

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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Petition for Declaratory Order of) Docket No. EL20-42
New England Ratepayers Association)
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Comments of Greg Dotson, Assistant Professor of Law, Energy Law and Policy Project, Environmental and Natural Resources Law Center, University of Oregon School of Law, in Opposition to the April 14, 2020, Petition for Declaratory Order by New England Ratepayers Association, Docket No. EL20-42-000

I respectfully file these comments on my own behalf in opposition to the April 14, 2020, Petition for Declaratory Order by the New England Ratepayers Association (NERA). NERA misconstrues a provision of the Energy Policy Act of 2005 (EPA 05) in order to support an argument that, if accepted, would upend state net metering laws and policy and be highly disruptive to the adoption of distributed solar generation in the United States.

The net metering provision of EPA 05 is unambiguous in delegating net metering responsibility to the states and contains no provisions suggesting that FERC would retain a role in determining how to credit consumers for excess electricity generation. Nonetheless, NERA's argument would require finding enough ambiguity in the provision to allow for a more creative interpretation. If such ambiguity were found, careful consideration of legislative intent would be required.

These comments explain the net metering provision of the EPA 05 and the history of its development, providing insight into Congress' intent in enacting this legislative provision. As the recounting of this history makes clear, Congress initially considered legislation to constrain state authority over net metering and to specify details of how net metering should be implemented at the federal level. Ultimately Congress rejected that

approach. Instead, Congress chose to provide states with the greatest latitude possible to consider, adopt and reject net metering policies as each state saw to be appropriate.

During congressional consideration of this provision, I worked as counsel to a senior member of Congress who sat on the committee of jurisdiction in the U.S. House of Representatives. I am currently a law professor at the University of Oregon School of Law and Faculty Leader of the Energy Law and Policy Project. These comments provide to the best of my knowledge an accurate history of the provision in question.

I. Introduction and Summary

The NERA Petition, if granted, promises to disrupt state efforts to develop, implement, and adjust carefully crafted, well-considered net metering policies. To support its position, NERA relies upon a whimsical interpretation of the federal net metering provision included in the Energy Policy Act of 2005, claiming that the provision was intended by Congress to limit state discretion in the kinds of net metering programs the states could lawfully adopt. These comments explain that this interpretation is contrary to both the text of EPAct 05 and the legislative history of that provision. As explained in detail below, the legislative history of EPAct 05 and its precursor bills demonstrate that:

- From 1997 through 2001, Congress developed and considered federally preemptive legislation to mandate that net metering be offered by electric utilities. These legislative proposals would have dictated such details as the size and type of systems that would be eligible for participation in net metering programs and how excess customer generation could or could not be credited. Such legislation was never approved by either chamber of Congress – let alone enacted into law.
- In 2001, Congress considered legislation that would have established a set of minimum net metering standards for states to implement. Under this cooperative federalism approach, if a state failed to implement the minimum federal standards, then the proposed legislation would have required FERC to implement

the standards within that state. This approach was opposed by influential stakeholders, including utility trade associations. Congress acquiesced to these concerns and the proposed legislation was never passed by either chamber of Congress.

- Congress ultimately decided to abandon its attempts to prescribe the details of net metering policy and impose those details upon the states. Instead, Congress decided to merely require States and nonregulated electric utilities to determine whether or not to adopt a net metering policy pursuant to state law and authorities. This alternative approach earned the support of stakeholders that had previously opposed net metering legislation.
- Nothing in the legislative history supports NERA's suggested interpretation that EAct 05 is intended to act as a constraint on the type of net metering program that states can consider and adopt.
- To the contrary, the record shows that when Congress was considering a federal net metering policy, it was understood that more than 30 states had already adopted net metering, that these policies had been adopted pursuant to state law, that they were compensating consumers at the level of retail rates, and that it was desirable to promote these policies.
- Congress rejected any notion of creating FERC jurisdiction over net metering policies, understood the implications of leaving compensation decisions to the states, and further understood that the states would retain such jurisdiction with passage of the new law. State policies to credit customer generators at the retail rate that were in effect at the time of enactment of EAct 05 would continue unhindered, and states remained free after enactment to establish new net metering policies to credit customer generators at the retail rate.

II. Net metering and the NERA Petition

Net metering is an important policy to provide for the expansion of renewable energy by providing for electricity customers with distributed generation to be compensated when

they deliver electricity to the grid. As of April 2019, 45 states had acted to require utilities to offer net metering or similar policies to customers. In some states where net metering is not required, some utilities nevertheless voluntarily offer net metering service to customers. Nearly 2 million customers participated in net metering programs in the United States in 2018.¹

Under current policies, the growth of distributed solar generation will continue. According to the Energy Information Administration, generation from renewable sources will more than double over the next 30 years and distributed solar generation will make up more than ten percent of renewable generation.² The adoption of distributed solar generation could far outpace these projections as EIA has historically underestimated the rate of adoption of solar energy.

NERA's Petition would upend these successful state policies and potentially disrupt deployment of solar distributed generation. NERA asks the Commission to declare that it has "jurisdiction over energy sales from rooftop solar facilities and other distributed generation located on the customer side of the retail meter (i) whenever the output of such generators exceeds the customer's demand or (ii) where the energy from such generators is designed to bypass the customer's load and therefore is not used to serve demand behind the customer's meter."³ NERA goes on to argue that once FERC has declared jurisdiction over these transactions, customers should be compensated at a much lower avoided cost of energy or at a just and reasonable wholesale rate.⁴

¹ Congressional Research Service, *Net Metering: In Brief*, at 2, Nov. 2019, <https://crsreports.congress.gov/product/pdf/R/R46010>.

² U.S. Energy Information Administration, *Annual Energy Outlook 2020, Electricity*, at 4, 20, <https://www.eia.gov/outlooks/aeo/pdf/AEO2020%20Electricity.pdf>.

³ Petition for Declaratory Order of New England Ratepayers Association Concerning Unlawful Pricing of Certain Wholesale Sales, at 6, Docket No. EL20-42-000, April 14, 2020 (hereinafter "NERA Petition").

⁴ *Id.*

III. Section 1251 of the Energy Policy Act of 2005 Directed States to Decide Whether or Not to Adopt Net Metering Policies of Their Own Design.

In support of its argument, NERA turns to the net metering provision enacted by Congress as Section 1251 of the Energy Policy Act of 2005.⁵ A brief discussion of this provision is appropriate. Section 1251 amends Section 111(d) of the Public Utilities Regulatory Policies Act (PURPA) to require that State public utility commissions and nonregulated utilities, such as municipally-owned utilities, consider whether or not to adopt a net metering policy (referred to as a “standard” in Section 111).⁶ Specifically, Section 111 of PURPA states:

Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall consider each standard established by subsection (d) and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this chapter. For purposes of such consideration and determination in accordance with subsections (b) and (c), and for purposes of any review of such consideration and determination in any court in accordance with section 2633 of this title, the purposes of this chapter supplement otherwise applicable State law. Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.⁷

Section 111 makes it clear that while consideration of a standard has to be on the record,⁸ states and nonregulated utilities are free not to implement the standard as long as they explain their decision.⁹ Further, the statute explicitly states that the standards can be

⁵ Section 1251, Energy Policy Act of 2005.

