratory Order.

1. Declaratory Orders are Advisory.

NERA asks the Commission to issue a declaratory order asserting jurisdiction over and “ordering” pricing of all net metering generation in accordance with PURPA or, where such facilities are not qualifying facilities, the FPA. Petition at 1. The Commission has no such authority.

The Commission cannot mandate compliance by declaratory order. *Constellation Power Source, Inc. v. Cal. Power Exch. Corp.*, 100 F.E.R.C. ¶ 61,380 at P 21 (2002) (holding in part that a declaratory order “does not require compliance but rather provides Commission guidance on the subject matter of a controversy”). Such orders are advisory, without binding legal effect, and provide guidance applicable “to specific parties of specific rights and duties arising under the statutes that the Commission administers.” *ITC Grid Dev., LLC*, 154 F.E.R.C. ¶ 61,206 at P 42 (2016); see also *Tri-State Generation & Transmission & Transmission Ass’n, Inc.*, 170 F.E.R.C. ¶ 61,263 at P 19 (2020) (“Declaratory orders are advisory and based on specific facts and

circumstances presented to the Commission.”). The Commission cannot grant NERA’s requested relief and must deny the Petition.

2. The Scope of NERA’s Request Is Too Broad.

NERA asks that the Commission assert federal jurisdiction over all net metering generation that flows back to the retail customer’s local electric utility. *See* Petition at 1. That issue is over-broad and not suitable for Commission resolution by declaratory order. Declaratory orders are appropriate to address focused inquiries such as “jurisdictional issues and the applicability to specific parties of specific rights and duties arising under the statutes that the Commission administers.” 154 F.E.R.C. ¶ 61,206 at P 42. Where a petition presents a broad issue that is not based on facts and circumstances applicable to specific parties, however, the request is not suitable for resolution by declaratory order and must be denied. *See id.* at P 45.

For example, in *ITC Grid Development*, a merchant transmission developer (ITC) requested a “generic finding” that if ITC were to file a proposed rate with the Commission that had been selected as part of a competitive regional solicitation consistent with the Commission’s Order No. 1000, the Commission would find the proposed rate just and reasonable, and subject to protections afforded by the *Mobile-Sierra* doctrine. *Id.* at P 1. ITC did not request a Commission ruling on any single proposed rate, but rather on a model bid that the company would use in multiple competitive solicitations administered by ISOs. *Id.* at P 2. The Commission denied ITC’s petition, holding that the “broad scope” of ITC’s requested relief “cannot be dealt with appropriately through a declaratory order.” *Id.* at P 45. The Commission found that “[p]etitions for declaratory order, and orders granting those petitions, are based on the specific facts and circumstances presented.” *Id.* ITC’s petition presented a “broad issue . . . not

an issue arising from specific facts Instead, the petition seeks a generic finding that will cover all bids [made in all applicable regional markets].” *Id.*

NERA’s petition for declaratory order also requests a broadly applicable ruling on the legality of *all* state-administered net metering programs and retail rates, based on little or no specific facts or circumstances. The Petition does not seek a Commission ruling regarding “the applicability to specific parties of specific rights” (*e.g.*, on the net metering rates of a particular electric utility company in a particular state). Rather, as in *ITC Grid Development*, the petition requests a generic Commission ruling determining the legality of net metering billing practices in all states and the rights of net metering customers under all such programs. Not only does NERA fail to provide substantive arguments that the Commission’s disclaiming jurisdiction over net metering raises a controversy or uncertainty appropriate for Commission review, NERA’s filing fails even to raise an appropriate issue for Commission review and resolution by declaratory order. On this basis alone, the Commission should reject the Petition, consistent with *ITC Grid Development*.

B. NERA’s Petition Ignores PURPA’s Enforcement Scheme.

NERA’s filing ignores the established enforcement scheme governing state implementation of PURPA requirements. Under PURPA, the Commission prescribes regulations to encourage alternative forms of generation (*e.g.*, rooftop solar) by requiring electric utilities to purchase the output of qualifying facilities at the utility’s avoided cost. 16 U.S.C. §§ 824a-3(a), (b) (prohibiting the setting of any rate for purchases from a qualifying facility that “exceeds the incremental cost to the electric utility of alternative electric energy”); 18 C.F.R. § 292.304. Each state public utilities commission must then implement the federal requirements for any public utility within its jurisdiction. *See* 16 U.S.C. § 824a-3(f).

