NARUC
National Association of Regulatory Utility Commissioners

Aligning PURPA with the Modern Energy Landscape

A Proposal to FERC

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The authors wish to thank Carl Pechman and Tom Stanton of the
National Regulatory Research Institute for their assistance with this paper.

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SUMMARY

Congress wrote the Energy Policy Act of 2005 (EPAct '05) permissively, allowing the Federal Energy Regulatory Commission (FERC) to implement it in light of evolving markets. FERC should be cognizant of the many developments since then and update its regulations accordingly. FERC should let competitive mechanisms, whether in regional transmission organizations (RTO) or non-RTO markets, do the work of achieving statutory goals of Public Utility Regulatory Policies Act of 1978 (PURPA), replacing administrative price forecasts that have been the backbone of PURPA compliance in many places. Reform of FERC's regulations on PURPA is one of states' top priorities, and FERC will be missing an opportunity if it does not act or enacts only modest reforms.

BACKGROUND

In 1978, Congress enacted PURPA in response to a national energy crisis.[1] To fulfill its goals to improve the wholesale distribution of electric energy and the reliability of electric service, Congress promoted the development of renewable energy and cogeneration technologies as competitive alternatives to oil and other scarce sources of fuel. PURPA required electric utilities to purchase power produced by qualifying facilities (QFs) that used renewable energy and cogeneration technologies, a requirement referred to as the mandatory purchase obligation.[2] Congress directed that the rates for such purchases be "just and reasonable to the electric consumers of the electric utility and in the public interest, and not discriminate against qualifying cogenerators or qualifying small power producers."[3]

In 2005, Congress amended PURPA through the EPAct '05 to account for the development of wholesale electricity markets. Congress added Section 210(m) to PURPA, which allowed FERC to terminate the must purchase obligation if the Commission determined that a QF has nondiscriminatory access to one of three types of markets. Congress described these three markets as:

> (A)(i) independently administered, auction-based day ahead and real-time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or
>
> (B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term, and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or
>
> (C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).[4]

1 16 U.S.C. § 2601 *et seq.* (2012).

2 16 U.S.C. § 824a–3; PURPA, Sec. 210(a).

3 16 U.S.C. § 824a–3; PURPA, Sec. 210(b).

4 16 U.S.C. § 824a-3(m) (2012).

In Order 688, the Commission determined which of the existing wholesale markets, the regional transmission organizations/independent system operators (RTOs/ISOs), met the criteria in Sec. 210(m)(1)(A), (B), or (C).[5] It found that Midwest Independent Transmission System Operator (MISO), PJM Interconnection, L.L.C. (PJM), ISO New England, Inc. (ISO–NE), and New York Independent System Operator (NYISO) qualify as markets described in Sec. 210(m)(1)(A).[6] The Commission determined in that Order that California Independent System Operator (CAISO) and Southwest Power Pool, Inc. (SPP) satisfy the criteria of Sec. 210(m)(1)(B)(i) because "they are Commission-approved regional transmission entities that provide transmission and interconnection services pursuant to Open-Access Transmission Tariff (OATT) that provide nondiscriminatory treatment to all customers[,]" but still required member electric utilities in those markets to "make all the other showings required under section 210(m)(1)(B) before its request may be granted."[7] The Commission also found that the Electric Reliability Council of Texas (ERCOT) qualified as a market described in Sec. 210(m)(1)(C).[8]

Regarding whether a QF has nondiscriminatory access to one of three types of markets, FERC determined that the existence of an OATT, or a reciprocity tariff filed by a non-jurisdictional utility, pursuant to the Commission's open access regulations, creates a rebuttable presumption that QFs exceeding 20 megawatts (MW) have such access to the relevant wholesale markets.[9] FERC also created a rebuttable presumption that QFs with a net capacity no greater than 20 MW do not have nondiscriminatory access to wholesale markets.[10]

A CHANGED ENERGY DEVELOPMENT LANDSCAPE

Although much had changed since PURPA was originally enacted in the late 1970s until the passage of EPAct '05, the energy landscape has changed even more dramatically from 2005 to today. These dramatic changes necessitate reforms to modernize PURPA so that it aligns with the current realities of the energy sector.

