Insight

Federal Jurisdiction of Net Metering

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Executive Summary

- The New England Ratepayers Association has petitioned the Federal Energy Regulatory Commission (FERC) to claim net metering is within FERC's jurisdiction.
- Historically, the practice of net metering by local utilities has been within the states' jurisdiction.
- The application of federal jurisdiction to the practice of net metering would result in additional regulatory burdens and increased costs as well as erode market confidence.

Introduction

Consumers are accustomed to receiving a bill from the local utility that charges a retail rate for the power they consumed each month. This transaction reflects the utility's relationship with the end user. Utilities, however, participate in a broader electric market that involves the production of power in one part of the country and then its transmission to another where utilities then sell it to consumers. These transactions are wholesale rather than retail.

The increased adoption of renewable resources, such as solar installations, at residential and commercial properties has complicated the role of utilities by effectively turning some consumers into generators. As the technology underlying solar panels has improved and resulted in cheaper yet more efficient panels, residential, commercial, and industrial consumers are increasingly installing them. The Energy Information Administration estimated that between 2014 and 2019, small-scale grid-connected photovoltaics power generation, i.e. rooftop systems, rose from 11 billion kilowatt-hours (kWh) to 33 billion kWh.[1] While power used to flow in one direction, from the utility to the consumer, the consumer can now generate enough power to not only meet their needs, but also supply the utility. This new transaction has been accounted for at utilities by "net metering"—i.e.

offsetting the costs of consumed electricity with the value of the produced electricity.

Because this transaction takes place between the utility and consumer, it has historically fallen under the purview of state-level regulators. The New England Ratepayers Association (NERA) has asked the Federal Energy Regulatory Commission (FERC), however, to consider whether reviewing net metering practices is within FERC's jurisdiction. Although FERC has the sole jurisdiction in reviewing wholesale power rates, taking claim of net metering from state agencies by redefining the retail transactions with consumers as wholesale would prove costly and detrimental to both consumers and solar manufacturers alike.

Net Metering and Regulation in Practice

Net metering is a practice that utilities employ in order to account for the value of the power generated by consumer installations, such as solar panels. In particular, it allows retail consumers of power, e.g. homeowners and local businesses, whose installation generated more power than they consumed to receive credit for the net power on their bill. The excess power generated flows to the utility's grid where it is then sold to other consumers. Full net metering means that the homeowner is paid the retail rate, the same value for the power they produced as they would be charged to consume that power.

Historically, state governments have regulated net metering practices. Over 40 states have laws in place to ensure credit is given for this excess consumer generation.[2] State regulatory agencies review the rates utilities charge retail consumers to ensure they are reasonable under their ratemaking jurisdiction.

FERC regulates transmission and wholesale sale of power in interstate commerce under the Federal Power Act.[3] This includes the rates, terms and conditions of wholesale electric sales by public utilities. Wholesale sales of electric energy are defined as a sale of power "to any person for resale."[4] As a result, federal ratemaking jurisdiction and state ratemaking jurisdiction regulate different aspects of the energy market.

NERA petitioned FERC on April 14, 2020 to issue a Declaratory Order revising the agency's interpretation of its jurisdiction under the Public Utility Regulatory Policies Act to include regulating net metering. NERA argues that since power is made available to the local utility for resale, the transaction constitutes wholesale sales in interstate commerce and that each consumer who has installed solar panels could be considered a qualifying facility under FERC's jurisdiction. They go on to argue that wholesale energy transactions should be priced at the utility's avoided cost of energy or according to a just and reasonable wholesale rate. Avoided cost rates are determined by the cost to the utility to generate or purchase the power from another source, the opportunity cost.[5]

Legal Precedent for State and Local Regulation of Net Metering

The rationale for state or local regulation of net metering is straightforward. The effectiveness of renewable technologies is dependent on their geographic location and the weather, among other factors. For this reason, the adoption of solar panels varies from one state to another. In addition, each state relies on a different mix of generation sources on a commercial scale, including both renewable and fossil-fuel resources. These, in turn, contribute to air quality and other issues subject to state mandates, as well as its long-term goals for investment in grid modernization and programming that incentivizes investment. As a result, net metering policies are best implemented with these localized concerns in mind.

