



FERC's Storage and Distributed Energy Resources Aggregation NOPR: Jurisdictional Challenges

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Distributed Energy Resources

- Distributed generation isn't new.
- But recently, costs have fallen and installations have increased.
 - Example: Residential Photovoltaic Systems
 - Nationwide
 - 2007 – 0.10 million installations
 - 2016 – 1.25 million installations
 - California
 - 2007 – 0.15 GW
 - 2016 – 5.70 GW

Distributed Energy Resources

- Distribution utilities and their state regulators have taken a variety of different regulatory approaches.
- Focus of today's discussion is *federal* regulation of distributed generation.
 - Historically, FERC has asserted only limited jurisdiction over distributed generation.
 - With the issuance of its new Storage and Distributed Energy Resources NOPR last year, that may be changing.

FERC's Electric Storage/DERs NOPR

- *Electric Storage Participation in Markets Operated by Regional Transmission Operators and Independent System Operators*, 81 Fed. Reg. 86,522 (Nov. 30, 2016), FERC Stats. & Regs. ¶32,718 (2016)
 - NOPR would require RTO tariff revisions to better accommodate market participation by storage.
 - NOPR defines, and proposes requirements for, Distributed Energy Resources.

FERC's Electric Storage/DERs NOPR

- The NOPR defines a DER as (P 104) :
 - [A] source or sink of power that is located on the distribution system, any subsystem thereof, or behind a customer meter. These resources may include, but are not limited to, electric storage resources, distributed generation, thermal storage, and electric vehicles and their supply equipment.
- Using aggregator concept similar to Order 719, NOPR proposes requirements to enable distribution-connected resources and loads to participate in FERC-jurisdictional wholesale markets.

FERC's Electric Storage/DERs NOPR

- FERC has not yet acted on the NOPR.
- Open jurisdictional questions on NOPR's DER requirements:
 - How far does the NOPR seek to go?
 - How far can the NOPR go, given the jurisdictional limits of the Federal Power Act?

FERC's Jurisdiction

- FPA provides that FERC has jurisdiction over:
 - “[S]ale of electric energy at wholesale in interstate commerce”
 - “[T]ransmission of electric energy in interstate commerce”
 - “[A]ll facilities for such transmission or sale of electric energy”
- FERC does *not* have jurisdiction over:
 - “[A]ny other sale of electricity”
 - “[F]acilities used for the generation of electric energy”
 - “[F]acilities used in local distribution”

FERC's Jurisdiction

- FERC's authority is primarily economic.
 - Rates for jurisdictional transmission and wholesale sales
 - Any rule or practice “affecting” such rates
- FERC has limited jurisdiction over municipals.
 - FPA §§ 205 and 206 do not apply to non-public utilities.
 - FPA §§ 210, 211, 211A, and 212 – for muni-owned facilities, limited jurisdiction over transmission and interconnection
 - Reciprocity

FERC Jurisdiction Over DERs

- Net metering for distributed generation
- State jurisdiction to set rates for sales of generation from distributed generators that are PURPA Qualifying Facilities
- Generator interconnections to distribution facilities
- FERC's "affecting" jurisdiction

Net Metering for Distributed Generation

- Retail customer that has installed a small generation facility
 - At times, customer consumes more electricity than it produces, drawing electricity from the distribution system.
 - At other times, customer generates more electricity than it uses; excess is sent back onto the distribution system to be consumed by other end-users.
 - Retail customer receives a bill that nets the customer's excess generation against any purchases made by the retail customer.
- Is there a FERC-jurisdictional sale for resale?

Net Metering for Distributed Generation

- *MidAmerican Energy Co.*, 94 FERC ¶ 61,340 (2001)
 - Challenged net metering requirements of Iowa Utilities Board. According to *MidAmerican*:
 - For generators that are QFs, IUB forced *MidAmerican* to purchase excess generation at rate exceeding avoided cost.
 - For generators that are not QFs, FERC—not the IUB—has exclusive jurisdiction over rates for wholesale sales.
 - FERC denied *MidAmerican*'s petition.

“no sale occurs when an individual homeowner or farmer ... installs generation and accounts for its dealings with the utility through the practice of netting.”
 - BUT FERC *will* assert jurisdiction if there is a net sale to the host distribution utility.

Net Metering for Distributed Generation

- *Standardization of Generator Interconnection Agreements and Procedures*, Order 2003, P 747:

[U]nder most circumstances the Commission does not exert jurisdiction over a net energy metering arrangement when the owner of the generator receives a credit against its retail power purchases from the selling utility. Only if the Generating Facility produces more energy than it needs and makes a net sale of energy to a utility over the applicable billing period would the Commission assert jurisdiction.
- *SunEdison LLC*, 129 FERC ¶61,146 (2009)
 - General net metering rule applies, even if retail customer is legally distinct from the entity with legal title to the behind-the-retail-meter generation.