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Throughout the nation, not just in ISOs and RTOs, states have encouraged the growth of renewable energy through legislative enactments and state public utility commission decisions in the name of fuel diversity, lowering emissions, national security, and low-cost energy.[11] The U.S. Energy Information Administration reports that nearly half of utility-scale capacity installed in 2017 came from renewable resources.[12]

5 FERC codified Sec. 210(m)(1)(A), (B), and (C) in 18 CFR § 292.309(a)(1), (2), and (3), respectively.

6 *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. 31,233 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. 31,250 (2007), *aff'd sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008) (Order No. 688) at P. 9; codified at 18 CFR § 292.309(e).

7 Order No. 688 at P. 11; codified at 18 CFR § 292.309(g).

8 Order No. 688 at P. 12; codified at 18 CFR § 292.309(f).

9 Order No. 688 at P. 9; codified at 18 CFR § 292.309(e) and (g). This part of Order 688 is somewhat vague, appearing to suggest that any utility with an OATT or reciprocity tariff, which are now nearly universal, would qualify for a rebuttable presumption. In practice, FERC appears to have classified certain regions as having one of the three wholesale markets, which then permits individual utilities to file for an exemption.

10 Order No. 688 at P. 9; codified at 18 CFR § 292.309(d)(1).

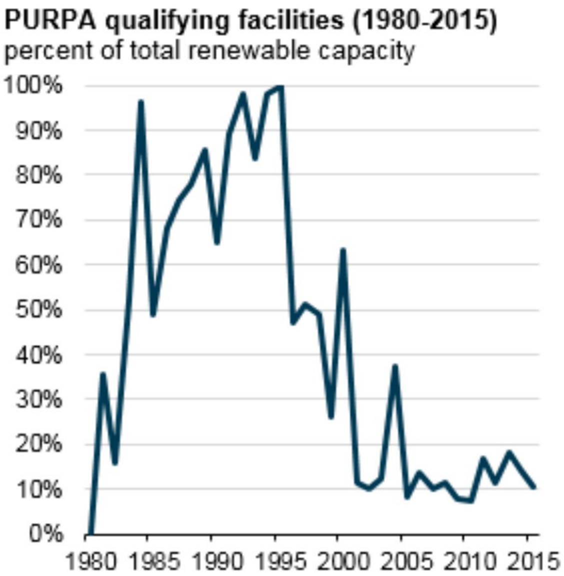
11 See U.S. Department of Energy's Renewable Energy Production by State map, https://energy.gov/maps/renewable-energy-production-state, and the Database of State Incentives for Renewables & Efficiency's Policies & Incentives by State map, http://www.dsireusa.org/, both showing renewable energy production and programs in every state.

12 U.S. Energy Information Administration, *Nearly half of utility-scale capacity installed in 2017 came from renewables*, "Today in Energy (Jan. 10, 2018)" (Form EIA-860M, Preliminary Monthly Electric Generator Inventory), available at: https://www.eia.gov/todayinenergy/detail.php?id=34472.

More than half of States have their own renewable mandates, and even those which do not, have shown substantial additions in renewable resources, not because of PURPA, but because of the falling cost curve of renewable technologies such as solar and wind.[13] In some cases, QFs in the 1980s to the mid-1990s made up the vast majority of renewable resource capacity, but overall from 1980 to 2000, the share of renewables that were QFs averaged 45 percent. Since 2000, however, the share of renewables that are QFs has declined to 18 percent. Seventy-nine percent of all renewables deployed since 1980 are not QFs.[14] Furthermore, wind and solar, the leading sources of renewable growth, rely little on PURPA QFs.[15] To the degree PURPA was enacted at a time when QF technologies were not the norm, that norm has changed profoundly.