“The Congress has declared with specificity the means by which the ends of the PURPA are to be achieved.” *N.Y. State Elec. & Gas Corp. v. FERC*, 117 F.3d 1473, 1476 (D.C. Cir. 1997). Where a state fails to implement regulations consistent with PURPA, the Commission may, either on its own or following a petition for such action by a public utility or qualifying facility, seek enforcement of PURPA’s requirements in federal district court. 16 U.S.C. §§ 824a-3(h)(2)(A), (B); *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 700 (D.C. Cir. 2017) (“[S]ubsection [16 U.S.C. 824a-3](h)(2) gives [the Commission] authority to direct the state utility commission to comply, which the Commission accomplishes by treating PURPA’s implementation obligation ‘as a rule enforceable under the Federal Power Act. . . . [S]ubsection (h)(2) actions require [the Commission] to proceed in district court.’”).²² “The failure of a state commission to ensure that a rate does not exceed a utility’s avoided cost is a failure to comply with a regulation implementing the PURPA.” *N.Y. State Elec. & Gas*, 117 F.3d at 1476.

NERA argues that each power flow from a net metered customer to the local electric utility is a wholesale sale and must be subject to the pricing requirements of PURPA or the FPA. Petition at 6. According to NERA, “behind the retail meter generators utilizing renewable or other qualifying energy sources (such as rooftop solar)” are “virtually always” qualifying facilities and subject to the requirements of PURPA. *Id.* at 8. For most net metering customers, then, NERA asks the Commission to mandate that rates for each purported “sale” to the local electric utility reflect avoided cost. *Id.* at 8, 33 (“Under FNM, [qualifying facilities] are being compensated for their energy in excess of avoided cost, and federal law is being violated.”). Stated differently, NERA’s contention is that state rules allowing for net metering instead of

²² In any such federal district court action, a Commission declaratory order “does no more than announce the Commission’s interpretation of the PURPA” and is of “no legal moment unless and until a district court adopts that interpretation when called upon to enforce PURPA.” *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1486, 1488 (D.C. Cir. 1997).

crediting behind-the-meter generation at the avoided cost rate violate the Commission's regulations implementing PURPA.

Despite making a PURPA implementation claim, NERA requests relief in a manner that is inconsistent with Congress's intended framework for enforcing the law. Under PURPA, only the federal district court has authority to "order" individual state regulatory commissions to do as NERA requests. *N.Y. State Elec. & Gas*, 117 F.3d at 1476 ("Under this enforcement scheme it is always the district court that first passes upon the merits of whatever position the Commission may take concerning the implementation of the PURPA."). The Commission cannot grant NERA's requested relief and must deny the Petition.

Even if NERA's petition for declaratory order was a proper request for Commission enforcement action in federal court against individual state regulatory authorities for alleged failure to implement PURPA's requirements pursuant to 16 U.S.C. § 824a-3(h)(2), that request would also be fatally flawed. As an initial matter, only an "electric utility, qualifying cogenerator, or qualifying small power producer" may file a request for enforcement. 16 U.S.C. § 824a-3(h)(2). The Petition provides no facts demonstrating that NERA or any of its members is such an entity. NERA's misguided, blanket request to price excess net metered generation in purported accordance with federal law also ignores the nature of an enforcement action in federal district court, in which the Commission seeks enforcement of PURPA's requirements against individual state regulatory authorities based on specific facts, and not based on a scattershot claim asserted against all states offering net metering to all retail customers. Furthermore, NERA's failure to disclose basic factual information regarding its members also casts doubt on the additional issue of whether it or any of its members would even have standing to appeal an adverse Commission order in federal court, and, as such, whether the Commission should

entertain such arguments now. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (requiring party invoking federal jurisdiction to bear the burden of establishing all elements of standing, including an injury-in-fact that would result in an “invasion of a legally protected interest which is concrete and particularized”; a causal connection between the injury and challenged conduct; and the likelihood that the injury “will be redressed by a favorable decision.”).

Rather than proceeding in a manner that is consistent with the procedures required by PURPA’s enforcement scheme, NERA ignores the federal district court’s role in enforcing the law and fails to allege it is a proper party to bring any request for enforcement. The Commission should deny the Petition based on these substantial procedural flaws alone.

CONCLUSION

The States respectfully request that the Commission deny NERA’s Petition for Declaratory Order, for the reasons set forth above.

Dated: June 15, 2020

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CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010, 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 this proceeding.

Dated at Boston, Massachusetts this 15th day of June, 2020.

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