

ATTACHMENT A

Review of The Public Staff Comments and Recommendations
Regarding NEM Tariff Revision Application

NCUC Docket No. E-100, Sub. 180

REPLY REPORT
OF
KARL R. RÁBAGO
Rábago Energy, LLC

MAY 6, 2022

OFFICIAL COPY

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QUALIFICATIONS

I am an expert in electric utility regulation, organizations, including distribution and generation and transmission (“G&T”) companies, operations, and rate making. I am principal and sole employee of Rábago Energy LLC, a Colorado Limited Liability Company with a business address of 2025 East 24th Avenue, Denver, Colorado.

I am the same Karl R. Rábago who previous submitted a report in this proceeding, dated March 29, 2022. That report included detailed information relating to my qualifications.

ASSIGNMENT

I have been retained by the Environmental Working Group (“EWG”) to review the Joint Application of Duke Energy Carolinas, LLC and Duke Energy Progress, LCC (collectively referred to as the “Companies”) for Approval of Net Energy Metering Tariffs (the “Application”) to modify existing tariffs, filed on November 29, 2021, in the above referenced docket before the North Carolina Utilities Commission (the “Commission”). I have previously opined on the fatal deficiencies in the Application and provided recommendations for a lawful, just, and reasonable path forward for the Commission.

For this REPLY REPORT, I have been asked by EWG to address the comments filed on March 29, 2022, in this proceeding by the Commission’s Public Staff (“Public Staff”).

SUMMARY OF OPINIONS

My overall opinion is that the Application fails to meet the requirements of industry best practices and the North Carolina statutory framework in several regards. I reviewed the comments in which the Public Staff recommends approval of the Application’s proposed Net Energy Metering (“NEM”) tariffs for a period of four years. I find that the Public

Staff's investigation and recommendations fail to provide all customers, including current and potential NEM customers, with effective representation on the issues presented in this matter.¹

The Public Staff recommends approval of the proposed NEM tariffs despite the lack of a comprehensive underlying investigation of the benefits and costs of customer-sited generation,² despite the piece meal nature of the Application's proposed rates, and without due regard for ensuring just, reasonable, and non-discriminatory cost-based rates for customer-sited generation facilities.

In particular, I recommend that that Commission reject the Public Staff's recommendations as not being in the public interest. I maintain and reiterate my recommendation of March 29, 2022, submitted on behalf of EWG, that the Commission direct the Companies to fully investigate the costs and benefits of customer-sited generation in accordance with the law and under a comprehensive Benefit-Cost Analysis framework.

In response to Public Staff's recommendation that the Commission determine NEM facilities to be Qualifying Facilities (QFs) under federal law, I address two additional points relating to rates applicable to QFs. First, I point out that QF status does not dictate that rates for exported energy be limited to wholesale avoided cost rates, also known as PURPA rates. Second, I point out that the NEM rates proposed by the Companies and supported by the Public Staff are unjust, unreasonable, and discriminatory under federal law and regulations.

¹ N.C. Gen. Stat. § 62-15: "... (d) It shall be the duty and responsibility of the Public Staff to: (1) Review, investigate, and make appropriate recommendations to the Commission with respect to the reasonableness of rates charged or proposed to be charged by any public utility and with respect to the consistency of such rates with the public policy of assuring an energy supply adequate to protect the public health and safety and to promote the general welfare; . . ."

² N.C. Gen. Stat. § 62-126.4(b).

I reserve the right to change, supplement or modify my opinions based on additional information obtained through the discovery process, including data requests and other information.

I. THE PUBLIC STAFF RECOMMENDATION TO APPROVE THE PROPOSED NEM TARIFFS IS NOT CONSISTENT WITH THE STATUTORY REQUIREMENT FOR AN INVESTIGATION OF THE BENEFITS AND COSTS OF CUSTOMER-SITED GENERATION

A. Statutory Requirements

North Carolina law provides that every rate demanded or received by a public utility must be “just and reasonable.”³ The utility has the burden of proving that any rate change is just and reasonable.⁴ The rates shall be non-discriminatory and established “only after an investigation of the costs and benefits of customer-site generation.”⁵ The key requirements from the law are that the Companies bear the burden of proposing rates for net energy metering (NEM) in accordance with N.C. Gen. Stat. § 62-126.4 and demonstrating that such proposed rates are just and reasonable.

In performing its duty of only recommending approval of rates that are just, reasonable, and in the public interest, the Public Staff is obligated to

³ N.C. Gen. Stat. § 62-131: “... (a) Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable.”