Not only have the sources of energy production changed, but the business of producing energy has changed as well. In 2008, independent power producers (IPPs) generated 847 megawatt hours (MWh) of solar energy and 84,928 MWh of energy from renewable sources excluding hydroelectric and solar; by 2017, those numbers were 48,814 MWh and 259,889 MWh, respectively.[16] These IPPs have greater access to buyers because most state commissions have required the utilities subject to their jurisdiction to make use of competitive solicitations as a means of selecting projects, opening an avenue for competition—even outside of those places with ISOs and RTOs—in the wholesale market. According to a recent survey the National Association of Regulatory Utility Commissioners (NARUC) /National Regulatory Research Institute conducted of its members, only two of the 32 states that responded neither required nor encouraged utilities to use competitive solicitations when acquiring new capacity. Indeed, most renewable projects throughout the country, regardless of RTO/ISO status, are developed in the context of procurement by load-serving entities and not because of the RTO/ISO's market design.

Figure 1



Source: U.S. Energy Information Administration, Annual Electric Generator Data Form EIA-860, available at https://www.eia.gov/todayinenergy/detail.php?id=27632.

13 U.S. Energy Information Administration, *PURPA qualifying facilities as a percentage of total renewable capacity (1980-2015)*, "Today in Energy (Aug. 23, 2015)," available at: https://www.eia.gov/todayinenergy/detail.php?id=27632.

14 U.S. Energy Information Administration *PURPA qualifying facilities as a percentage of total renewable capacity (1980-2015)*, "Today in Energy (Aug. 23, 2015)," available at: https://www.eia.gov/todayinenergy/detail.php?id=27632; ABB, Ability Velocity Suite, https://new.abb.com/enterprise-software/energy-portfolio-management/market-intelligence-services/velocity-suite; SEIA/GTM, Solar Market Insight, https://www.seia.org/us-solar-market-insight.

15 U.S. Energy Information Administration *PURPA qualifying facilities as a percentage of total renewable capacity (1980-2015)*, "Today in Energy (Aug. 23, 2015)," available at: https://www.eia.gov/todayinenergy/detail.php?id=27632; ABB, Ability Velocity Suite, https://new.abb.com/enterprise-software/energy-portfolio-management/market-intelligence-services/velocity-suite; SEIA/GTM, Solar Market Insight, https://www.seia.org/us-solar-market-insight; please note that the 2017 data are preliminary.

16 U.S. Energy Information Administration *PURPA qualifying facilities as a percentage of total renewable capacity (1980-2015)*, "Today in Energy (Aug. 23, 2015)," available at: https://www.eia.gov/todayinenergy/detail.php?id=27632; ABB, Ability Velocity Suite, https://new.abb.com/enterprise-software/energy-portfolio-management/market-intelligence-services/velocity-suite; SEIA/GTM, Solar Market Insight, https://www.seia.org/us-solar-market-insight.

Because of FERC's open-access regulations, each public utility has on file an OATT.[17] Moreover, the generator interconnection procedures FERC has adopted are a powerful tool to prevent utilities from discriminatorily blocking access to QFs and other independent generators. This has increased the diversity of renewable resources able to serve customer load.

Even in non-RTO/ISO areas, renewables have been developed to serve non-incumbent loads. In Montana, NaturEner's 399-MW wind farm complex—the state's largest—is not contracted to the incumbent utility but to a California utility, and often sells its power on the bilateral wholesale market. The wind and hydroelectric production of the Columbia River Valley, meanwhile, frequently substantially outstrips native load requirements and sells its surplus into both the bilateral markets of the West, at the Mid-Columbia trading hub and also into the California ISO. According to the Public Generating Pool, "[t]he Northwest region has between 4,000–11,000 aMW of surplus energy depending on water year."[18] At the Mid-Columbia trading hub, the average daily volumes from 2014 to 2017 ranged from 35,726 MWh to 52,647 MWh.[19] In short, renewable projects have access to buyers other than the incumbent utility even in the non-RTO Western Interconnection.