⁶ Section 111 of PURPA; 16 U.S. Code § 2621.

⁷ Section 111(a) of PURPA; 16 U.S. Code § 2621(a).

⁸ Section 111(b) of PURPA; 16 U.S. Code § 2621(b).

⁹ Section 111(c)(2) of PURPA; 16 U.S. Code § 2621(c)(2).

implemented only “to the extent consistent” with state law.¹⁰ In short, Congress expressly intended for Section 111 to merely direct that states and nonregulated utilities decide, pursuant to their own authorities and discretion, whether or not to implement a net metering standard by August 8, 2008.¹¹ Moreover, a state would not need to consider the standard pursuant to Section 111, if the state had already adopted a net metering policy or already considered doing so.¹² Congress made clear that states would not have to consider adopting a net metering program pursuant to Section 1251 as long as the state had considered a “comparable” policy in the past. The capacious definition of “comparable” makes it clear that far from constraining states, Congress sought to provide the maximum leeway possible.

Section 1251 of the Energy Policy Act has had some success. In 2001, more than 30 states had adopted net metering policies.¹³ After enactment of Section 1251, ten additional states adopted statewide net metering policies.¹⁴ These policies vary in their details as PURPA Section 111 contemplates.

IV. NERA Misconstrues the Purpose and Effect of Section 1251 of the Energy Policy Act of 2005

NERA turns the intent and effect of Section 1251 on its head, arguing that the provision was intended by Congress to limit the scope of the types of net metering programs that states could permissibly consider. Moreover, NERA ignores the obvious conclusion that congressional enactment of Section 1251 demonstrates that Congress understood that net metering was a policy subject to state jurisdiction. Had Congress believed that the

¹⁰ Section 111(c)(1) of PURPA; 16 U.S. Code § 2621(c)(1).

¹¹ Section 112(b)(3) of PURPA; 16 U.S. Code § 2622(b)(3).

¹² Section 112(d) of PURPA; 16 U.S. Code § 2622(d).

¹³ See Testimony of Robert D. Priest on behalf of the American Public Power Association before the House Energy and Commerce Committee, Hearing entitled “National Electricity Policy: Barriers to Competitive Generation” at 42, July 2001.

¹⁴ Greg Dotson and Ben Bovarnick, A Forward-Looking Agenda for the Nation’s Public Utility Commissions, Center for American Progress at 12, <https://cdn.americanprogress.org/wp-content/uploads/2015/05/PURPA-report-final.pdf>, May 2015.

handling of excess generation from distributed generation behind the customers' meters were wholesale sales, or otherwise FERC jurisdictional, the enactment of Section 1251 would make no sense. However, let us examine NERA's argument in detail.

The NERA Petition states "Section 1251 of EPAAct 2005 (PURPA Section 111(d)) allows States to consider net metering only for the energy component of electric service."¹⁵ The petition explains that under many state net metering policies "the customer is given an offset equal to the full retail electric rate, which includes not only energy but also transmission, distribution, ancillary services and other state-imposed costs."¹⁶ In contrast, NERA argues, because Congress used the term "electric energy" in Section 1251, "Congress appears to be saying that the supplier should receive an offset equal to the avoided cost of energy consistent with the other relevant provisions of PURPA."¹⁷ NERA goes on to argue that the amendment "infers that the offset is equal to the avoided cost of energy."¹⁸

NERA offers no statutory support or evidence of congressional intent to buttress its inferred meaning of "electric energy." Additionally, for NERA's argument to prevail, its unsupported inference must overcome the express language of the statute described in Section II of these comments above.

In essence, NERA's argument is that the Energy Policy Act of 2005 required states to consider adopting net metering policies, but only allowed states to consider a very narrow type of net metering. Congress created these limitations on state authority only indirectly or by inference. In advancing this argument, NERA makes two serious errors. First, NERA undercuts the primary point of its petition that net metering policies result in wholesale sales that are subject to FERC jurisdiction. By acknowledging that Congress directed the states to consider establishing net metering policies, NERA acknowledges Congress' understanding and intent that these programs remain as a matter of state

¹⁵ NERA Petition at 35 (emphasis added).

¹⁶ *Id.* at 36.

¹⁷ *Id.*

¹⁸ *Id.* at 37.

jurisdiction. Second, NERA misinterprets the Energy Policy Act of 2005. As explained in the remainder of these comments below, the legislative history of the Energy Policy Act of 2005 demonstrates that after years of robust consideration of various approaches to address net metering that would have dictated policy choices and limited state discretion, Congress decided to take an approach which left the most discretion possible to the states in this area.

V. Congress Considered Multiple Proposals to Require Utilities to Provide Net Metering Service Between 1997 to 2000.

In the late 1990's Congress developed multiple legislative proposals to promote the widespread availability of net metering. While these proposals took various forms and contained various details, each proposal would have differed significantly from the approach Congress ultimately took in Section 1251 of EPAct 05. The legislative proposals from 1997 to 2000 would have used federal law to mandate that retail electricity suppliers provide net metering service and to prescribe specific policy details. This section describes these proposals.

A. During the 105th Congress (1997-1998), Proposals were offered for Federally Preemptive Net Metering Programs with Specific Rate Elements.

The first federal legislation addressing net metering policy appears to have been introduced in 1997, the first session of the 105th Congress. Three bills were introduced to fundamentally alter the nation's historic approach to electricity regulation by introducing competition at the retail level.¹⁹ Net metering was just one small part of these proposals. One proposal, if enacted, would have made net metering a condition for participation in a competitive electric retail marketplace.²⁰ The two other proposals would have required all

¹⁹ H.R. 1960, 105th Cong. (1998); S. 2287, 105th Cong. (1998); H.R. 4798, 105th Cong. (1997).

²⁰ Sec. 102, H.R. 1960, 105th Cong. (1998) (establishing a new Sec. 152 in PURPA).

retail electric suppliers to make net metering available to customers upon request.²¹ By having the federal mandate fall upon the retail electric supplier, these proposals would have preempted certain state laws.

Each of these three proposals specified a different net metering policy for how to handle excess customer-generated electricity. One proposal specified that the rates paid for excess consumer-generated electricity would have to be “identical in all respects to the standard retail rates applicable to retail sales of electric energy to retail electric customers in the same area served by such persons.”²² The second proposal required that customer generated electricity “offset electricity provided by the retail electric supplier to the electric consumer during the applicable billing period so that an electric consumer is billed only for the net electricity consumed during the billing period, but in no event shall the net be less than zero during the applicable billing period.”²³ The third proposal was very similar to the second proposal except that it specified that “[i]f the net electricity consumed is less than zero, then the consumer shall be paid during the next billing period the average spot market price for the electricity generated.”²⁴

The 105th Congress adjourned without approving any of these bills.

