The NERA Petition, FERC’s Dilemma, and the Economic Future of Rooftop Solar

Key Takeaways:

- New filing could result in payments to rooftop solar owners being cut in half.
- The NERA petition challenges a long-standing decision by FERC not to apply federal avoided-cost rates to state net metering programs.
- DC Circuit Court of Appeals will likely make the ultimate decision.

The April 14, 2020 filing by New England Ratepayers Association (NERA) is a serious attempt to force Federal Energy Regulatory Commission (FERC) to fundamentally change the economics of the rooftop solar market by asserting federal jurisdiction over energy sold in net metering transactions. If successful, the result could be that the compensation currently received by rooftop solar owners could be slashed by one-half or more. The petition is based on what NERA asserts to be controlling legal precedent from the DC Circuit requiring FERC to take jurisdiction over rooftop solar. 
energy sales as a matter of law. For that reason, the challenge raised by the petition is not to be lightly dismissed.

Specifically, the NERA petition challenges a long-standing decision by FERC not to assert federal jurisdiction over state net metering programs. Net metering rates compensate rooftop solar owners at levels roughly equal to what they would receive if they sold all of their energy to the utility at the utility’s full retail rate for energy. FERC avoided cost rates, on the other hand, compensate generators only for the cost the utility saves by not having to produce the energy provided, a much lower payout.

The difference is often dramatic. Many of a utility’s fixed charges for maintaining and operating the grid, and maintaining core utility functions are excluded in calculating avoided cost rates. But these charges are included in the calculating the energy portion of its retail rates. As a result, as the NERA petition reports, avoided costs rates are typically one-half to one-fifth retail energy rates.

Outside of the net metering context, the laws and regulations administered by FERC only compel utilities to offer small renewable energy projects avoided cost rates. But FERC has not applied those rules to net metering sales based on the logic that no federal jurisdictional sale occurs when power taken off the grid is matched by power put back on the grid, specifically when purchases and sales are netted on a monthly or hourly basis. FERC based that decision on cases involving large wholesale generators. However, in later decisions the DC Circuit Court of Appeals rejected FERC’s logic in these cases, ruling that offsetting higher-priced consumption with lower priced generation cannot be used to avoid FERC jurisdiction. In *Southern Cal Edison Co. v. FERC* and *Calpine Corp. v. FERC*, the court ruled that a FERC jurisdictional sale occurs in spite of the possibility of netting, thereby undercutting the legal basis on which FERC had relied in exempting net metering sales from FERC jurisdiction.

As a practical matter, the ability to net purchases against sales can make a dramatic difference in price. Under net metering, a customer with a solar panel that produces 1000 KWH of power in a month but uses 2000 KWH of power in that month is only billed for 1000 KWH of power consumption. The customer is, in effect, allowed to apply all 1000 MWH of solar generation to offset 1000 MWH of its energy consumption at the full retail price. It doesn’t matter when the energy was consumed or when it was generated. Full matching is allowed.

But without the netting of generation and consumption, the customer could be required to pay full retail prices for power consumed, and could receive only the much lower avoided cost rate for power generated. The effect would be a dramatic lowering of the value of rooftop solar generation to the utility customer.

The gist of *Southern Cal Edison Co. v. FERC* and *Calpine Corp. v. FERC*, particularly as interpreted by NERA, is that netting is not allowed to defeat FERC jurisdiction and a bright regulatory line must be maintained between state regulated sales of energy for consumption and federally regulated generation for potential export to the grid.

The question posed by the NERA petition is this: Will FERC invite the regulatory
confusion and the political discord that would be caused by asserting jurisdiction over rooftop solar under *Southern Cal Edison Co. v. FERC* and *Calpine Corp. v. FERC* and applying avoided cost rates to rooftop generation? Such a move would fundamentally disrupt rooftop solar markets and could frustrate the investment decisions of thousands of consumers who have brought rooftop solar based on the old rules. Instead, might FERC seek to find a way to distinguish the cases on which NERA relies, or otherwise craft a ratemaking accommodation that would allow rooftop solar to continue to enjoy net metering rates or something equivalent?

What FERC does in the coming months to answer these questions will be revealing. But in all likelihood, the ultimate decision on these matters will be made in the Court of Appeals for the DC Circuit where the case is clearly headed. That court’s reversal of earlier attempts by FERC to accommodate wholesale generators is the legal basis of the NERA petition. It is petition, NERA has taken procedural steps to get FERC to rule on these matters quickly. Is it possible that NERA is signaling that the real fight will be at the Court of Appeals?

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