Jurisdiction Over Net Metering

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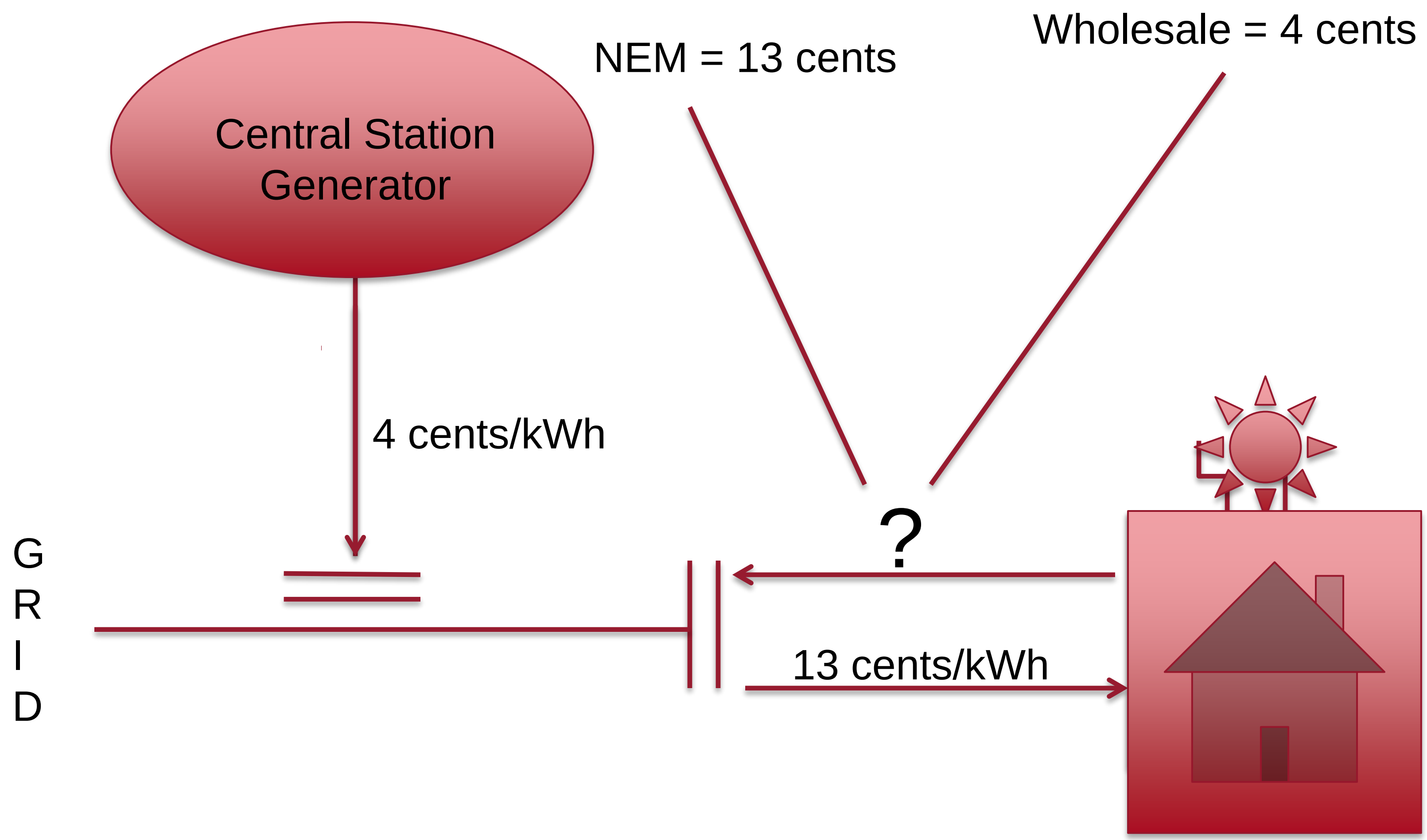
Thesis of My Presentation

- FERC has jurisdiction over the price of energy sold to utilities from behind the meter solar PV facilities, not the states.
- When the seller is a QF, the price cannot exceed the buyer's avoided cost, which is the alternative cost of energy, not the bundled retail rate.
- When the seller is not a QF, the utility does not have to buy, and even if it is required to buy, the price is the market price of energy, not the bundled retail rate.
- Wholesale sales at the bundled retail rate are unduly discriminatory and grossly distort competitive bulk power markets.
- A key legal issue is whether all energy produced behind the retail meter is subject to FERC jurisdiction, or only when the hourly amount generated exceeds the amount consumed behind the meter.

Net Metering Economics

- Net metering values non-firm energy generated behind the retail meter at the bundled retail rate.
- Transmission, distribution and reliability (firming and balancing) are effectively supplied for free.
- The average (bundled) residential **retail** rate is approximately **13 cents** per kWh. Daytime **wholesale** energy prices typically vary between approximately **2 and 6 cents** per kWh.
- Net metered customers are therefore compensated at **2 to 4 times the market price of energy,** unless retail rate design provides for separate compensation.
- This subsidy is in addition to a 30% investment tax credit.


Central Station Generator
NEM = 13 cents
Wholesale = 4 cents
4 cents/kWh
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13 cents/kWh

What are the implications of these subsidies?