⁴ N.C. Gen. Stat. § 62-134(c): “At any hearing involving a rate changed or sought to be changed by the public utility, the burden of proof shall be upon the public utility to show that the changed rate is just and reasonable.”

⁵ N.C. Gen. Stat. § 62-126.4: “Commission to establish net metering rates.

(a) Each electric public utility shall file for Commission approval revised net metering rates for electric customers that (i) own a renewable energy facility for that person's own primary use or (ii) are customer generator lessees.

(b) The rates shall be nondiscriminatory and established only after an investigation of the costs and benefits of customer-sited generation. The Commission shall establish net metering rates under all tariff designs that ensure that the net metering retail customer pays its full fixed cost of service. Such rates may include fixed monthly energy and demand charges.

(c) Until the rates have been approved by the Commission as required by this section, the rate shall be the applicable net metering rate in place at the time the facility interconnects. Retail customers that own and install an on-site renewable energy facility and interconnect to the grid prior to the date the Commission approves new metering rates may elect to continue net metering under the net metering rate in effect at the time of interconnection until January 1, 2027. (2017-192, s. 6(a).)”

ensure that the rates are in the interests of all of the using and consuming public.

As proposed, the NEM rates are not compliant with the law, and therefore, the Public Staff should not have recommended their approval.

B. Flaws in the Proposed NEM Rates and Public Staff's Investigation, Findings, and Recommendations

1. The Application is Not Supported by an Investigation of the Benefits and Costs of Customer-Sited Generation: Several commenters noted that the Companies' proposals are not supported by an investigation of both the benefits and costs of customer-sited generation, as required by North Carolina law.⁶ The Public Staff satisfies itself as to the adequacy of the studies underlying the proposals from the Companies and the settling parties by concluding that it "generally finds the methodology and results to be a reasonable analysis."⁷ However, the Public Staff fails to document its review of the proposed NEM tariffs and underlying and associated studies except in the broadest narrative terms.⁸

In describing the approach used by the Companies, Public Staff makes clear that they relied solely on data from cost of service studies, treated lost revenues as costs, never sought examination of the benefits produced by customer generation that are not captured in cost of service or marginal cost studies, and sought no evaluation of the future impacts of distributed generation on future fixed costs.⁹ The Public Staff accepts the limited view from the Companies and the settling parties that only avoided energy,

⁶ N.C. Gen. Stat. § 62-126.4(b). Joint Initial Comments of 350 Triangle, 350 Charlotte, and the North Carolina Alliance to Protect Our People and the Places We Live ("350 Triangle, et al.") (Mar. 29, 2022) at page 12-17; Comments of North Carolina Rooftop Solar Installers ("Solar Installers") (Mar. 29, 2022) at pages 1-3; Joint Initial Comments of NC WARN, NCCSC, and Sunrise Durham ("NC WARN") (Mar. 29, 2022) at pages 9-22; Attorney General's Office (Mar. 29, 2022) at pages 3-4.

⁷ Public Staff Comments at ¶ 40.

⁸ Public Staff Comments at ¶¶ 40-44.

⁹ Public Staff Comments at ¶ 42.

avoided capacity, and some avoided transmission and distribution costs need be analyzed under a marginal cost study in order to capture the benefits of customer generation.¹⁰ This limited analysis is untested and unverified by independent evaluation.

The Public Staff reprises only the most general characterizations of the impacts of customer generation on system costs, appearing to assume at face value that the Companies' "balance of costs and benefits represents a reasonable compromise between NEM and non-NEM residential customers."¹¹ There is no such "reasonable compromise" standard for just and reasonable rates in North Carolina law for customer generators. Rather, it appears that the Public Staff is willing to accept, largely at face value, the positions of the Companies and the settling parties.

Even though the Public Staff apparently recognizes that the Companies did not conduct a full and impartial investigation of the benefits and costs of customer-sited generation, it nonetheless fails to call for such an investigation in its recommendations to the Commission. The Public Staff would enshrine the substandard analysis upon which the Companies' proposals rest for a period of at least four years,¹² and would only ask the Companies for annual production of statistical reports and annual repetition of the same one-sided cost of service studies used by the Companies in the instant application.¹³

2. The Public Staff Unreasonably Assumes That NEM Customers are Subsidized by Non-NEM Customers and Supports Generation and Usage Assumptions about NEM Customers that are Not Based on Metered Data: The Public Staff compounds the errors inherent in its broad support of the Companies' untested and unverified assertions about benefits

¹⁰ Public Staff Comments at ¶ 42.

¹¹ Public Staff Comments at ¶ 47.

¹² Public Staff Comments at ¶ 63.