Ironically, PURPA in many situations now works at cross purposes with competition policy. In late 2017/early 2018, PacifiCorp issued RFPs for wind and solar resources that would add more than 1,100 MW of wind to their system, as well as repower 1,000 MW of existing wind. Since that time, at least three developers have sought QF pricing for potential wind and solar projects that also competed in, but did not win, these most recent PacifiCorp RFPs. As another example, Public Service Co. of Colorado, doing business as Xcel, issued a competitive solicitation in August 2017 to meet the needs of its customers.[20] The results were stunning: 430 bids, with a range of median bids for renewables without storage of $18.10/MWh for wind to $29.50/MWh for solar, were submitted.[21] The bids constituted some of the lowest-cost renewable bids ever publicly disclosed in the United States.[22] The utility submitted the results to its regulator, which approved the company's Colorado Energy Plan Portfolio, which includes the "acquisition of existing gas-fired generation resources, as well as the development of new wind resources, new photovoltaic (PV) solar resources, and, for the first time in Colorado, utility-scale battery storage."[23] However, relying on PURPA, a large renewable developer who was not awarded a contract in the competitive solicitation has claimed that it has a legal right to sell the output of 17 solar and wind projects totaling nearly 1,400 MW of generation to Xcel, which it claims are based on an "avoided cost" calculated in 2016, before the solicitation, when it established a legally enforceable obligation with the company.[24] That rate would be significantly higher

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17 *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed.Reg. 21,540 (1996), *clarified*, 76 FERC 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888–A, FERC Stats. and Regs. ¶ 31,048, 62 Fed.Reg. 12,274, clarified, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888–B, 81 FERC ¶ 61,248, 62 Fed.Reg. 64,688 (1997), *on reh'g*, Order No. 888–C, 82 FERC ¶ 61,046 (1998).

18 *Reply comments of the Public Generating Pool on IRP Stakeholder Comments*, Order Instituting Rulemaking to Develop an Electricity Integrated Resource Planning Framework and to Coordinate and Refine Long-Term Procurement Planning Requirements, California Public Utilities Commission Rulemaking 1602007 (February 11, 2016) at 3.

19 U.S. Energy Information Administration, Wholesale Electricity and Natural Gas Market Data, available at: https://www.eia.gov/electricity/wholesale/.

20 Public Service Company of Colorado, *2016 Electric Resource Plan: 2017 All Source Solicitation 30-Day Report*, Colorado Public Utilities Commission Proceeding No. 16A-0396E, (December 28, 2017) at 2.

21 For comparison, Public Service Company of Colorado received 55 bids in the 2013 All Source Solicitation. *Id.*, at 3.

22 Aldo Svaldi, "Xcel Energy receives shockingly low bids for Colorado electricity from renewable sources," *The Denver Post*, Jan. 16, 2018; updated Feb. 1, 2018, available at: https://www.denverpost.com/2018/01/16/xcel-energy-low-bids-for-colorado-electricity/.

23 Colorado Public Utilities Commission, *Phase II Decision Approving Retirement of Comanche Units 1 and 2; Approving Resource Selection in Colorado Energy Plane Portfolio; Setting Requirements for Applications for Certificates of Public Convenience and Necessity; and Setting Requirements for the Next Electric Resource Plan Filing*, In the Matter of the Application of Public Service Company of Colorado for Approval of its 2016 Electric Resource Plan, Colorado Public Utilities Commission Proceeding No. 16A-0396E (August 27, 2018) at 3.