Distributed Generators That Are QFs

- *California Public Utilities Commission, 132 FERC ¶61,047, clarified and reh'g denied, 133 FERC ¶61,059 (2010)*
 - Reviewed California feed-in tariff program for combined heat and power generators
 - Held:
 - FPA preempts state-established rates for wholesale sales in interstate commerce.
 - BUT PURPA exception for Qualifying Facilities
 - States have considerable flexibility in setting the avoided cost rate applicable to distributed generators that are QFs.
 - E.g., particular types of generators; long durations
 - If individual generator chooses not to obtain QF status, FERC

FERC Jurisdiction over DERs

- FERC's FPA jurisdiction:
 - “[S]ale of electric energy at wholesale in interstate commerce”
 - “[T]ransmission of electric energy in interstate commerce”
 - “[A]ll facilities for such transmission or sale of electric energy”
- With respect to the first prong:
 - *MidAmerican* and related cases – FERC disclaimed jurisdiction over net-metered distributed generation, unless there is a net sale to the distribution utility.
 - In *CPUC*, FERC disclaimed jurisdiction over distributed generators that are QFs.

FERC Jurisdiction Over Local Distribution

- Order 888 – “bright-line” test for transmission of electric energy being sold for resale
 - [A]ny facilities of a public utility used to deliver electric energy in interstate commerce to a wholesale purchaser, whether such facilities are labeled “transmission,” “distribution” or “local distribution,” are subject to the Commission’s jurisdiction under sections 205 and 206.
- Does not necessarily include ability to compel interconnection to, or delivery over, local distribution facilities for *new* wholesale transactions.

FERC Jurisdiction over Local Distribution

- Order 2003 – Two-part test for FERC jurisdiction over interconnections to distribution facilities (Order 2003-A, PP 710, 730):
 - New generator would connect to a facility that, at the time of the interconnection request, is already included in a public utility's OATT; *and*
 - The interconnection is for the purpose of facilitating a jurisdictional wholesale sale of electric energy.

FERC Jurisdiction over Local Distribution

- In adopting this test, FERC rejected a rehearing request that it assert broader jurisdiction (Order 2003-C, P 51):

We concluded that applying our interconnection rules to facilities already subject to an OATT would properly respect the jurisdictional bounds recognized by the courts in upholding Order No. 888 and subsequent cases. ***To adopt SoCal Edison's position and interpret our authority more broadly, however, would allow a potential wholesale seller to cause the involuntary conversion of a facility previously used exclusively for state-jurisdictional interconnections and delivery, and subject to the exclusive jurisdiction of the state, into a facility also subject to the Commission's interconnection jurisdiction—a result that we believe crosses the jurisdictional line established by Congress in the FPA.***

FERC Jurisdiction over Local Distribution

- FERC affirmed the two-part test in Order 2006
- Approach applied and clarified in *PJM*, 114 FERC ¶61,191 (2006):
 - No FERC jurisdiction over interconnections, because relevant local distribution facilities did not satisfy Order 2003 test
 - Although there was an existing sale for resale, host utility bought full output of distributed generator at busbar; so no FERC-jurisdictional delivery service was involved in that pre-existing transaction.

FERC's "Affecting" Jurisdiction

- *FERC v. EPSA*, 136 S. Ct. 760, 774 (2016)
 - “[C]ommon-sense construction of the FPA’s language limiting FERC’s ‘affecting’ jurisdiction to rules or practices that ‘directly affect the wholesale rate.’”
 - FERC’s regulation of rates paid by RTOs for the demand response of retail customers sold into the supply side of wholesale markets fell within FERC’s jurisdiction “with room to spare.”

Where does this leave distribution utilities?

- FERC does not assert jurisdiction over large tranches of distributed generation.
 - Net metered can be state-regulated, unless there is a net sale to host utility
 - QF exemption
- For distribution facilities, FERC asserts limited jurisdiction to require interconnection and delivery.
 - 2-part test requiring pre-existing FERC-jurisdictional transmission
 - But – foot-in-the-door
 - If FERC jurisdictional service – rates/terms/conditions

Looking Forward

- Will new FERC pursue the NOPR?
 - FERC has many options
 - October 6, 2017 letters from Chairman Chatterjee to Congress:

I believe that the nation should be able to rely on all forms of energy resources, which includes renewable and electric storage resources and that the Commission has a role in fostering resource neutral, non-discriminatory policies with respect to the wholesale markets. This would include removing barriers to the participation of resources, such as distributed energy resources, in the wholesale markets. ... I am personally committed to addressing the issues raised in the NOPR with my colleagues and moving forward on this rulemaking.

Looking Forward

- If FERC moves forward, how will it interpret the DER requirements?
 - Affirm existing precedent and limit rule only to electricity products from DERs that have been delivered to the RTO grid?
 - Opt-in/Opt-out by relevant electric retail regulatory authorities, similar to Order 719-A?
 - Other?

Questions?



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