¹³ Public Staff Comments at ¶ 64.

and costs by supporting discriminatory rate design principles. Rather than support a careful examination of the costs and benefits of customer-sited generation, as required by law, the Public Staff advocates for the imagination of costs based on lost revenues¹⁴ and the ignoring of even the limited benefits identified in the Companies' marginal cost studies.¹⁵

The Public Staff points out that when class average rates are set, some customers who use less than the class average amount of electricity will inevitably pay more toward fixed costs recovery than those who use the average amount or more.¹⁶ This basic statement of mathematical truth reveals the discriminatory position toward NEM customers that the Public Staff is willing to take in order to support the Companies' proposals. Doubtless within the residential class there are NEM customers paying more than the average bill for the class, and yet the Public Staff does not point out that these NEM customers are therefore possibly subsidizing all class members. While any customer can take action to reduce usage below the class average, the Public Staff is fixated on the alleged but unsupported assumption that when NEM customers reduce their bills below the class average, they are being unjustly subsidized—even without any evaluation of the many benefits that customer-sited generation offers to the grid and all customers.

Public Staff further extends its analysis based on averages to justify the approval of rates that are designed to make NEM customers, and NEM customers only, bear the charges and credit penalties in the proposed rates, to drive their bills closer to the hypothetical class average.¹⁷

Public Staff also engages in an unnecessary and confusing discussion of rate class separation for NEM and non-NEM residential customers to justify assumptions about average class costs upon which its review and

¹⁴ Public Staff Comments at ¶ 45.

¹⁵ Public Staff Comments at ¶ 46.

¹⁶ Public Staff Comments at ¶ 45.

¹⁷ Public Staff Comments at ¶ 43.

recommendations rest. Without analysis, the Public Staff assumes that the consumption patterns and cost of service for NEM and non-NEM customers are not materially different,¹⁸ and on the basis of this assumption erects a straw man argument that fully addressing the costs and benefits of customer-sited generation as well as full fixed cost coverage in rates would require consideration of separate rate classes for NEM and non-NEM customers.¹⁹ The Public Staff asserts that differences in cost causation between NEM and non-NEM customers should only be addressed with more in-depth analysis in a general rate case that would address rates for all residential customers.²⁰ Notwithstanding the requirements in North Carolina law for an investigation of the benefits and costs of customer-sited generation, the Public Staff therefore implies that meeting the obligations of the law would require examination of class rates separately for NEM and non-NEM customers, unnecessarily conflating the issues.²¹

The Public Staff expressly rejects any proposal for an independent, unbiased, and comprehensive evaluation of the benefits and costs of customer-sited generation.²² The Public Staff prefers to rely on the private, self-interested, and incomplete evaluation conducted by the Companies that excludes or limits the evaluation of many kinds of benefits typically assessed in more reliable studies on the value of solar.²³ The Public Staff asserts that the Companies' analyses "capture the bulk" of known and verifiable benefits, a standard that does not appear in the law and should not be applied here.²⁴ Moreover, the Public Staff, which is responsible for representing the public interest inherent in electric rates and services, argues that compensating NEM customers for creating public benefits would not reduce ratepayer bills.

¹⁸ Public Staff Comments at ¶ 46.

¹⁹ Public Staff Comments at ¶ 46.

²⁰ Public Staff Comments at ¶ 46.

²¹ Public Staff Comments at ¶ 46.

²² Public Staff Comments at ¶ 48.

²³ Public Staff Comments at ¶ 48, at table.

²⁴ Public Staff Comments at ¶ 48.

This position is irresponsible and unreasonable, as the added costs of residual pollution (above that limited by law), climate change from greenhouse gas emissions, fuel price volatility, ancillary services, and increased service interruption risk are borne by all customers and reduced by customer-sited generation.²⁵

The Public Staff supports a rate structure that increases the punitive impacts of the proposed NEM rates in correlation with the level of exported energy from customer-sited generation.²⁶ The Public Staff provides no basis for this position against exports from NEM generators, even though there is also a correlation between summertime export rates and increased grid costs. Having exports during the summer provides more benefits for all customers in terms of reduced system costs. The result is that the punitive export impacts of the proposed rates will not only diminish the availability of valuable injections of clean energy into the grid, but will also enhance the Companies' market power as monopolistic providers of the most expensive energy during the year. The Public Staff's position on NEM exports is exactly counter to the public interest.