B. During the 106th Congress (1999-2000), More Federally Preemptive Proposals were Introduced.

Like those from the 105th Congress, the proposals introduced in the subsequent Congress would have established federal mandates for net metering programs, preempting certain state laws on the matter. In total, nine bills were introduced that included provisions to establish national net metering availability.²⁵ While most net metering proposals in the

²¹ Sec. 303, S. 2287, 105th Cong. (1998) (establishing a new Sec. 612 in PURPA); Sec. 116, H.R. 4798, 105th Cong. (1998) (establishing a new Sec. 605 in PURPA).

²² Sec. 102, H.R. 1960, 105th Cong. (1998) (establishing a new Sec. 152 in PURPA).

²³ Sec. 303, S. 2287, 105th Cong. (1998) (establishing a new Sec. 612 in PURPA).

²⁴ Sec. 116, H.R. 4798, 105th Cong. (1998) (establishing a new Sec. 605 in PURPA).

²⁵ S.1047, 106th Cong. (1999); H.R.1828, 106th Cong. (1999); H.R.2050, 106th Cong. (1999); S.1369, 106th Cong. (1999); H.R.2569, 106th Congress (1999); H.R.2645, 106th Cong. (1999);

106th Congress were small parts of comprehensive electricity bills, a freestanding bill to address net metering was also introduced for the first time.²⁶ Five of the proposals were comprehensive electricity proposals similar in scope to those introduced in the previous Congress.²⁷ Two of the proposals primarily addressed emissions reductions requirements from powerplants.²⁸ One of the proposals addressed both electricity regulation and emissions reduction.²⁹

All of the proposals would have required retail electric suppliers to provide net metering service to customers and would therefore preempt certain state laws and remove state discretion about whether or not to promote net metering within their state. These proposals differed in detail, however. For instance, one question the proposals addressed was how large the generating capacity of a system could be and still be eligible for net metering. The proposals answered that question differently. Four of the bills provided that net metering did not have to be offered for systems with generating capacity that exceeded 20 kilowatts.³⁰ Four bills set the limit at 100 kilowatts.³¹ One proposal required net metering to be offered for systems up to two megawatts in size.³²

Another policy question the bills answered was what kind of electricity generation was eligible for net metering. One proposal specified that net metering only had to be offered for systems operating on an undefined “renewable energy source.”³³ Others specified that net metering only had to be offered for electricity generated by solar, wind, geothermal

H.R.2944, 106th Cong. (1999); H.R. 2947, 106th Cong. (1999); H.R. 4861, 106th Cong. (2000). S.1047, 106th Cong. (1999) and H.R.1828, 106th Cong. (1999) were introduced at the request of the Clinton Administration and are therefore recognized as the Administration’s proposal.

²⁶ H.R. 2947, 106th Cong. (1999).

²⁷ S.1047, 106th Cong. (1999); H.R.1828, 106th Cong. (1999); H.R.2050, 106th Cong. (1999); H.R.2645, 106th Cong. (1999); H.R.2944, 106th Cong. (1999).

²⁸ S.1369, 106th Cong. (1999); H.R. 4861, 106th Cong. (2000).

²⁹ H.R.2569, 106th Congress (1999).

³⁰ S.1047, 106th Cong. (1999); H.R. 1828, 106th Cong. (1999); H.R. 2050, 106th Cong. (1999); H.R.2944, 106th Cong. (1999).

³¹ H.R.2569, 106th Congress (1999); S.1369, 106th Cong. (1999); H.R. 2947, 106th Cong. (1999); H.R. 4861, 106th Cong. (2000).

³² H.R.2645, 106th Cong. (1999).

³³ S.1369, 106th Cong. (1999).

and biomass generating systems.³⁴ Yet another proposal included “landfill gas” as a source of electricity that could be net metered.³⁵ The last proposal added fuel cells, presumably fueled by natural gas, to the categories of generation for which net metering should be offered.³⁶

The proposals also specified how excess customer-generated electricity would be dealt with. While all of the proposals provided that consumers could use the electricity they generate to offset the electricity they purchase, five bills stated that “in no event” could the consumers’ billing be less than zero in a billing period.³⁷ If enacted, this would result in consumers receiving no compensation or credits for electricity they generated in excess of what they consumed during a billing cycle. Two bills modified this approach by allowing credits to be carried over between billing periods but prohibiting credits from being carried over to the next calendar year.³⁸

The last two bills had more complicated answers to the question of what to do with excess generation. One proposal sought to ensure that consumers would be compensated for excess generation at a rate equivalent to retail rates by explicitly stating that the consumer “shall not be charged for transmission losses” and that “the credit shall be based on the retail rates for sale by the retail electric supplier at the time of such generation.”³⁹ The other bill specified that when a consumer generated more electricity than they used, “the consumer shall be paid during the next billing period the average spot market price for the electricity generated.”⁴⁰

The 106th Congress adjourned without approving any of these bills.

³⁴ S.1047, 106th Cong. (1999); H.R.1828, 106th Cong. (1999); H.R.2050, 106th Cong. (1999); H.R.2944, 106th Cong. (1999); H.R. 2947, 106th Cong. (1999); H.R. 4861, 106th Cong. (2000).

³⁵ H.R.2645, 106th Cong. (1999).

³⁶ H.R.2569, 106th Congress (1999).

³⁷ S.1047, 106th Cong. (1999); H.R.1828, 106th Cong. (1999); H.R.2050, 106th Cong. (1999); H.R.2944, 106th Cong. (1999); H.R. 4861, 106th Cong. (2000).

³⁸ H.R.2569, 106th Congress (1999); S.1369, 106th Cong. (1999).

³⁹ H.R. 2947, 106th Cong. (1999).

⁴⁰ H.R.2645, 106th Cong. (1999).

VI. Congress Abandoned a Federally Preemptive Approach in Favor of Requiring States to Consider Whether to Adopt a Net Metering Policy Pursuant to State Authorities in 2001 and 2002.

In the subsequent Congress, lawmakers began to act on energy legislation in a more serious and committed fashion. A new President had called for a national energy policy and Congress took up the mantle. Other energy issues, such as oil production and automobile fuel economy standards, dominated popular attention but net metering received ample congressional focus in legislation, hearings and markups. The new Administration supported legislative efforts to promote net metering.⁴¹ There was bipartisan support for advancing the policy. This section discusses the significant congressional activity on net metering that occurred in the 107th Congress from 2001 to 2002.

Eleven bills were introduced that proposed to adopt a federal net metering policy.⁴² Nine of these bills proposed the approach from the previous Congresses – a direct federal mandate upon electric utilities to offer net metering service upon request by a consumer.⁴³ Two of the bills proposed a cooperative federalism approach.⁴⁴ Under this approach, Congress would establish a minimum set of standards for a net metering policy. States would be given the opportunity to establish such a program with express discretion to go beyond the federal minimum standards. If a state failed to establish such a program, then the Federal Energy Regulatory Commission would have been required to

⁴¹ See National Energy Policy Development Group, National Energy Policy at 6-9 to 6-10, May 2001 (describing the advantages of distributed generation, the obstacles to distributed generation, and the need for net metering); S. Hrg. 107-144 (Pt.1) Testimony of Francis S. Blake, Deputy Secretary, Department of Energy, Before the Senate Energy and Natural Resources Committee, Hearing “National Energy Issues” at 91, July 12, 2001.