24 *Initial Comments of Public Service Company of Colorado*, In the Matter of the Proposed Amendment to Rules Regulating Electric Utilities in Relation to Qualifying Utilities, 4 Code of Colorado Regulations 723-3-3902(c), Colorado Public Utilities Commission Proceeding No. 18R-0492E (August 24, 2018) at 4.

than the prices that emerged from the solicitation.[25] Furthermore, the company had estimated a future demand of only 450 MW in its 2016 Electric Resource Plan.[26] If the developer's claims under PURPA are accepted, the actual winners of the competitive solicitation may be displaced as their output would no longer be useful to serve customers.[27] For those states that have competitive solicitation requirements, the use of PURPA actually encourages developers to evade competitive avenues of resource selection if, as in Colorado, a developer can simply trump that process through a PURPA claim. Such behavior renders the actual winning bidders a mere stalking horse and will ultimately undermine the integrity of the competitive solicitation. The Colorado commission has responded by opening a rulemaking docket to consider whether a QF's legally enforceable obligation, by which it obtains the right to use PURPA to sell its output, should be contingent on a QF's selection through a competitive solicitation.[28] Indeed, the Colorado Independent Energy Association (CIEA), a traditional proponent of PURPA, has raised concerns that the proposed rulemaking may have the unintended consequence of undermining the pending electric resource planning process by retroactively allowing parties that were not selected in that process to fill a resource need that should be satisfied by winning bids in the solicitation process.[29] CIEA put it best when it told the Colorado commission, "[s]uch a result would be administratively inefficient, fundamentally unjust and unreasonable to the multiple IPPs that submitted bids and to the parties that have participated in the ERP as advocates, as well as to the Commission's resources and ratepayer interests protected by a robust ERP process."[30]

Yet, it is unclear what type of competitive solicitations are consistent with FERC's rulings on PURPA. FERC has interpreted the text of 18 CFR 292.309 to exclude certain types of competitive solicitations,[31] but found other types of solicitations do comport with the regulations.[32] In Winding Creek, FERC noted that, "as long as a state provides QFs the opportunity to enter into long-term legally enforceable obligations at avoided cost rates, a state may also have alternative programs that QFs and electric utilities may agree to participate in; such alternative programs may limit how many QFs, or the total capacity of QFs, that may participate in the program."[33] FERC also noted that in *Hydrodynamics*, the issue was that "there were no other means to obtain a PURPA long-term avoided cost legally enforceable obligation."[34] Though these rulings are nonbinding, FERC should establish transparent guidelines regarding competitive solicitations to facilitate PURPA implementation and promote competition.

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25 *Id.*

26 Aldo Svaldi, "Xcel Energy receives shockingly low bids for Colorado electricity from renewable sources," *The Denver Post*, Jan. 16, 2018; updated Feb. 1, 2018, available at: https://www.denverpost.com/2018/01/16/xcel-energy-low-bids-for-colorado-electricity/.

27 The absence of clear FERC policy on the use of competitive solicitations could mean that this is a matter decided in the courts. The developer, sPower Development Company, LLC (sPower), brought an enforcement action at FERC against the Colorado commission to enforce its legally enforceable obligation under PURPA because the utility had told sPower that under the Colorado commission's regulations, it could not purchase a QF's capacity or energy power unless the QF is awarded a contract under a bid or auction or combination process. FERC was without a quorum and did not rule on the matter, at which point sPower filed in federal court seeking declaratory and injunctive relief that this part of the rule is unlawful and violates PURPA. *sPower Dev. Co., LLC v. Colorado Pub. Utilities Comm'n*, No. 17-CV-00683-CMA-NYW, at 59 (D. Colo. Jun. 18, 2018). This matter is still pending. Separately, the Colorado commission has opened a rulemaking to review its rule at issue and that proceeding has not concluded yet. *Notice of Proposed Rulemaking*, In the Matter of the Proposed Amendment to Rules Regulating Electric Utilities in Relation to Qualifying Utilities, 4 Code of Colorado Regulations 723-3-3902(c), Colorado Public Utilities Commission Proceeding No. 18R-0492E (July 25, 2018).