Public Staff takes inconsistent positions on full and fair evaluation of customer-sited generation. While it supports the private, self-interested, and incomplete evaluation that underlies the Companies' proposals, the Public Staff nonetheless rejects accounting for the Carbon Plan benefits of private investment in clean generation added to the grid by NEM customers, stating that "NEM should be fairly evaluated with all other options . . . if it constitutes a least-cost step toward compliance."²⁷ The Public Staff would create an impossible Catch-22 for NEM customers and the rooftop solar industry in North Carolina, denying the public the benefit of a full evaluation of the benefits and costs of customer-sited generation for purposes of

²⁵ Public Staff Comments at ¶ 48, at table.

²⁶ Public Staff Comments at ¶ 49.

²⁷ Public Staff Comments at ¶ 50.

reviewing the proposed rates from the Companies, but demanding such an investigation as a prerequisite step to evaluating the Carbon Plan benefits in some unspecified future evaluation. At the very least, the Public Staff proposes economic waste; at worst, it proposes discriminatory treatment of customer generators and solar installers. Instead of encouraging clean generation that operates at or near the site of load, and that is paid for, insured, and maintained by private investment, the Public Staff appears more concerned with ensuring that NEM customers always make at least an average level of bill payments to support legacy costs, including the disposal costs for fuel wastes that NEM customer help avoid.²⁸

As discussed further in this Reply Report, the Public Staff takes an unreasonable and unjust discriminatory posture toward customer-sited generation and the proposed NEM rates even in the few places in which it disagrees with the Companies and the settling parties.

3. Public Staff Accepts and Advances a Piece Meal Ratemaking Approach: As discussed in greater detail below, Public Staff recognizes that the Companies and the settling parties have brought an incomplete package of tariff proposals to the Commission. N.C. Gen. Stat. § 62-126.4(c) provides that current NEM customers may keep their existing terms until 2027. There is no statutory deadline for revision of NEM tariffs. In this proceeding, the Companies have not proposed new NEM tariffs for all tariff designs, nor have they implemented customer engagement and information systems to allow customers to understand and adapt to the new proposed rates. The Companies have not made any proposals on incentives that were part of the agreement with settling parties.²⁹ Nor have the Companies addressed customer generators with electric storage systems.³⁰ The incomplete

²⁸ Public Staff Comments at ¶ 50.

²⁹ Public Staff comments at ¶ 65.

³⁰ Public Staff comments at ¶ 60.

proposals from the Companies have not been coordinated with, or assessed in, the context of the Carbon Plan that the Commission must produce by the end of 2022 under HB 951, and which will be updated at least twice before new NEM tariffs must be approved.³¹ The Public Staff recognizes, but does not address, the variability and uncertainty inherent in the fact that many proposed charges in the proposed NEM rates are subject to change on a frequent basis;³² Public Staff offers no recommendations to address the uncertainty that will result for potential NEM customers facing a major investment decision. Public Staff has “concerns” about the proposed calculation of the Net Excess Energy Credit as calculated by the Companies, but rather than take the time to address those concerns in this proceeding, the Public Staff would allow what it believes is a flawed methodology to go into effect for four years, while forcing NEM customers to seek just and reasonable NEM rates for exports in the biennial avoided cost proceeding.³³ In the face of all these gaps, and the uncertainty created for existing and potential customer generators, as well as the industry trying to serve them, the ultimate recommendations by the Public Staff to approve the Companies’ NEM tariff proposals with only modest changes epitomizes the worst of piece meal rate making. The many issues raised in this proceeding are *prima facie* evidence of the need for a comprehensive and integrated solution. The time allowed by the statute is evidence of legislative intent that care be taken in crafting just and reasonable replacements for current net metering tariffs. Public Staff’s conclusions and recommendations, like the Companies’ applications which they support, are inconsistent with policy, justice, and fairness.

³¹ Public Staff Comments at ¶ 50.

³² Public Staff Comments at ¶ 26.

³³ Public Staff Comments at ¶ 53.

4. Application Does Not Address All Tariff Designs: As noted by intervenor NC WARN,³⁴ North Carolina law requires that net metering rates address “all tariff designs.”³⁵ Public Staff correctly observes that the Companies have not proposed net metering tariffs for non-residential NEM customers and that the Companies propose to address NEM rates for these customers at some undefined “later time.”³⁶ Rather than recommending that the Companies use the time available between now and the statutory deadline of January 1, 2027,³⁷ Public Staff only “strongly encourages” the Companies to engage with stakeholders on non-residential NEM rate design.³⁸ This encouragement does not meet the statutory requirement and supports piece meal rate making.