⁴² H.R. 954, 107th Cong. (2001); H.R. 3406, 107th Cong. (2001); S. 597, 107th Cong. (2001); H.R. 3089, 107th Cong. (2001); H.R. 2184, 107th Cong. (2001); H.R. 2412, 107th Cong. (2001); H.R. 2478, 107th Cong. (2001); S. 1333, 107th Cong. (2001); S. 1403, 107th Cong. (2001); H.R. 3037, 107th Cong. (2001); S. 1766, 107th Cong. (2001).

⁴³ H.R. 954, 107th Cong. (2001); S. 597, 107th Cong. (2001); H.R. 2184, 107th Cong. (2001); H.R. 2412, 107th Cong. (2001); H.R. 2478, 107th Cong. (2001); S. 1333, 107th Cong. (2001); S. 1403, 107th Cong. (2001); H.R. 3037, 107th Cong. (2001); S. 1766, 107th Cong. (2001).

⁴⁴ H.R. 3089, 107th Cong. (2001); H.R. 3406, 107th Cong. (2001).

establish the program itself. These eleven bills attempted to specify details of net metering programs in every state – eligible size of facilities, eligible energy source types, and most relevant to the NERA petition, how to treat excess electricity generation from net metered systems.

Congressional consideration of the electricity portion of a comprehensive energy bill was roiled by two major developments: the California energy crisis of 2000 and 2001⁴⁵ and the collapse of Enron, a major proponent of restructuring regulation of the electricity sector.⁴⁶ For example, the House spent the first half of 2001 attempting to pass electricity legislation to respond to the California energy crisis, but ultimately failed to garner sufficient support to even report a bill from Committee.⁴⁷ Accordingly, the House passed an energy bill in August 2001 without including a net metering provision nor a broader electricity title.⁴⁸

As described in more detail below, a federally prescriptive and preemptive approach to net metering was never approved by either chamber of Congress. Instead, in the second session of the 107th Congress, the Senate ended up abandoning a federally prescriptive approach to net metering and instead approved legislation containing a precursor to Sec. 1251 of EAct 05. This approach sought to require states to merely consider whether or not to adopt net metering requirements pursuant to state law.⁴⁹

Although both the U.S. House of Representatives and the U.S. Senate passed comprehensive energy legislation in the 107th Congress, they were unable to resolve their difference in the House-Senate conference committee. Comprehensive energy legislation was not enacted in 2001 or 2002.

⁴⁵ See The California Crisis, Frontline, Public Broadcasting Service, 2001, <https://www.pbs.org/wgbh/pages/frontline/shows/blackout/california/timeline.html>.

⁴⁶ See Richard A. Oppel Jr. and Andrew Ross Sorkin, Enron's Collapse: The Overview; Enron Collapses as Suitor Cancels Plans for Merger, *New York Times*, Nov. 29, 2001, <https://www.nytimes.com/2001/11/29/business/enron-s-collapse-the-overview-enron-collapses-as-suitor-cancels-plans-for-merger.html>.

⁴⁷ H.R. 1647, 107th Cong. (2001).

⁴⁸ H.R. 4, 107th Cong. (2001)(as passed by the U.S. House of Representatives on Aug. 8, 2001).

⁴⁹ H.R. 4, 107th Cong. (2001)(as passed by the U.S. Senate on Apr. 25, 2002).

A. In the U.S. House of Representatives, a Cooperative Federalism Approach to Net Metering was Attempted but Failed.

After the House had passed its energy bill in July 2001 without an electricity title, the Chairman of the Energy and Air Quality Subcommittee, Rep. Joe Barton of Texas, continued to work on electricity legislation. Rep. Barton had stated early in the Congress that he considered net metering to be a “no brainer”.⁵⁰ And in December 2001, Chairman Barton introduced a lengthy electricity bill that included a provision on net metering.⁵¹ The net metering provision, if enacted, would have amended PURPA to require a state to consider establishing a net metering program. If the state did not establish a program that met the minimum federal requirements, then FERC would have been required to establish the net metering program through federal regulation. The bill provided numerous details about how net metering should work, including being available for systems up to 250kw in size that operate on renewable energy or natural gas fuel cells. The bill specified that rates and charges, including net metering credits, would be determined by the states (or by the utilities themselves in the case of nonregulated utilities). However, if the duty of setting such rates and charges was not carried out, then the proposal would have required FERC to do so.⁵²

The Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce held two days of hearings to collect views of members and stakeholders on the bill. In their opening statements, Members of the Subcommittee expressed a range of reactions, but no member at the hearing endorsed the provision as it was introduced. Rep. Greg Ganske of Iowa commended the chairman for including the provision on net metering and stated his intent to work with the Chair on a clarifying amendment.⁵³ Rep.

⁵⁰ Statement of Rep. Joe Barton, Hearing “National Electricity Policy: Barriers to Competitive Generation” at 3, July 2001.

⁵¹ Sec. 102, H.R. 3406, 107th Cong. (2001).

⁵² Sec. 102(b), H.R. 3406, 107th Cong. (2001) (establishing new Section 215(c)(3) of the Federal Power Act).

⁵³ *The Electric Supply and Transmission Act of 2001: Hearings Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 107th Cong. 9 (2001).

Greg Walden of Oregon found the provision’s potential to interfere with states’ existing programs “troubling.”⁵⁴ Rep. Heather Wilson of New Mexico emphasized the regional nature of electricity markets and urged the Committee to “rethink the preemptive powers H.R. 3406 would grant FERC.”⁵⁵ Rep. Barton acknowledged that there was not full agreement yet in how that provision should be implemented.⁵⁶

The Bush Administration expressed support for the net metering provision,⁵⁷ but the testimony from other federal officials was more mixed. FERC Commissioner Linda Breathitt supported the concept of encouraging distributed generation as it “can increase options for consumers and would provide added reliability to the grid,”⁵⁸ but cautioned that the Committee should “expect states to insist on a process that allows their opinions and concerns to be heard since this section shifts jurisdiction to the federal level.”⁵⁹ Commissioner Nora Mead Brownell supported establishing federal minimum standards of net metering as “an essential step in the development of viable markets for new technologies, such as distributed generation.”⁶⁰ The Chairman of the Tennessee Valley Authority stated general support for net metering without expressly endorsing the net metering provision in the legislation.⁶¹

Other stakeholders were clearly opposed to the bill’s net metering provision because of its federally preemptive approach. Arkansas Public Service Commission Chair Sandra Hochstetter testified on behalf of the National Association of Regulatory Utility Commissioners (NARUC) that NARUC was “troubled by the great extent to which the bill intrudes into areas now regulated by the States.”⁶² Hochstetter stated that NARUC “must express concern and oppose the federally preemptive” net metering provisions. She

⁵⁴ *Id.* at 195.

⁵⁵ *Id.* at 18.

⁵⁶ *Id.* at 75.

⁵⁷ *Id.* at 69-70.