28 *Notice of Proposed Rulemaking*, In the Matter of the Proposed Amendment to Rules Regulating Electric Utilities in Relation to Qualifying Utilities, 4 Code of Colorado Regulations 723-3-3902(c), Colorado Public Utilities Commission Proceeding No. 18R-0492E (July 25, 2018).

29 *Comments of the Colorado Independent Energy Association*, In the Matter of the Proposed Amendment to Rules Regulating Electric Utilities in Relation to Qualifying Utilities, 4 Code of Colorado Regulations 723-3-3902(c), Colorado Public Utilities Commission Proceeding No. 18R-0492E, at 3.

30 *Id.*

31 *See, e.g., Hydrodynamics, Inc.*, 146 FERC ¶ 61,193 at P. 32 (2014) (*Hydrodynamics*); *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, at P. 40 (2013).

32 *Winding Creek Solar, LLC*, 151 FERC ¶ 61,103 (2015) (*Winding Creek*).

33 *Winding Creek* at P. 6.

34 *Winding Creek* at P. 7.

In a similar vein, PURPA is increasingly being used to attempt to sell energy production to places where customer load is flat, declining, or growing too modestly to absorb the production. In Wyoming, a utility noted in a 2015 filing to the Public Utilities Commission that QFs had requested pricing for 4,563 MW of supply, even though its integrated resource plan indicated "no need for any system resource until 2028."[35]

Finally, as the Commission knows, QF developers have gamed the rules of PURPA to engage in a type of regulatory arbitrage that allows them to take advantage of PURPA price constructs, rather than engage in the routine procurement practices of utilities. The Idaho Public Utilities Commission has observed developers disaggregating larger projects into smaller ones to take advantage of favorable PURPA rates.[36] Clearly, there are economies of scale in renewable project development, so this type of activity around PURPA ultimately increases costs to ratepayers.

FERC SHOULD SUPPORT EXPANDING COMPETITIVE PRACTICES UNDER PURPA

FERC should allow competitive practices to supplant certain PURPA requirements under Sec. 210(m)(1)(C).

FERC should allow competitive practices to supplant certain PURPA requirements under Sec. 210(m)(1)(C). EPAct '05 permits FERC to exempt utilities from the requirements of PURPA if QFs there have access to wholesale markets. Sec. 210(m)(1) described two types of markets in subparagraphs (A) and (B), which FERC has interpreted to apply to six of the seven RTOs/ISOs. For the seventh RTO/ISO, FERC found that ERCOT met the requirements of the third subparagraph of Sec. 210(m)(1), subparagraph (C).[37] But subparagraph (C) is much broader than that; it could and should be applied to non-RTOs that have a sufficient measure of competitive access to QF technologies. To the extent the Commission has found Sec. 210(m)(1)(C) to be, essentially, yet another RTO/ISO provision, it has never been properly implemented. The Commission should determine that there are certain developments in the wholesale markets outside of RTOs that have provided QFs avenues to contract formation similar to those in RTOs/ISOs. Through Sec. 210(m)(1)(C), FERC has the legal authority to declare those areas outside of RTOs/ISOs similarly exempt from PURPA.

At the time EPAct '05 was enacted, all seven of the RTOs/ISOs already existed. By the broad language of Section 210 (m)(1)(C), Congress clearly meant to allow for other forms of wholesale markets to satisfy the requirements of the exemption, but instead of specifying what the characteristics would be, Congress left this to FERC to interpret. Congress gave FERC flexibility with subparagraph (C) to apply it to other areas, outside of the well-known RTO structures.

35 *Application*, In the Matter of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities (Aug. 26, 2015), Wyoming PSC Docket No. 20000-481-EA-15, at 9.

36 FERC Technical Conference Submittal of Commissioner Paul Kjellander, at 4-5 (discussing the example of Cedar Creek Wind LLC disaggregating a single 151 MW wind project into two 78 MW projects in 2010 to become QFs and then later dividing the projects again into five projects, spaced a mile apart, to take advantage of Idaho's then standard (or published) rates for QF projects at or below 10 average MW).

