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# Federalism and the net metering alternative

Jim Rossi

*Vanderbilt University, 131 21st Avenue South, Nashville, TN 37203, United States*

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ABSTRACT

There is nothing in federal law that supports the Federal Energy Regulatory Commission extending the reach of its jurisdiction to dictate net metering terms for the hundreds of thousands of retail customers that deploy generation resources in compliance with state or utility net metering programs. Instead, FERC jurisdiction over compensation for retail customer resources exists only when a customer explicitly chooses to participate in FERC jurisdictional markets or programs. At the end of the day, net metering is the type of policy that FERC should encourage states to experiment with and improve.



Net metering programs allow a retail customer (such as a home, a school, or a small business) to generate electricity primarily for its own use, as with rooftop solar panels. These programs also typically allow the customer to provide any excess electricity to the distribution grid and, in exchange, a utility or retail electric provider will credit the customer's bill.

More than 40 states have authorized net metering, and many utilities have also adopted their own net metering programs.[1] These policies have aided states in meeting renewable portfolio standard goals. They also have helped to spawn growth in customer solar photovoltaic installations, which expanded 15-fold between 2008 and 2013[2] and more than doubled between 2012 and 2014.[3]

Despite the success and promise of net metering overseen by the states, some have recently called for its federal regulation. In the pages of the *Energy Law Journal*[4] and *Harvard Business Law Review Online*,[5] David Raskin has made a plea that the Federal Energy Regulatory Commission (FERC) regulate retail customer net metering. The primary legal argument he advances is that billing credits for distributed generation resources can, in effect, transform a retail customer into a wholesale supplier in the interstate energy market, triggering FERC's statutory obligation to oversee prices under the Federal Power Act (FPA) of 1935.

In contrast to Raskin, FERC Chairman Norman Bay has recently questioned whether FERC's jurisdiction extends to customer net metering. "In my mind it's not clear," he stated in December 2015 before the House Energy and Commerce Subcommittee, that Congress "intended some individual who had a rooftop solar unit to be viewed as a utility within the meaning of the Federal Power Act and to be subject to federal regulation."[6]

This essay evaluates whether FERC has a legal basis for regulating customer net metering. I conclude that, under existing law, the statutory and regulatory foundations for any federal regulation of net metering are weak. Outside of a situation where the retail customer affirmatively transacts to sell energy into the interstate wholesale energy market, FERC lacks statutory authority to regulate compensation for retail customer energy resources. Even where a retail customer affirmatively transacts to sell energy into the wholesale market, FERC would share jurisdiction over compensation for retail customer energy resources with state regulators, who have the ultimate responsibility to determine whether or not retail customers may participate in wholesale markets.

*E-mail address:* j.rossi@vanderbilt.edu (J. Rossi).

[1] Net Metering Policy Overview and State Legislative Updates, National Conference of State Legislatures, Dec. 14, 2014, online at http://www.ncsl.org/research/energy/net-metering-policy-overview-and-state-legislative-updates.aspx. In 2010, every state except for Tennessee reported net metering customers. See Participation in Electric Net-Metering Programs Increased Sharply in Recent Years (May 12, 2012), online at https://www.eia.gov/todayinenergy/detail.cfm?id=6270.

[2] See http://www.seia.org/news/new-report-us-solar-market-grows-41-has-record-year-2013.

[3] See http://www.seia.org/research-resources/solar-market-insight-report-2014-q2.

[4] David B. Raskin, Getting Distributed Generation Right: A Response to Does Disruptive Competition Mean a Death Spiral for Electric Utilities?, 35 Energy L.J. 263 (2014).

[5] David B. Raskin, The Regulatory Challenge of Distributed Generation, 4 Harv. Bus. L. Rev. Online 38 (2013), http://www.hblr.org/?p=3673.

[6] See Norman Bay remarks in preliminary transcript from December 1, 2015 hearings before U.S. House of Representatives Energy and Commerce Subcommittee, p. 59, online at http://docs.house.gov/meetings/IF/IF03/20151201/104237/HHRG-114-IF03-Transcript-20151201.pdf.

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In order to more precisely assess FERC's jurisdiction, it is helpful to distinguish the *practice* of allowing excess energy onto the distribution grid by retail customer resources from the *policy* of net metering. From here on, I will refer to the practice of allowing excess energy onto the distribution grid from behind-the-meter customer resources as "customer net energy," and the policy that allows customers to receive billing credits for that energy as "net metering."

The key jurisdictional question is whether customer net energy triggers federal regulation. The FPA requires FERC to regulate "sales for resale" (also known as wholesale sales) of energy.[7] At the same time, FERC decisions consistently disclaim federal jurisdiction over net metering credits, based on the principle that there is no wholesale sale of energy unless a customer consistently produces sufficient excess energy over the netting period to become a net seller rather than purchaser. This "net sales" test is supported by the text and purposes of the FPA, as well as precedents.