⁵⁸ *Id.* at 33.

⁵⁹ *Id.*

⁶⁰ *Id.* at 38.

⁶¹ *Id.* at 75.

⁶² *Id.* at 107.

emphasized that net metering is “a retail issue subject to State jurisdiction.”⁶³ Hochstetter testified that “the bill should be amended to promote State implementation of net metering programs of the States’ own choosing, in the States’ own time, rather than being forced to implement minimum standards of FERC’s choosing.”⁶⁴

Investor owned utilities also opposed federalizing net metering policy. David Sokol, chairman and CEO MidAmerican Energy Holdings Company, testified that the provision “should not overturn existing state net metering policies,”⁶⁵ and that addressing the details of issues associated with net metering is “best left to the states.”⁶⁶ Although the investor owned utility trade association, the Edison Electric Institute, did not testify about net metering, press accounts from this time period document its opposition. For instance, in one press account, a representative of the Edison Electric Institute is quoted as saying EEI “opposes legislation setting up a national net metering policy because it feels utilities should not be mandated to buy power from local [distributed generation] sources.”⁶⁷

Alan Richardson, President and CEO of the American Public Power Association, testified that many states already had a net metering plan in progress and that “net metering is essentially a ‘retail’ program and should be left to states and localities.”⁶⁸ Richardson said, “Approximately half of the states already have some type of net metering program in the works. If net metering is to be included in a federal bill it should, at the minimum, grandfather existing state programs.”⁶⁹

Finally, Glenn English, Chief Executive Officer of the National Rural Electric Cooperative Association (NRECA), testified in opposition to the net metering language. He stated that the provision “Federalizes net metering” and would “preempt[] the net metering provisions that have already taken place in 34 States, as well as the deliberate

⁶³ *Id.* at 108.

⁶⁴ *Id.*

⁶⁵ *Id.* at 131.

⁶⁶ *Id.*

⁶⁷ Damon Franz, National net metering policy could soon be law, *Greenwire*, Apr. 8, 2002.

⁶⁸ *Hearing on The Electric Supply and Transmission Act of 2001*, *supra* note 53 at 142.

⁶⁹ *Id.*

decisions by many of these States that net metering has not been official to their communities.”⁷⁰ He went on to explain why NRECA opposed the federally preemptive approach:

First, electric cooperatives own 44% of the nation's distribution system. Much of these distribution systems are located in rural areas where the population density is low, averaging less than 6 consumers per mile. As a result, the revenue generated in these areas is extremely low, averaging approximately \$7,000 per mile. Net metering and distributed generation interconnection programs, for instance, if formulated and implemented without a strong sensitivity and appreciation for local conditions would lead to increased electricity costs for consumers in rural areas that could least afford to pay them.

Second, electric cooperatives have obtained \$36.4 billion in RUS [U.S. Department of Agriculture’s Rural Utilities Service] financing. As a result of this financing, RUS must approve the rates and practices of distribution cooperatives and cooperatives that own generation and transmission. Negawatt and net metering programs and distributed generation interconnection standards have a direct impact on these rates and practices; however, they are being federalized without any role for RUS. This will create significant problems for cooperatives, including increased costs and the risk of conflicting regulatory obligations.

Third, these issues have traditionally been the responsibility of states and local regulatory bodies for a very good reason: moving these issues to the federal level makes it more difficult, or in some cases impossible, for states and local regulators to protect the public interest. Policy decisions with respect to retail electric and distribution services can have a tremendous impact on local standards of living and economies. It is important, therefore, for state and local regulators to be able carefully to balance local interests and to craft tightly focused regulations of retail electric and distribution services that meet local needs. Moving responsibility over these issues away from the local community to the federal level makes it less likely that regulatory decisions will reflect local needs or protect local interests. Moving responsibility over these issues away from the local community to the federal level also makes it harder for utilities to provide reliable, universal electric service at a reasonable cost.

Moreover, NRECA does not believe that FERC has the experience or the resources to regulate effectively matters relating to retail electric or distribution services. Over more than 65 years, FERC and its predecessor, the Federal Power Commission (FPC), regulated wholesale sales and transmission service. FERC has never established technical standards for the interconnection of generation at the transmission levels, and it has never had any experience whatsoever regulating

⁷⁰ *Id.* at 145.

retail services or distribution systems. FERC does not employ today a single distribution engineer. Further, FERC is experiencing difficulty meeting its existing responsibilities today with its limited resources. Multiplying FERC's responsibilities by giving it new jurisdiction over retail and distribution services would spread FERC's limited resources even more thinly to the detriment of both wholesale and retail consumers.⁷¹

After these influential stakeholders testified in opposition to the legislation, the bill failed to advance in the legislative process in the House. A Subcommittee markup was held,⁷² but the markup was suspended without voting on the legislation.⁷³ This indicates that the proposal lacked sufficient support among members to be favorably reported by the Subcommittee. As discussed below, Rep. Barton attempted to incorporate the bill into the comprehensive energy legislation when the House met in conference with the Senate.

B. In the U.S. Senate, a Federally Preemptive Approach was Attempted but Abandoned in Favor of Requiring States to Consider Whether or Not to Adopt Net Metering.

In the Senate, the energy legislation that formed the basis for the Senate's floor consideration initially included a requirement that all electric utilities offer net metering.⁷⁴ Importantly, the bill reflected concerns of smaller and rural electric utilities by excluding from the net metering program any electric utility that sold less than 1 billion kilowatt hours of electricity in the previous year.⁷⁵ This would have exempted many electric utilities from being included in the proposed mandatory federal net metering program.

⁷¹ *Id.* at 146-47.

⁷² Congressional Record, Daily Digest at D1269, Dec. 18, 2001, <https://www.congress.gov/crec/2001/12/18/CREC-2001-12-18-pt2-PgD1267.pdf> (stating that a Subcommittee markup was scheduled to occur on Dec. 18, 2001); U.S. House of Representatives, Legislative Calendar, 107th Cong., House Committee on Energy and Commerce, Markups Held, Subcommittee on Energy and Air Quality at 353 (Stating that a Subcommittee markup had occurred on Dec. 18, 2001).

⁷³ H.R.3406 - Electric Supply and Transmission Act, All Actions, 107th Congress (2001-2002), <https://www.congress.gov/bill/107th-congress/house-bill/3406/all-actions?KWICView=false>.

⁷⁴ S. 1766, 107th Cong. (2001). S. 1766 was incorporated in S. Amdt. 2917 to S. 517. The Senate subsequently amended the House-passed energy bill H.R. 4 with S. 517.

⁷⁵ Sec. 245, S. 1766, 107th Cong. (2001).

