

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Otter Creek Solar LLC, Allco Finance Limited, and PLH LLC))))))	Docket Nos. EL17-16-000 QF13-402-006 QF16-353-001 QF16-354-001 QF16-355-001 QF16-356-001
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**MOTION TO INTERVENE AND PROTEST OF THE NATIONAL
ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

Pursuant to Rules 211 and 214 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure,¹ November 7, 2016 Notice of Petition for Enforcement, and November 18, 2016 Notice of Extension of Time issued in the above captioned dockets, the National Association of Regulatory Utility Commissioners (“NARUC”) submits this motion to intervene and protest in response to the Petition for Enforcement of the Public Utility Regulatory Policies Act of 1978² (“Petition”) filed by Otter Creek Solar LLC, Allco Finance Limited, and PLH LLC (collectively, “Otter Creek”) against the Vermont Public Service Board (“VPSB”).

I. COMMUNICATIONS

All pleadings, correspondence, and other communications related to this proceeding should be addressed to the following person:

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¹ 18 C.F.R. §§ 385.211, 385.214 (2016).

² 16 U.S.C. § 2601 et seq. (2012).

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II. MOTION TO INTERVENE

NARUC is the national organization of the State commissions responsible for economic and safety regulation of the retail operations of utilities. NARUC's members have the obligation under State law to ensure the establishment and maintenance of such energy utility services as may be required by the public convenience and necessity, as well as ensuring that those services are provided at just and reasonable rates. NARUC's members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the rates and terms and conditions of service associated with the intrastate operations of electric, natural gas, water, and telephone utilities. Both Congress³ and the federal courts⁴ have long recognized NARUC as the proper party to represent the collective interests of State regulatory commissions.

In 1978, Congress enacted the Public Utility Regulatory Policies Act ("PURPA"), Section 210⁵ of which requires electric utilities to purchase power at wholesale from certain cogenerators and small power producers using renewable technologies, otherwise known as

³ See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Boards to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns); Cf., 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "...Carriers, to get the cards, applied to...[NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the 'bingo card' system").

⁴ See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985).

⁵ 16 U.S.C. § 824a-3.

“Qualifying Facilities” (“QFs”). PURPA’s primary purpose was to increase the use of renewable energy resources and cogeneration for wholesale power supply. The impact on NARUC’s member State commissions is clear. State regulatory commissions have ratemaking authority over the utilities they regulate. PURPA references State regulatory authorities and *mandates* State implementation of the statute. Any action FERC takes in this proceeding necessarily will either influence or directly impact future implementation by both the VPSB and other NARUC member commissions.

III. PROTEST

On November 4, 2016, Otter Creek filed its Petition requesting FERC to initiate an enforcement action against the VPSB “to remedy the State of Vermont’s improper implementation of PURPA.”⁶ Otter Creek alleges deficiencies in VPSB’s implementation of PURPA that, if accepted by the Commission, will undermine Commission precedent that provides States with flexibility essential to implement the statute efficiently. Otter Creek’s arguments undercut a State Commission’s ability to implement PURPA in a manner that best balances the interests of ratepayers and renewable developers.

Against decades of FERC precedent, Otter Creek argues that:

[t]here is no basis in either the statute or the Commission’s regulations on which to conclude that a State has the authority to define parameters around a legally enforceable obligation. Nor is there any basis in the statute or the Commission’s regulations for any sort of deference to a State commission or a nonregulated utility with regard to the formation of a legally enforceable obligation.⁷

⁶ Petition at 1.

⁷ Petition at 20.

FERC, however, has always recognized both State flexibility and authority to design PURPA implementation programs. For example, a 2010 FERC Order specifies that:

[a]s the Commission has previously explained, “states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with our regulations. Similarly, with regard to review and enforcement of avoided cost determinations under such implementation plans, we have said that our role is generally limited to ensuring that the plans are consistent with section 210 of PURPA” In this regard, the determinations that a state commission makes to implement the rate provisions of section 210 of PURPA are by their nature fact specific and include consideration of many factors, and we are reluctant to second guess the state commission’s determinations; our regulations thus provide state commissions with guidelines on factors to be taken into account, “to the extent practicable,” in determining a utility’s avoided cost of acquiring the next unit of generation.⁸

By ignoring this and similar rulings, Otter Creek is essentially arguing that the VPSB violated Federal law by adhering to FERC precedent. This is not a sustainable basis for a request for FERC to bring an enforcement action against the VPSB. The Commission should reject this Otter Creek argument and confirm the important role that State Commissions play in the PURPA framework.