- Price discrimination against generators connecting on the utility side of the meter (including renewables!) distorts markets and capital investment.
- Wholesale energy prices are suppressed during the day, sending faulty price signal that inhibits investment in generation needed to meet load reliably and balance the system.
- Solar generation rapidly disappears during the evening peak. This limits the value of this alternative and may create operational problems down the road
- Shortfall in revenues caused by net metering is borne by other customers. Wealth transfer is from low to high income customers. California PUC study shows this effect.
- Incentive to invest in storage is reduced because customers are already getting paid as if they have it. Yet, it is storage that potentially makes distributed generation a true alternative.
- Much of the subsidy seems to be going to suppliers rather than customers, fueling tremendous investment in solar PV that is not tied to true economics.

FERC Disclaims Jurisdiction Over Most Net Metering Transactions

- No wholesale sale occurs under the FPA or PURPA unless there is a net delivery of energy to the utility over the course of a month. *MidAmerican Energy,* 94 FERC 61,340 (2001); *Sun Edison LLC,* 129 FERC 61,146 (2009).
  - This is unlikely to occur since solar is at zero for approximately half the day.
- These holdings were arguably consistent with FERC law at the time, which provided for monthly netting of energy to and from generators for purposes of establishing jurisdiction over station service energy.
- D.C. Circuit has now rejected the monthly netting theory, holding that a long netting period cannot be used to establish jurisdictional boundaries. *So. Cal. Edison v. FERC,* 603 F.3d 996 (D.C. Cir. 2010); *Calpine Corp. v. FERC,* 702 F.3d 41 (DC Cir. 2012).

So Cal Edison and Calpine Decisions

- The issue was whether FERC could use a monthly netting period to determine whether state-jurisdictional sales to generators occur when generators acquire energy for station service purposes.
- The decisions are not a model of clarity and the core holdings are difficult to discern.
- However, the Court unambiguously rejected FERC's use of a monthly netting period to determine whether state jurisdiction exists.
- The Court in *Calpine* says that netting is a billing convention and not a determinant of jurisdiction. It also notes that a wholesale sale takes place whenever energy is supplied for resale, without regard to billing period.
- FERC's brief in the second case (*Calpine*) makes clear that FERC had accepted the basic jurisdictional holding – no monthly netting.

FERC Jurisdiction Over Net Metering

- FERC has exclusive jurisdiction over all energy sales at wholesale in interstate commerce by public utilities. Bright-line test.
- Contracts and other papers of sellers are “jurisdictional facilities” making the sellers public utilities even if they own no transmission facilities.
- FERC-jurisdictional wholesale sales are routinely identified as occurring hourly and are priced on a MWh basis.
- FERC now requires 15-minute scheduling of transmission service, which means that energy sales will be priced on that basis in the future.
- Other than purchases from QFs, utilities cannot be compelled to buy energy at wholesale.
- PURPA requires that QF energy be capped at the buyer’s avoided cost of energy, which should be the market price.

Defining the Quantity of Wholesale Sales

- Option One: Net metering involves an exchange of energy. The utility is supplying energy to the retail customer at the same time that the retail customer is selling energy back to the utility.
  - FERC defines exchange transactions (wholesale/wholesale) as two separate transactions and does not permit netting of the two amounts to determine the extent of jurisdictional sales.
  - Therefore, a retail sale exists for the entire amount of the customer’s load and a separate wholesale sale exists for the entire amount of the on-site generator’s output.
- Option Two: In those hours (or fifteen minutes) in which the net generation behind the retail meter exceeds on-site consumption, there is a net sale to the utility.

Contrary Arguments

- *So Cal Edison* and *Calpine* dealt with interaction between retail sales jurisdiction and transmission netting periods. Cases limited to their specific facts.
- Congress did not intend that individual retail customers would be public utilities. But FERC allows them to be QFs without even having to certify!
  - Note: This argument also would not help those suppliers who are using leasing arrangements. The suppliers are the public utilities in these instances.
- Wholesale sales at distribution level are not in interstate commerce (Lindh).
- Section 111(d) of PURPA permits States to use net metering as it is currently defined. Let's explore this one further

Section 111(d) of PURPA

Net-Metering – Each electric utility shall make available upon request net metering service to any electric consumer that the electric utility serves. For purposes of this paragraph, the term “net metering service” means service to an electric consumer under which **electric energy** generated by that electric consumer from an **eligible** on-site generating facility and delivered to the local distribution facilities may be used to offset **energy** provided by the electric utility to the electric consumer during the applicable billing period.

So, what does Section 111(d) mean?

- Section 111(d) allows for energy supplied by the on-site generator to be used to offset energy from the utility. It does not allow on-site energy to be used to offset bundled retail service, which includes transmission, distribution, and reliability (firming and balancing). **It says "energy for energy."**
- The Ohio Supreme Court so ruled in interpreting a net metering statute that allowed for offsets for "electricity" produced by an on-site generator. It held that the on-site generator does not supply transmission, distribution or ancillary services, and therefore the offset should be for the generation component only. *First Energy Corp. v. P.U.C. of Ohio,* 768 N.E.2d 648 (Ohio, 2002).
- What is an "eligible" on-site generating facility? It logically means a certified Qualifying Facility because, in the absence of such certification, the utility would have no obligation to interconnect with or buy power from the generator.

Unbundling Retail Rates

- **Charge separately for:**
- Energy
- Transmission and Distribution
- Reliability
  - Firming
  - Balancing
- Public Policy Costs (statutory and regulatory mandates)