However, when the U.S. Senate considered energy legislation on the Senate floor in March 2002, even this federally preemptive approach was quickly abandoned. On March 13, 2002, Sen. Craig Thomas offered an amendment that fundamentally changed the debate on this issue.⁷⁶ He offered an en bloc amendment relating to electric utility mergers, market-based rates, FERC refund authority, transmission, reliability, real-time pricing, federal purchasing requirements for renewable energy, and net metering. He offered the amendments on behalf of himself and Sen. Bingaman, the Chairman of the Energy and Natural Resources Committee. Sen. Bingaman indicated that there was no objection to their adoption and stated that the amendments moved them towards a bipartisan consensus on the electricity title of the bill.⁷⁷

The Thomas Amendment struck the federally preemptive language relating to net metering and replaced it with a requirement that states consider whether or not to adopt a net metering policy pursuant to Section 111(d) of PURPA. This provision was the precursor to the language ultimately enacted three years later. The Thomas Amendment prescribed a number of elements that states would need to consider, such as limiting net metering facilities to 10 kW in size that generate electricity from the sun or fuel cells. The amendment was adopted by unanimous consent.⁷⁸ The amendment was described in the press as follows: “[Edison Electric Institute] appears to have scored a victory with the Senate energy bill in the form of an amendment by Sen. Craig Thomas (R-Wyo.) that would make the net metering provision in the bill optional, rather than mandatory.”⁷⁹

The comprehensive energy legislation was passed as a Senate amendment to the House-passed H.R. 4 on April 25, 2002.⁸⁰

⁷⁶ Congressional Record – Senate, S1835, March 13, 2002.

⁷⁷ Congressional Record – Senate, S1838, March 13, 2002.

⁷⁸ S.Amdt.3003 to S.Amdt.2917, 107th Cong. (2002) (agreed to by unanimous consent on March 13, 2002).

⁷⁹ Damon Franz, National net metering policy could soon be law, Greenwire, Apr. 8, 2002.

⁸⁰ H.R. 4, 107th Cong. (2002) (as passed by Senate, April 26, 2002).

C. Congress Knew that State Net Metering Programs Compensated Consumers for Excess Generation at Retail Rates.

It is clear that Congress knew that states had adopted net metering policies that compensated owners of distributed generation at retail rates for their excess generation of electricity.

For example, in 1999 the Congressional Research Service explained that “[u]nder ‘net metering,’ a customer’s electric meter is permitted to run backward when the customer is self-generating electric power to feed into the utility grid.”⁸¹ It’s important to appreciate that when a residential retail meter runs backward, the consumer is necessarily receiving the retail rate for excess electricity generated.

This understanding appeared to be widely understood. In a July 2001 hearing on electricity in the House, Chairman Barton noted that “Individuals with residential renewable generation onsite certainly should be allowed to have their electric meter run backward when they are contributing power and not consuming it.”⁸² That same month in the Senate, an expert witness explained, “Net metering provides a modest economic incentive for eligible facilities by crediting them for this excess electricity at the retail rate.”⁸³

Additionally, contemporaneous press accounts show that the Edison Electric Institute, the powerful lobby for investor owned utilities, was explaining that some state net metering laws provided for customers to receive retail rates for the power they generate. For example, a press account from September 2002 stated:

⁸¹ Congressional Research Service, *Renewable Energy and Electricity Restructuring*, at 4, July 20, 1999, <https://www.everycrsreport.com/reports/RS20270.html>.

⁸² Statement of Rep. Joe Barton, Hearing “National Electricity Policy: Barriers to Competitive Generation” at 3, July 2001 (emphasis added).

⁸³ Statement of Thomas J. Starrs, J.D., Ph.D., Senior Partner, Kelso Starrs and Associates, L.L.C. before the Senate Energy and Natural Resources Committee. At 36, July 19, 2001.

Utilities in general oppose net metering. Laws like the one enacted in California, which effectively allow customers to receive retail rates for the power they generate, are actually subsidies because they do not factor in costs borne by the utility -- like distribution, they say. Utilities would rather have net metering programs that charge utilities wholesale costs for the power they buy from customers, according to Pat McMurray of the Edison Electric Institute.⁸⁴

D. Congress was Aware of the Argument that FERC had Jurisdiction Over Excess Generation from Net Metered Systems, but When a Petition at FERC on the Matter was Resolved, Congressional Concerns Over Jurisdiction Abated.

The NERA Petition is not the first time that arguments about federal preemption of state net metering laws have been raised. In fact, Congress began to engage on this issue in 2001 as the matter was pending before FERC. However, once the matter was resolved before FERC, congressional concern abated in obvious recognition that the issue had been resolved in favor of the states.

In October 1998, MidAmerican Energy Company petitioned FERC over net metering requirements established by the Iowa Utilities Board, alleging in part that the state law was preempted by the Federal Power Act. On March 28, 2001, FERC denied the MidAmerican petition finding that “no sale occurs” when a retail customer “installs generation and accounts for its dealings with the utility through the practice of” net metering.⁸⁵ Therefore, FERC concluded that the state’s net metering law was not preempted by federal law.⁸⁶

However, MidAmerican continued to press the issue. On April 27, 2001, MidAmerican filed for rehearing before FERC.⁸⁷ FERC granted the rehearing request on May 29, 2001,

⁸⁴ Damon Franz, Davis extends state net metering law, *Greenwire*, Sept. 26, 2002.

⁸⁵ *MidAmerican Energy Company*, 94 FERC 61,340 (2001).

⁸⁶ *Id.*

⁸⁷ *MidAmerican Energy Co.*, FERC Docket No. EL99-3, MidAmerican Application for Rehearing (April 27, 2001).

but held rehearing proceedings in abeyance in order for MidAmerican to pursue settlement discussions with the Iowa Utilities Board.⁸⁸

With the MidAmerican petition not yet resolved and a potential FERC re-hearing hanging over the states' heads, NARUC raised the issue of "alleged" FERC jurisdiction over net metering. In July 2001, Commissioner David Svanda of the Michigan Public Utilities Commission testified on behalf of NARUC:

NARUC further supports legislation removing federal barriers to State implementation of net metering. The most critical barrier involves the current lack of jurisdictional clarity over net metering. The Federal Power Act has been alleged to preempt State net metering programs, slowing development of this promising new approach to promoting competition and resource divesting.⁸⁹

NARUC provided similar testimony in the Senate.⁹⁰

The rehearing of MidAmerican's petition was still in abeyance at FERC in December 2001, when Rep. Barton introduced his legislative proposal, discussed above. Rep. Barton and supporters of his legislative proposal were obviously concerned about the alleged preemption and included a provision presumably intended to address this concern. The bill provides "A net metering credit under a net metering program established under this section shall not be considered a sale for resale for the purposes of Federal or State law."⁹¹ At the December 2001 hearing on the legislation, the NARUC representative testified that "the Federal Power Act has been alleged to preempt State net

⁸⁸ *MidAmerican Energy Co.*, FERC Docket No. EL99-3, Order Granting Reh'g for Further Consideration (May 29, 2001).

⁸⁹ Statement of Hon. David A. Svanda, Hearing "National Electricity Policy: Barriers to Competitive Generation" at 17, July 27, 2001.

⁹⁰ Statement of William M. Nugent, Commissioner, Maine Public Utilities Commission, and President, National Association of Regulatory and Utility Commissioners before the Senate Energy and Natural Resources Committee at 222, July 25, 2001.