In a variant of this argument, Otter Creek rejects fundamental principles of rate regulation by arguing that States (and apparently the Commission) have no role in defining the terms of the contract between a QF and the interconnecting utility:

It is the QF that must select the time period over which it is offering and committing to sell. If the right to specify the term were not vested in the QF, then it is easy to see how the must-buy obligation at a rate “determined at the time the obligation was incurred” would be meaningless.⁹

⁸ *Calif. Pub. Util. Comm’n*, 132 FERC ¶ 61,047, (CPUC Declaratory Order) order on clarification and reh’g, 133 FERC ¶ 61,059, at P 24 (2010), (CPUC Clarifying Order) order denying reh’g, 134 FERC ¶ 61,044 (2011) (CPUC Rehearing Order).

⁹ Petition at 32.

According to Otter Creek, “a solar facility needs a long-term contract in able [sic] to obtain financing to allow it to be constructed.”¹⁰ This assertion necessarily presumes there should be no check on the risks to ratepayers of uneconomic costs associated with those financing needs. Indeed, while FERC recently stated that “a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors,”¹¹ it simultaneously specified that its regulations “do not, however, specify a particular number of years for such legally enforceable obligations.”¹² As NARUC stated in Docket AD16-16-000, “[f]lexibility in setting the contract length can allow regulators to mitigate the risks when calculating the avoided cost. State Commissions should be allowed to adjust contract length to ensure that ratepayers are not harmed as required by PURPA.”¹³

Otter Creek’s allegation that PURPA entitles QFs to set the terms of the contract is inconsistent with the statutory scheme. Congress clearly recognized the need for State Commissions (and FERC) to protect the interests of ratepayers. Both PURPA and FERC’s implementing regulations recognize the need to weigh the needs of ratepayers and protect the public interest when promoting PURPA’s goal. Both specify that avoided costs must be “just and reasonable to the electric consumer of the electric utility and in the public interest” and “shall not discriminate against [QFs].”¹⁴ Even if one were to assume that PURPA requires a contract length sufficient to provide adequate financing, such a determination is best made not by a developer seeking to maximize its profit from the renewable resource, but instead by the State

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Id.

¹¹ *Windham Solar LLC*, 157 FERC ¶ 61,134 at P. 8.

¹² *Id.*, at note 13.

¹³ NARUC Comments re: *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Docket No. AD16-16-000, at 4 (November 7, 2016).

¹⁴ 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304 (2015).

Commissions that are aware of the local markets where the QF is proposed and are charged with the duty of balancing the interests of ratepayers and utilities.

At its November 2016 Annual Meeting, NARUC adopted a *Resolution Regarding the Enforcement of PURPA Standards and Regulations* (Attachment 1). That resolution concludes, in part, that:

State commissions must remain the appropriate bodies to make mandatory purchase and avoided cost determinations, not only because PURPA Section 210 specifies that the State commissions are to implement PURPA and FERC rules, but also because those determinations are subject to local conditions best known at the regional and local level by State commissions; . . . and

Each State should retain the full authority and discretion to determine, consistent with the lawful implementation of PURPA, the process by which QFs become entitled to PURPA contracts; the scope of such contracts; the extent to which QFs with a design capacity larger than 100 kilowatts are entitled to standard avoided cost rates; and other necessary and proper terms and conditions to ensure that each PURPA contract is consistent with and protects the State's public interest, does not adversely impact retail ratepayers, and fairly calculates the rates paid to the QFs.

Otter Creek's petition misconstrues the role of the State Commissions in PURPA implementation, and FERC should dismiss this attempt to distort the PURPA implementation structure.

IV. CONCLUSION

For the above reasons, NARUC requests that it be permitted to intervene with all the rights that attend to such status. Additionally, NARUC protests the Petition and strongly urges this Commission to deny the requested relief and to issue a Notice of Intent Not to Act instead.