5. The Application Proposes Unreasonably Complex Rates: The Companies’ proposed NEM rates for residential customers are unreasonably complex and therefore unjustly discriminate against residential NEM customers. The Companies fail to propose a tariff-design for flat-rate customers, which violates the statutory requirement for new tariffs that apply to all tariff designs. The complexity and difficulty of the proposed NEM rates was identified in comments from several parties.³⁹ This unreasonable complexity is dramatically summarized in the comments of the Solar Installers in the following table, which identifies the complex rate elements proposed by the Companies and the settling parties:⁴⁰

³⁴ NC WARN Comments at pages 7-9.

³⁵ N.C. Gen. Stat. § 62-126.4(b).

³⁶ Public Staff comments at ¶¶ 36-37.

³⁷ N.C. Gen. Stat. § 62-126.4(c).

³⁸ Public Staff comments at ¶ 37.

³⁹ 350 Triangle, et al. Comments at page 1; Comments of North Carolina Rooftop Solar Installers (“Solar Installers”) (Mar. 29, 2022) at pages 4-7; Petition to Intervene and Initial Comments of the North Carolina Electric Membership Corporation (Mar. 29, 2022) at page 6.

⁴⁰ Solar Installers Comments at page 5.

Current Bill	Proposed Bill
<ul style="list-style-type: none"> • Energy Charge • Basic Facilities Charge • Reprs Rider Per Month 	<ul style="list-style-type: none"> • Energy Charge <ul style="list-style-type: none"> ○ Discount ○ Off Peak ○ On Peak ○ Critical • Basic Facilities Charge • Reprs Rider Per Month • Grid Access Fee For >15Wk Per Kwde • Non-bypassable Charge Per Kw • Minimum Bill Calc • Minimum Bill Charge • Total Bill Before Excess Solar • Excess Solar Adjustment
<p style="text-align: center;">Energy charges on the TOU rates are divided into 4 parts based on when energy is imported or exported from the utility:</p> <ul style="list-style-type: none"> • Discount - 6.09 cents per kWh • Off Peak - 8.04 cents per kWh • On Peak - 19.23 cents per kWh • Critical Peak - 35 cents per kWh 	

Notwithstanding this unreasonable and discriminatory complexity, the Public Staff finds, in a statement that strains credulity and is condescending and dismissive to the more than 400 statements of position filed in response to the proposed NEM rates, that the Companies’ proposals “offer straightforward reform of the structure of the NEM program.”⁴¹

The Public Staff’s only offer in response to the rate design complexity in the proposals noted by other parties in Statements of Position is to support the Companies’ generalized “commitment” to develop an online savings calculator within two years of tariff implementation, and to recommend the development of the calculator prior to tariff implementation.⁴²

Public Staff’s position that essential customer engagement functions can wait for years is unreasonable. Considering the complexity of the proposed rates and the severe adverse impacts that the proposed NEM rates

⁴¹ Public Staff Comments at ¶¶ 38, 39.

⁴² Public Staff Comments at ¶ 51.

would have on the distributed generation market, customers must be provided with a meaningful and affordable path to responding to proposed new rates,⁴³ otherwise, the new rates are just high fixed charges imposed by a rent-seeking monopoly with market power. Public Staff failed to condition its overall recommendation on any such reasonable customer engagement tools and options, including the development of the calculator, and did not address the need that NEM customers would have for real-time data regarding production and consumption to minimize the adverse economic consequences of the proposed NEM rates.

6. Public Staff Supports Economically Regressive and Unjustly Discriminatory Minimum Bill and Non-Bypassable Fixed Charges

Elements: Public Staff supports the proposals by the Companies to impose, on residential NEM customers only, a set of charges that are economically regressive and non-bypassable. Minimum monthly charges impose greater costs on customers that use less electricity. The proposed rates and minimum bill make investment in customer-sited generation less economical to the detriment of all customers.

The purposes for which non-bypassable charges are to be collected (energy efficiency, storm cost recovery, cyber security, and other similar charges⁴⁴) are all costs that can be reduced by the installation and operation of customer-sited generation. There are potential benefits from customer-sited generation that could be identified and quantified through a full and impartial investigation of the benefits and costs of customer-sited generation—benefits that the Public Staff should have demanded be addressed before offering any endorsement of proposed NEM rates.

⁴³ K. Rábago & R. Valova, *Revisiting Bonbright's Principles of Public Utility Rates in a DER World*, The Electricity Journal, Vol. 31, Issue 8, § 3.2 (Oct. 2018), available at: <https://peccpubs.pace.edu/getFileContents.php?resourceid=43bdf87a9063c34>.

⁴⁴ Public Staff Comments at ¶ 28.

Furthermore, earning a credit for producing valuable and beneficial distributed generation is not bypassing; it is offsetting.