⁹¹ Sec. 102(b), H.R. 3406, 107th Cong. (2001) (establishing new Section 215(c)(7) of the Federal Power Act).

metering programs, slowing development of this promising new approach to promoting competition and resource diversity.”⁹²

Notwithstanding the Barton provision and the NARUC testimony, the Senate must have found the “allegation” of preemption to be unpersuasive. This would have been reasonable given that the concern did not appear to be broadly shared. For instance, when testifying about a legislative proposal to federally require utilities to offer net metering, David Garman, Assistant Secretary for Energy Efficiency and Renewable Energy at the Department of Energy testified that “The Administration supports the concept of net metering, recognizing that these decisions have historically fallen under state jurisdiction.”⁹³ Curt Hebert, Chair of FERC testified on the same proposal that “state and local authorities, rather than the Commission, have traditionally regulated local distribution, including retail metering. The Commission has no current experience or expertise on the mechanics of net metering.”⁹⁴

The MidAmerican rehearing was still held in abeyance at FERC in March 2002 when the Senate unanimously adopted the Thomas Amendment. That amendment made clear that the Senate understood that states had authority to address appropriate crediting of excess electricity generated by a net metered system. The Thomas Amendment would have required states to consider crediting “the owner or operator of the on-site generating facility” for “excess kilowatt-hours generated during the billing period, with the kilowatt-hour credit appearing on the bill for the following billing period.”⁹⁵ This is important because the policy direction of the Thomas Amendment could only be carried out by the states using existing state authority as required by Sec. 111 of PURPA. The inclusion of

⁹² *The Electric Supply and Transmission Act of 2001: Hearings Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce* at 108, 107th Cong. 9 (2001).

⁹³ Statement of David Garman, Assistant Secretary, Energy Efficiency and Renewable Energy, Department of Energy, before the Senate Energy and Natural Resources Committee at 9, July 19, 2001.

⁹⁴ Statement of Curt Hebert, Jr., Chairman, Federal Energy Regulatory Commission, before the Senate Energy and Natural Resources Committee at 77, July 26, 2001.

⁹⁵ Congressional Record – Senate, S1837, March 13, 2002.

this language on net crediting for excess generation demonstrates an understanding that states could consider such a net crediting approach using existing state authority.

On June 11, 2002, MidAmerican withdrew its application for rehearing from FERC.⁹⁶ With the jurisdictional issue now resolved before FERC, the issue of federal preemption over net metering was not raised again by NARUC, other stakeholders, or members of Congress. This indicates that the states and the Congress were satisfied with how the jurisdictional question had been resolved by FERC.

E. The House Attempted to Return to a Federally Preemptive Approach to Net Metering in Conference, But the Senate did not Agree.

Although Chairman Barton's proposed electricity bill had never been reported by subcommittee or full committee, or considered or approved by the House of Representatives, the Chairman attempted to include the electricity bill in the House-Senate conference.⁹⁷ The Senate never agreed to the proposal and the 107th Congress adjourned without resolving the differences between the energy bills passed by the House and the Senate.

VII. Congress Crafted the Final Language for Section 1251 in 2003 but Did Not Pass A Final Bill.

In the 108th Congress, energy policy development continued where the previous Congress had left off. Although preemptive bills were introduced to require the establishment of

⁹⁶ *MidAmerican Energy Co.*, FERC Docket No. EL99-3, Notice of Withdrawal of Petition (June 3, 2002).

⁹⁷ Colin Sullivan, Energy conference resumes, focusing on electricity, *Environment & Energy Daily*, Sept. 25, 2002 (reporting that "The House proposal is essentially composed of an electricity draft dropped by Barton in late July" and that "all signs seem to point to the Senate rejecting much of the text of Barton's standing House offer"). Rep. Barton discussed the draft that would become H.R. 3406 in July. *See* Statement of Rep. Joe Barton, Hearing "National Electricity Policy: Barriers to Competitive Generation" at 1, July 2001.

net metering programs with federally prescribed details,⁹⁸ this approach was no longer being seriously entertained in either the House or the Senate. Instead, led by the Thomas amendment in the previous Congress, lawmakers in both chambers had moved to pursue a net metering policy based on Sec. 111 of PURPA.

In the House, the Energy and Commerce Committee reported energy legislation that contained a provision to require consideration of net metering policies pursuant to Sec. 111.⁹⁹ The provision stated “[i]n undertaking the consideration and making the determination under section 111 with respect to the standard concerning net metering” states and nonregulated utilities would have to consider whether “the owner or operator of the on-site generating facility shall be credited for the excess kilowatt-hours generated during the billing period, with the kilowatt-hour credit appearing on the bill for the following billing period.”¹⁰⁰ The provision also included other specific elements that states would need to consider, such as whether residential systems up to 10kw in size and commercial systems up to 500kw in size should be considered eligible for net metering service. The House Committee report described this provision as simply providing “for state consideration of model Federal standards for ‘net metering’ service.”¹⁰¹ This provision was reintroduced as part of a comprehensive energy bill¹⁰² and passed by the House of Representatives on April 11, 2003.¹⁰³

On April 30, 2003, the Senate Energy and Natural Resources Committee reported energy legislation that contained a provision nearly identical to the House passed language.¹⁰⁴ The Senate Committee report described this provision as amending “the Public Utility Regulatory Policies Act of 1978 (PURPA) to require States to consider the adoption of net metering standards regarding how on-site energy production will be measured and

⁹⁸ H.R. 142, 108th Cong. (2003); H.R. 3509, 108th Cong. (2003).

⁹⁹ Sec. 7071, H.R. 1644, 108th Cong. (2003).

¹⁰⁰ *Id.*

¹⁰¹ H. Rept. 108-65, Energy Policy Act of 2003.

¹⁰² Sec. 16071, H.R. 6, 108th Cong. (2003).

¹⁰³ Roll no. 145, On passage Passed by recorded vote: 247 – 175, April 11, 2003.

¹⁰⁴ Sec. 1141, S. 1005, 108th Cong. (2003).

billed.”¹⁰⁵ When the Senate considered the House-passed energy bill, the Senate Committee approved net metering provision was included in the Senate amendment to the House bill.¹⁰⁶ The amended legislation passed the Senate on July 31, 2003.

The House and the Senate went to conference on the energy legislation and a conference report, embodying the agreed upon text between the two chambers was filed on Nov. 18, 2003. This conference report contained identical net metering language to what was ultimately enacted in EPAct 05.¹⁰⁷ Importantly, the conference report language gave the states even broader discretion in complying with the proposed net metering language than had passed either the House or the Senate. First, the conference report dropped any detailed specificity of what kind of program states and nonregulated utilities must consider adopting. States and nonregulated utilities would not be required to consider the 10kw and 500kw size limits for system size; nor, would they be required to consider specific methods for crediting consumers’ excess generation. Second, the conference report included the “comparable” language discussed in Section III of these comments which would ensure that as long as a state had considered any type of net metering policy in the past, they would be precluded from having to revisit net metering. Rep. Billy Tauzin, Chair of the House Energy and Commerce Committee, released a number of explanatory fact sheets to educate members and the press about the contents of the conference report. One fact sheet explains that the net metering provision “[p]rovides for State consideration of model standards for net metering.”¹⁰⁸ Another explains that “Model standards for net metering ... will improve demand management.”¹⁰⁹ While the conference report was passed by the House,¹¹⁰ the Senate failed to invoke cloture,¹¹¹ essentially ending consideration of that legislation for the 108th Congress.