The Energy Policy Act of 2005 directed states to implement net metering policies, not FERC or any other federal agency. What's more, both FERC and federal courts have addressed the question of FERC's role in reviewing net metering and found that it is not within the agency's jurisdiction. In 2009, FERC addressed its most recent case concerning net metering where it continued to hold that it lacked jurisdiction over net metering, a decision that was affirmed by federal circuit cases several years later.[6] FERC is well within its administrative discretion to consider the petition invalid.

Regulatory Implications

Should FERC ignore precedent and choose to take on net metering, its decision will likely be hotly contested, but it would also have many undesirable effects in the short and long term. The implications of such a change would include a new layer of regulation in electric markets that would complicate state authority, lead to new reporting requirements, and slow investment in installation as consumer confidence drops, leading to fewer jobs when we need them most.

Many states have sought to incentivize the installation of renewable resources by developing long-term policies that seek to reduce greenhouse gas emissions. To the extent that the federal review of net metering practices would prove to disincentivize utilities, consumers, or industry, states will work to counteract with new policies of their own. For example, after handing over the review of net metering to FERC, states may adopt new practices for calculating retail rates to offer new incentives. This, in turn, could create additional regulatory burden for utilities that drive up administrative costs. Similarly, utilities may be subject to additional regulatory reporting to FERC as they are the conduit for consumer power to reach through the market. As a result, retail rates for consumers could increase.

Changing the rate provided to consumers from a retail rate to one that reflects the avoided cost or the wholesale market rate as suggested by NERA will result in lower returns to consumers on their utility bills and as a result, decrease consumer confidence. While retail rates vary by locality, they are generally higher than wholesale rates and avoided cost rates. When considering retail rates on a state-by-state basis, New England states had the highest average rate in the continental United States in 2018, $0.21/kWh. Neighboring mid-Atlantic states New York, New Jersey, and Pennsylvania had an average price of $0.16/kWh[7]. Wholesale rates, on the other hand, are lower. In 2018, in New England the average wholesale price was around $0.05/kWh. Discounting the value of the power that consumers produce will be perceived as a loss relative to current billing practices, despite the fact that they're still receiving some credit for power that they did not utilize.

This lack of confidence will only be exacerbated by the months spent by state agencies and FERC in determining how to implement this new regulatory regime. While consumers wait to get a clear picture of the benefits to installing solar panels, companies already affected by the COVID-19 pandemic will face additional headwinds. The installation of residential solar panels is anticipated to decline by 25 percent in 2020.[8]

Conclusion

In the past, federal statutes, agency rulemakings, and federal court review have all found that net metering is within states' jurisdiction. Altering these policies now would prove detrimental to consumers who could see higher retail rates while utilities would be subject to additional regulatory burden. Further, this change in the short term would undermine the energy sector's ability to recover from the impacts of the COVID-19 pandemic.

Of course, simply thinking through the reasons that a consumer would have for putting a solar panel on the roof indicates why FERC regulation of net metering is a bad idea. When considering whether to install solar panels, the consumer weighs factors such as the expense of purchasing or leasing panels and their installation, how long it will take to make the investment worthwhile, as well as any incentives that the state or locality has to offer. The consumer simply is looking to reduce the cost of power, an unavoidable expense. In other words, the consumer is not looking to enter the electric market as a generator. FERC regulation could treat solar-panel owners as interstate power generators, even though that is nobody's intention.

[1] https://www.eia.gov/energyexplained/solar/photovoltaics-and-electricity.php

[2] https://www.greentechmedia.com/articles/read/ferc-might-rewrite-solar-net-metering-heres-

what-that-means

[3]https://www.ferc.gov/about/ferc-does/ferc101.pdf

[4] https://www.law.cornell.edu/uscode/text/16/824

[5] https://www.power-grid.com/2010/03/01/why-we-can-t-avoid/#gref

[6] http://eelp.law.harvard.edu/wp-content/uploads/net-metering-policymaker.pdf

[7] https://www.eia.gov/electricity/sales_revenue_price/pdf/table5_a.pdf

[8] https://www.utilitydive.com/news/coal-production-to-drop-25-in-2020-as-solar-expected-to-grow-33-eia-sei/579674/