The Public Staff did not investigate whether the charges to be imposed on larger NEM customers through the Grid Access Fee were derived from actual and specific cost of service, usage, and production data from those customers, apparently taking on faith the Companies' broad assertion that distributed generation system size correlates reliably and specifically with distribution costs for all larger systems.⁴⁵ Instead, in all these regards, the Public Staff appears to have accepted the outcome of a negotiation in which it did not participate.

7. Public Staff Recommends Unjust and Confiscatory Treatment of Renewable Energy Certificates (RECs): The Companies have proposed that NEM customers be forced to transfer all RECs to the Companies with no compensation, and as a subsidy to the Companies in achieving compliance under N.C. Gen. Stat. §2-133.8. The Companies' position is fundamentally unjust, especially since the Companies propose no compensation for, or recognition of, the value of the environmental attributes from customer-sited generation in their proposed NEM tariffs. Notwithstanding this proposed regulatory taking, the Public Staff sees the forced transfer of RECs as a mechanism for reducing the cross-subsidy it has failed to substantiate. Rather than correct the injustice proposed by the Companies, the Public Staff proposes that all NEM customers be assumed and required to transfer ownership of RECs, even for energy not delivered to the grid, for which the Companies are required to make no payment, at least unless and until the Companies in their apparent discretion establish some unspecified opt-out process.

⁴⁵ Public Staff Comments at ¶ 28.

The Public Staff's position on REC ownership and transfer is tainted and unreasonably biased by its assumptions of cross-subsidy that have yet to be substantiated by a full, independent investigation of the benefits and costs of customer-sited generation. The Public Staff's position that the Companies should hold claim by default to rights in environmental attributes, where neither the Public Staff nor the Companies recognize all the environmental benefits that RECs are designed to embody, is unjust, discriminatory, and confiscatory.

II. QUALIFYING FACILITIES

The Public Staff seeks a determination by the Commission that NEM generation facilities are Qualifying Facilities (QFs) under the federal Public Utility Regulatory Policies Act⁴⁶ for purposes of fuel cost recovery. QF status automatically applies to on-site solar generators up to 1 MW,⁴⁷ so it is not clear that such a designation is necessary.

One possible explanation for the Public Staff's recommendation that the Commission determine that NEM facilities are QFs is in service of the Public Staff's support for a Net Energy Export Credit based on the wholesale avoided cost of energy. This approach reflects an erroneous view that NEM facilities, because they are QFs, are only entitled to so-called "PURPA avoided cost rates" for exported generation. This flawed approach was advanced at the Federal Energy Regulatory Commission (FERC) in the now-dismissed petition of the New England Ratepayers Association (NERA), which

⁴⁶ 16 U.S.C. Ch. 46.

⁴⁷ Facilities with net power production of less than 1 MW are exempt from the QF certification process. *Id.* § 292.203(d).

sought a declaratory judgement that export compensation rates for energy produced “behind the meter” under net metering arrangements must be priced at PURPA-based wholesale rates.⁴⁸

A. Federal Law and Regulations Do Not Limit Retail NEM Compensation Rates to PURPA Avoided Costs

The NERA approach and any assertion that the Net Energy Excess Credit rate must be limited to wholesale avoided cost rates is inconsistent with established law. As the FERC held in its MidAmerican order in 2001, “no sale occurs when an individual homeowner or farmer (or similar entity such as a business) installs generation and accounts for its dealing with the utility through the practices of netting.”⁴⁹ The Commission later relied on MidAmerican in Order No. 2003-A, which addressed whether state or federal interconnection rules would apply to a distributed resource that participated in a net metering program. Order No. 2003-A concluded that “[i]n order for the LGIP and LGIA to apply, the net metering customer at the time it requests interconnection has to both seek interconnection to a facility subject to a Commission-approved OATT and intend to make net sales of energy to a utility.”⁵⁰ In SunEdison, the Commission extended the reach of MidAmerican to distributed resources that sold electricity to end users that participated in a net metering program.⁵¹

⁴⁸ FERC Docket EL20-42-000.

⁴⁹ MidAmerican Energy Company, 94 FERC ¶ 61,340 (2001)

⁵⁰ Order No. 2003-A, 106 FERC ¶ 61,220 at P. 747.

⁵¹ SunEdison LLC, 129 FERC ¶ 61,146.