¹⁰⁵ S. Rept. 108-43, Energy Policy Act of 2003.

¹⁰⁶ S. Amdt. 1537, 108th Cong. (2003).

¹⁰⁷ Conference report for H.R. 6, Nov. 18, 2003.

¹⁰⁸ House Committee on Energy and Commerce, Fact Sheet, Highlights of Energy Policy Act of 2003,” Nov. 18, 2003.

¹⁰⁹ House Committee on Energy and Commerce, Fact Sheet, Energy Policy Act of 2003: Fair, Balanced Electricity Title Will Strengthen the Grid to Prevent Blackouts,” Nov. 18, 2003.

¹¹⁰ Roll No. 630, conference report agreed to 246-180, Nov. 18, 2003.

¹¹¹ Record Vote Number: 456, Cloture on the conference report to accompany H. R. 6 not invoked in Senate by Yea-Nay Vote. 57 – 40, Nov. 21, 2003.

VIII. Congress Passes the Energy Policy Act of 2005

In February 2005, Rep. Joe Barton circulated a discussion draft of comprehensive energy legislation, which was largely identical to the conference report that was developed in the previous Congress.¹¹² It included the net metering language from the previous Congress' conference report. The House Subcommittee on Energy and Air Quality held two days of hearings on the discussion draft which was entitled the Energy Policy Act of 2005.

The testimony revealed three types of reactions to the net metering provision. Some were more supportive now that the net metering provision was no longer federally preemptive. Some believed that requiring states to even consider net metering was unnecessary. Still others expressed a desire for the net metering provision to be federally preemptive. All of these views demonstrated an understanding that Sec. 1251 was not a constraint on state authority to establish net metering, but merely required the states to consider whether or not to adopt a net metering policy.

First, the revised provision on net metering eased opposition to net metering provisions that had been voiced in 2001. For example, NARUC had opposed the federally preemptive approach in 2001 as described above. However, at the February 2005 hearing, Marilyn Showalter, president of NARUC, testified that her organization was

pleased that the legislation provides that each State has the ability to determine if the services in sections 1251 [net metering] and 1252 are appropriate for State implementation. The long-standing NARUC position is that implementation of these programs should be of the States' own choosing, in the States' own time, and not forced on States under timelines and minimum standards of FERC's choosing.¹¹³

¹¹² See Statement of Rep. Rick Boucher before the House Subcommittee on Energy and Air Quality at 4, Hearing entitled "Energy Policy Act of 2005," Feb. 10, 2005.

¹¹³ Statement of Chairwoman Marilyn Showalter, Washington Utilities and Transportation Commission and President of the National Association of Regulatory Utility Commissions before the House Subcommittee on Energy and Air Quality at 109, Hearing entitled "Energy Policy Act of 2005," Feb. 10, 2005.

Similarly, while the American Public Power Association had expressed concern about the net metering provision in 2001, Alan Richardson of APPA testified that the revised provision had been “carefully crafted” and APPA “support[s] their inclusion in future legislation.”¹¹⁴

Second, some stakeholders testified that even requiring states to consider adopting net metering policies was unnecessary. Gerald Norlander, Executive Director of the Public Utility Law Project of Albany, New York, testified on behalf of the National Association of State Utility Consumer Advocates that “Federal measures to require or encourage states to address net metering, ... such as contained in Section 1251 ... of the draft bill, are unnecessary. NASUCA is not opposed to net metering or to voluntary real-time pricing options. At the retail level, traditionally not an area of federal concern, states are experimenting with a variety of net metering”¹¹⁵

Finally, some advocates of net metering were concerned that Sec. 1251 did not require net metering to be adopted throughout the country. Alan Noguee of the Union of Concerned Scientists testified that

we are gratified by the net metering provisions in the Draft, but we suggest that these provisions be mandatory—not merely suggested changes. We have uniformity governing the use of such things as phones throughout the country. We recommend similar uniformity apply to such things as solar panels and other forms of distributed generation.¹¹⁶

¹¹⁴ Statement of Alan Richardson, American Public Power Association, before the House Subcommittee on Energy and Air Quality at 149, Hearing entitled “Energy Policy Act of 2005,” Feb. 10, 2005.

¹¹⁵ Statement of Gerald Norlander, Executive Director of the Public Utility Law Project of Albany, New York, on behalf of the National Association of State Utility Consumer Advocates, before the House Subcommittee on Energy and Air Quality at 405, Hearing entitled “Energy Policy Act of 2005,” Feb. 16, 2005.

¹¹⁶ Statement of Alan Noguee, Union of Concerned Scientists, before the House Subcommittee on Energy and Air Quality at 494, Hearing entitled “Energy Policy Act of 2005,” Feb. 16, 2005.

The House Energy and Commerce Committee considered the Energy Policy Act of 2005 on April 13, 2005.¹¹⁷ Rep. Jay Inslee, along with Rep. Ed Markey, offered an amendment to require retail electric suppliers to provide net metering service, but the Committee rejected the amendment.¹¹⁸

The Energy Policy Act of 2005 was enacted on August 8, 2005.¹¹⁹

IX. Conclusion

As the history detailed above shows, from 1997 to 2001 congressional proposals relating to net metering had contemplated federally preemptive language that would have constrained how states handled the crediting of excess electricity generation from net metered systems. However, in 2002, Congress shifted gears and the first net metering proposal to pass either chamber of Congress would have merely required states to consider whether or not to adopt net metering programs albeit with certain characteristics, including a specific method for crediting excess generation. By the end of 2003, both chambers were moving towards reducing those minimal requirements on the states even further. The language ultimately adopted in EAct 05 required states to consider whether or not to adopt net metering policies of any design and the legislation essentially grandfathered in any previously considered state policy regardless of its policy details.

NERA's claims that (1) states do not have jurisdiction over net metering, and (2) EAct 05 only permits states to consider a specific type of net metering, are at odds with Congress' unambiguous direction that (1) states consider whether or not to establish net metering programs pursuant to state law, and (2) previously established "comparable" state net metering programs are sufficient for purposes of Sec. 1251. The statutory

¹¹⁷ See Congressional Record – House, H2192, April 20, 2005.

¹¹⁸ Amendment Offered by Mr. Inslee of Washington, designated as "F:\M9\INSLEE_027.XML", Apr. 1, 2005 (3:30 PM); Mary O'Driscoll, House panel completes marathon markup on energy bill, *E&E Daily*, Apr. 14, 2005.

¹¹⁹ Pub. Law No. 109-58 (enacted Aug. 8, 2005).

structure of PURPA Sec. 111 and the legislative history of Sec. 1251 of EPAct 05 do not offer any rationale for supporting NERA's argument.

FERC should deny NERA's Petition.