I conclude that nothing in federal law supports FERC extending the reach of its jurisdiction to dictate the net metering terms for the hundreds of thousands of retail customers that deploy generation resources in compliance with state or utility net metering programs. Instead, FERC jurisdiction over compensation for retail customer resources exists only when a customer explicitly chooses to participate in FERC jurisdictional markets or programs. FERC's primary statutory responsibility is to ensure just and reasonable rates that are not unduly discriminatory. Such jurisdiction allows FERC to enable, but not require, the participation of resources in FERC's markets and programs. At the same time, states maintain jurisdiction over their programs for retail customer resources: Each customer determines whether to participate in a FERC jurisdictional market or state jurisdictional net metering program.

## 1. Is FERC foreclosed from regulating customer net metering?

A first order question in assessing federal jurisdiction over net metering is whether anything in federal law forecloses FERC from regulating it. With regard to that question, the FPA gives FERC jurisdiction over wholesale energy sales in interstate commerce but Section 201(b) of the statute expressly states that FERC jurisdiction does not extend to "any other sale of electric energy."[8] The FPA further limits FERC jurisdiction to "only to those matters which are not subject to regulation by the States."[9] Because of the savings clause in the FPA that specifically reserves certain activities for state regulators, most (if not all) aspects of retail customer net energy and other retail customer resources are primarily reserved to the states.

According to the Supreme Court, in distinguishing between wholesale and retail sales, the FPA endorses a "bright line" jurisdictional test.[10] Applying this traditional test, retail customer net energy and crediting methodologies would fall squarely within the purview of authority reserved for state regulators.

Congress expressly classified net metering policies as among the retail policies commended to states in 2005 amendments to the Public Utilities Regulatory Policies Act of 1978 (PURPA). Specifically, Congress included net metering among a list of 18 retail policies that states and non-regulated utilities are directed to consider implementing, including "time of day" rates, seasonal rates, and integrated resource planning.[11] These are all quintessentially state – not federal – regulatory prerogatives. Had Congress intended that net metering be subject to FERC regulation, there would have been no reason to direct states, as opposed to FERC, to consider adopting this policy.

PURPA's definition of net metering – "service to an electric consumer under which electric energy generated by that 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" – also envisions that any customer credit for excess energy is primarily a retail billing matter. To the extent that any such billing credits to the retail customer are intertwined with retail customer sales of energy, under the FPA they would appear to constitute "any other sale" (i.e., other than a wholesale sale), thus reserved entirely to state regulators.[12]

The Supreme Court's 2016 decision in *FERC v. Electric Power Supply Association* (*EPSA*) clearly rejects the argument that FERC's demand response regulations are *ultra vires* agency action.[13] At the same time, the Court was careful to emphasize that any regulation of "terms of sale at retail" is "a job for the States alone."[14]

As the Court also highlighted in *EPSA*, FERC's demand response regulations preserve state authority over the fundamental decision of whether retail customers can participate in wholesale markets. Indeed, the Court characterized FERC's demand response regulations as "a program of cooperative federalism, in which the State retain the last word."[15] So, states retain authority over whether retail customers can participate in the wholesale markets, and customers must affirmatively act to participate in wholesale transactions. This leaves net metering policies clearly within the purview of the states, while enabling customers, where not prohibited by state rules, to participate in wholesale energy markets if they so choose.

## 2. FERC is not required to regulate customer net excess energy as a wholesale sale

Raskin claims that the FPA obligates FERC to "ensure that the price paid to retail customer generators for their energy is the same as the price paid to other generators with whom they compete to

[7] 16 U.S.C., 824(a).
[8] 16 U.S.C., 824(b).
[9] 16 U.S.C., 824(a).
[10] See, e.g., FPC v. Southern California Edison, 376 U.S. 205, 215-16 (1964) (Congress meant to draw a bright line easily ascertained, between federal and state jurisdiction. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the states.); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 964 (1986) (noting that in addressing wholesale sales jurisdiction under the FPA there is no divided authority over interstate commerce and that federal regulation is supreme and exclusive.).
[11] These amendments specifically define net metering as electric energy generated by [an] electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities. to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period. See Section 1251, Energy Policy Act of 2005 (adding this definition of net metering to section 111(d) of PURPA, which also requires utilities to make available upon request net metering).
[12] Under the FPA, FERC already regulates the interconnection of small solar generation facilities under Order 2006 and its more recent updates in Order 792, though this extends to jurisdictional transmission providers and not to distribution utilities. See Order 792, 145 FERC 61,159 (2013). PURPA, described below, requires utilities, including distribution utilities, to interconnect with qualifying facilities and many states model their interconnection rules after FERC's rules, as FERC has encouraged.
[13] No. 14-840 (opinion issued January 25, 2016), available at http://www.supremecourt.gov/opinions/15pdf/14-840_k537.pdf.
[14] Slip op. at 18.
[15] Slip op. at 25.