The FERC relied on this ruling in its landmark energy storage rule, Order No. 841, when it cited SunEdison for the proposition that “injections of electric energy back to the grid do not necessarily trigger the Commission’s jurisdiction.”⁵²

Net energy metering, as recognized by FERC decisions and orders, involves retail service regulated by the state at the distribution level, and in which energy produced by the customer will sometimes flow back to the distribution system, and that when that happens, a method must be developed to credit the customer for the energy. State regulators are uniquely positioned to determine the value of net-metered resources for the distribution system and to design net metering policies, because unlike federal regulators, state regulators have distribution-level data, awareness of state policy, experience with resource planning at the state level, and expertise in retail rates, terms, and services. The Federal Power Act, which grants federal regulatory authority, makes clear that states have jurisdiction over generation, distribution, and all sales other than wholesale sales in interstate commerce—jurisdiction that is at the heart of net metering.⁵³

B. State Authority Regarding Net Metering Rates

FERC precedent reflects these foundational principles, respects cooperative federalism, and avoids the thorny constitutional and

⁵² Order No. 841, 162 FERC ¶ 61,127 at P 30, n.49 (citing Sun Edison LLC, 129 FERC ¶ 61,146).

⁵³ See FPA § 201(b)(1); 16 U.S.C. § 824(b)(1).

jurisdictional issues that would result from a less-deferential approach. State policies relating to net metering are furthering a host of non-wholesale sales objectives at the retail level, including the use of clean energy, job creation, and supporting the distribution system. In some locations on the distribution system, net metering programs can provide significant savings, for example, by reducing or deferring the demand for costly increases in distribution system capacity, and other benefits await investigation as well.

Given this clear statutory and regulatory authority, two key observations become clear. First, any determination that net metered facilities are QFs under PURPA is not determinative of the credit rate for exports from those facilities. Second, North Carolina wisely, reasonably, and appropriately requires a comprehensive and impartial investigation of the benefits and costs of customer-sited generation as a condition precedent to setting net metering rates. To the extent that the Public Staff does not strongly support such an investigation, it is wrong as a matter of both federal and state law and policy.

The fact that QF status automatically applies to on-site solar generators up to 1 MW in capacity does raise additional issues regarding the Companies' proposals and the Public Staff's investigation of the application.

C. Under Federal and State Law Rates Must be Just, Reasonable and Non-Discriminatory

FERC's regulations implementing PURPA require that rates for electricity sales to QFs "shall be just and reasonable and in the public

interest” and “[s]hall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility,”⁵⁴ but they do not, as previously discussed, infringe on state authority to “specif[y] terms of sale at retail.”⁵⁵ Under FERC’s regulations, rates for QFs that differ from the rates otherwise applicable to non-QF customers are considered to be non-discriminatory only when they are “based on accurate data and consistent system-wide costing principles” and only “to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics.”⁵⁶ FERC has held that a violation of “any single prong of these rules” would be sufficient to show a failure to adhere to FERC Order No. 69 and, hence, a failure to adhere to PURPA.⁵⁷

For the rates applicable to a QF to meet the standard of being just, reasonable, and non-discriminatory, they must be based on accurate data and consistent with system-wide costing principles. On costing principles, FERC has explained, “[t]his section [of FERC regulations] contemplates formulation of rates on the basis of traditional ratemaking (i.e., cost-of-service) concepts.”⁵⁸ First among these principles in the setting of retail

⁵⁴ *Id.* § 292.305(a)(1)(ii).

⁵⁵ FERC v. Elec. Power Supply Ass’n, 577 U.S. 260, 280 (2016).

⁵⁶ *Id.* FERC Order No. 69, 45 Fed. Reg. 12,214, 12,228; 18 C.F.R. § 292.305(a)(2); FERC Docket No. EL21-64-000, Joint Statement by Chairman Glick and Commissioner Clements Concurring with the June 1, 2021 Notice of Intent Not to Act re *James H. Bankston, Jr. et al v. Alabama Public Service Commission* under EL21-64 at 1-2 (June 2, 2021) (“Commissioner Joint Statement”).

⁵⁷ Commissioner Joint Statement at 2.

⁵⁸ 45 Fed. Reg. 12,214, 12,228 (Feb. 25, 1980) (“FERC Order No. 69”).

rates is cost-causation—a material, data-based connection between costs created by the customer and the rates aimed at recovering those costs.