Respectfully submitted,

/s/ Jennifer M. Murphy

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Dated: November 30, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC.: November 30, 2016

Respectfully submitted:

/s/ Jennifer M. Murphy

Attachment 1

EL-2 Resolution Regarding the Enforcement of PURPA Standards and Regulations

WHEREAS, In 1978 Congress enacted the Public Utility Regulatory Policies Act (PURPA) in response to a national energy crisis; *and*

WHEREAS, PURPA's purpose was to lessen the country's dependence on foreign oil and to encourage the promotion and development of renewable energy and cogeneration technologies; *and*

WHEREAS, PURPA requires electric utilities to purchase power produced by qualifying facilities (QFs), referred to as a mandatory purchase obligation; *and*

WHEREAS, PURPA requires that the power from QFs be purchased by utilities at avoided cost rates that are just and reasonable to a utility's ratepayers, in the public interest, and not discriminatory to the QFs; *and*

WHEREAS, PURPA mandates power sales at a utility's avoided cost, but otherwise creates a broad and flexible framework for the sale of QF power by leaving the details to be worked out by State regulatory commissions; *and*

WHEREAS, There are significant differences among electric market structures and the penetration of renewable generation throughout the country and, therefore, significant differences in PURPA implementation; *and*

WHEREAS, Since PURPA was enacted, there has been tremendous growth in renewable generation, both inside and outside the mandates of PURPA; *and*

WHEREAS, Because of the significant growth in various forms of renewable generation, PURPA's mandatory purchase obligation has created unintended consequences in some jurisdictions, including: PURPA generation that is not needed to serve loads; long-term fixed-price PURPA contracts that have resulted in avoided costs detrimental to retail ratepayers; large amounts of intermittent generation that require standby generation; operating and reliability concerns; and planning uncertainties because of the unexpected and unpredictable addition of PURPA projects; *and*

WHEREAS, Such unintended consequences have been compounded by some QF developers that have been able to work around the Federal Energy Regulatory Commission's (FERC) small renewable QF criteria by disaggregating their projects into multiple smaller projects, thereby availing themselves of more advantageous avoided cost calculations to the detriment of retail ratepayers; *and*

WHEREAS, A number of State regulatory commissions have recently been devoting an inordinate amount of time attempting to discern the intent and assess the impact of PURPA, the meaning of FERC regulations, and the parameters of State discretion; *and*

WHEREAS, In light of these developments and concern within a number of States, members of Congress recently asked FERC to conduct a comprehensive review of PURPA Section 210; *and*

WHEREAS, FERC conducted a technical conference on June 29, 2016, regarding issues associated with State commission implementation of PURPA and particularly focused on the mandatory purchase obligation and determination of avoided costs; *and*

WHEREAS, NARUC, through President Travis Kavulla, along with various other State regulatory and energy commissions, participated in the technical conference and submitted comments; *and*

WHEREAS, NARUC and its members have a long history of successfully implementing PURPA and encouraging renewable development that is consistent with FERC regulations and that is in the public interest of each respective State regulatory jurisdiction; *and*

WHEREAS, The availability, practicality, need for, and cost effectiveness of PURPA renewable and cogeneration power supply sources varies from region to region and from State to State; *and*

WHEREAS, Because the ability to efficiently acquire and manage renewable resources varies from region to region, the States are in the best position to analyze the need for, and the availability, practicality, and cost effectiveness of new renewable and cogeneration resources; *and*

WHEREAS, The States are uniquely qualified to measure whether unexpected, large-scale intermittent resources can be added to the electric system without compromising reliability; *now, therefore be it*

RESOLVED, That the National Association of Regulatory Utility Commissioners, convened at its 128th Annual Meeting in La Quinta, California, concludes that:

- The State commissions must remain the appropriate bodies to make mandatory purchase and avoided cost determinations, not only because PURPA Section 210 specifies that the State commissions are to implement PURPA and FERC rules, but also because those determinations are subject to local conditions best known at the regional and local level by State commissions;
- The State commissions should continue to be afforded the authority to select an appropriate methodology for calculating avoided costs;
- PURPA's goal of promoting QF development must be balanced with the States' interest in just and reasonable rates;
- FERC should establish criteria that assists States in evaluating whether a project developer has disaggregated a large project into multiple smaller projects in an effort to circumvent FERC's size limitations and undermine PURPA regulations to the retail ratepayers' detriment; and

- Each State should retain the full authority and discretion to determine, consistent with the lawful implementation of PURPA, the process by which QFs become entitled to PURPA contracts; the scope of such contracts; the extent to which QFs with a design capacity larger than 100 kilowatts are entitled to standard avoided cost rates; and other necessary and proper terms and conditions to ensure that each PURPA contract is consistent with and protects the State's public interest, does not adversely impact retail ratepayers, and fairly calculates the rates paid to the QFs.

Sponsored by the Committee on Electricity

Recommended by the NARUC Board of Directors, November 15, 2016

Adopted by the NARUC Committee of the Whole, November 16, 2016