A utility may charge a different rate to QFs only if it demonstrates “on the basis of accurate data and consistent system-wide costing principles” that “the rate that would be charged to a comparable customer without its own generation is not appropriate.”⁵⁹ Absent such data, the rate for sales to QFs “shall be the rate that would be charged to the class to which the qualifying facility would be assigned if it did not have its own generation.”⁶⁰

Rather than base charges on NEM facilities on specific costs created by those facilities, the Companies propose, and Public Staff supports, the imposition of charges and the constraining of export credit based on average values derived from embedded cost studies. On the basis of averaged data that is, at best, only indirectly related to cost of serving individual customer-generators, the Companies would impose charges on NEM facility owners. FERC has addressed the incongruity and unfairness in such broad assumptions about the costs to serve QFs. In FERC Order 69 (Rule Making Docket No. 79-55), Final Rule: Small Power Production and Cogeneration Facilities, 45 Fed. Reg. 12,214, 12,229 (Feb. 25, 1980), the FERC stated:

The effect of such diversity [among multiple qualifying facility generators] is that an electric utility supplying back-up power or maintenance power will not have to plan for reserve capacity on the assumption that every facility will use power at the same moment. The Commission believes that probabilistic analyses of the demand of qualifying facilities will show that a utility will probably not need to

⁵⁹ *Id.*

⁶⁰ *Id.*

reserve capacity on a one-to-one basis to meet back-up requirements. Paragraph (c)(1) prohibits utilities from basing rates on the assumption that qualifying facilities will impose demands during simultaneously and at system peak unless supported by factual data.

In this case, the Companies propose, and the Public Staff supports, requiring NEM customers to take service under Time of Use rates, to pay a minimum bill for service that non-generators in the class do not have to pay, to pay a grid access fee (for larger NEM customers) that would impose charges even if the NEM facility did not operate, and to pay non-bypassable charges on the bill even if offset by generation credits.

The entire foundation of the Companies' proposals is a study of how net metering customers reduced their bills through earned credits for offsetting consumption and exporting excess generation. There is no comparison of NEM and non-NEM customers that allows for assessment of whether incremental costs are caused by NEM customers. The minimum bill and grid access charges have the effect of charging customers for services they did not receive and costs they did not create.

The methods of charging are different for NEM and non-NEM customers under the proposed tariffs, resulting in a NEM customer paying more for electricity than a non-NEM customer who imports the same amount of grid-supplied electricity, even if they have similar load or other cost-related characteristics. A NEM customer that significantly reduces consumption will run into and be required to pay a minimum bill, non-bypassable charges based on system capacity, and, for larger customers, a

grid access charge. A non-NEM customer that reduces their usage will simply pay a proportionately lower bill.

The charges proposed by the Companies, and which the Public Staff supports, are unjust, unreasonable, and discriminatory because they were not formulated by the use of cost causation principles and are not based on a true cost of service study comparing the costs to serve NEM and non-NEM customers. Rather, the charges proposed are the product of confidential settlement negotiations by a few parties and are based on a study of selective and incomplete data by the Companies. The charges presented for approval in this case are by definition arbitrary and the product of negotiation, not analysis or adherence to system-wide costing principles.

SUMMARY OF COMMENTS AND RECOMMENDATIONS

After review of the comments of all parties in this proceeding and in particular the report of the Public Staff, I maintain the overall opinion that the Application fails to meet the requirements of industry best practices and the North Carolina statutory framework in several regards. I find that the Public Staff's investigation and recommendations fail to provide all customers, including current and potential NEM customers, with effective representation on the issues presented in this matter.⁶¹

⁶¹ N.C. Gen. Stat. § 62-15: "... (d) It shall be the duty and responsibility of the Public Staff to: (1) Review, investigate, and make appropriate recommendations to the Commission with respect to the reasonableness of rates charged or proposed to be charged by any public utility and with respect to the consistency of such rates with the public policy of assuring an energy supply adequate to protect the public health and safety and to promote the general welfare; . . ."

In my opinion, the Public Staff errs in recommending approval of the proposed NEM tariffs, given the lack of a comprehensive underlying investigation of the benefits and costs of customer-sited generation⁶² and the piece meal nature of the Application's proposed rates. The proposed rates for NEM customers are unjust, unreasonable, and discriminatory and therefore do not merit support from the Public Staff.

I suggest the Commission reject the Public Staff's recommendations for approval of the proposed NEM tariffs as not in the public interest. I maintain and reiterate my recommendation of March 29, 2022 submitted on behalf of EWG, that the Commission direct the Companies to fully investigate the costs and benefits of customer-sited generation in accordance with the law and under a comprehensive Benefit-Cost Analysis framework.

QF status does not dictate that rates for exported energy be limited to wholesale avoided cost rates, also known as PURPA rates. Additionally, the NEM rates proposed by the Companies and supported by the Public Staff are unjust, unreasonable, and discriminatory under federal law and regulations. For this additional reason, the Commission should deny the Application.

This 11th day of May, 2022.



Karl R. Rábago

⁶² N.C. Gen. Stat. § 62-126.4(b).