37 Order No. 688 at P. 12.

Given how dramatically the energy sector has changed since 2005, FERC should use the flexibility provided for by subparagraph (C) to account for these changes and to extend the market exemption to areas that have developed competitive markets since then. In Order 688A, the Commission acknowledged that it was its role to consider what other market designs might provide sufficient sales alternatives for QFs.[38] "The Commission explained that although this provision is not clear on its face, its reference to subparagraphs (A) and (B) requires the Commission to be mindful, in interpreting the provision, of the two types of requirements that are embodied in those sections, i.e., (1) nondiscriminatory access to transmission and interconnection services, and (2) competitive short-term and long-term markets that provide a meaningful opportunity to sell to buyers other than the utility to which the QF is interconnected."[39]

Congress gave FERC flexibility with subparagraph (C) to apply it to other areas, outside of the well-known RTO structures.

Although it might have been reluctant a decade ago when the exemption was new to adopt any bright line tests when applying subparagraph (C), FERC should now create a "yardstick" that signals to both the utilities and states what characteristics of a wholesale market would allow them to qualify under Sec. 210(m)(1)(C).[40] Subparagraph (C) requires there to be "wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B)." NARUC proposes that for long-term energy and capacity, this would mean that integrated resource plans (IRPs) or their equivalent identify additional energy and capacity needs and that to fill those needs competitive solicitations for energy and capacity would be conducted. These competitive solicitations, or request for proposals (RFPs), would be open to all QFs and would be overseen by state commissions or administered independently of any individual market participant to mitigate anti-competitive behavior of the buyer. As it did for affiliate transactions, FERC could adopt advice or guidelines to ensure competitive solicitations are genuinely competitive.[41] In *Allegheny*, to determine whether an RFP met the underlying principal of the *Edgar* criteria that no affiliate should receive undue preference during any stage of the RFP, the Commission established four guidelines: "a. Transparency: the competitive solicitation process should be open and fair[;] b. Definition: the product or products sought through the competitive solicitation should be precisely defined[;] c. Evaluation: evaluation criteria should be standardized and applied equally to all bids and bidders[; and] d. Oversight: an independent third party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection."[42] Here, FERC could adopt similar guidelines or look to whether there was a large number of bilateral agreements for a particular "region" or to the existence of retail competition to determine the competitiveness of these markets.

For short-term energy and capacity, NARUC proposes that utilities could demonstrate that transactions routinely occur at one or more liquid trading hubs, and that load-serving entities engage in "off-system" transactions at these hubs.[43] To ensure that QFs have alternatives to their local utility to sell their electric energy, utilities could be required to apply for a Sec. 210(m)(1)(C) exemption *en bloc* for a particular region and demonstrate that a QF would have the opportunity to sell to multiple utilities, as opposed to only one.

38 Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP. 46-47.

39 Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P. 34.

40 Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP. 46-47.

41 *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382 (1991) ("*Edgar*"); *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082 (2004) ("*Allegheny*").

42 *Allegheny*, 108 FERC ¶ 61417.

43 For example, a utility like Montana's NorthWestern Energy trades energy at a point off-system of its own transmission, at Mid-Columbia.

For example, if several utilities in a region each adopted a robust competitive solicitation framework for their incremental energy and capacity needs, and each of them has an OATT, this legal architecture would ensure that a QF in the area would have the opportunity to sell to multiple utilities, as opposed to only one. NARUC expects some of this work might be naturally undertaken by existing consortia of utilities that are subject to region-focused FERC regulations, such as the regional transmission planning groups already in place that respond to Order 890/1000 obligations.

In finding that ERCOT satisfied the requirements of subparagraph (C), the Commission has already signaled that no centralized day-ahead market for energy is necessary and that a forward capacity market is not required.[44] The Commission discussed that ERCOT does have an independently operated market mechanism with a robust bilateral market, which could be considered necessary characteristics in developing a yardstick.[45] In the ERCOT determination, the Commission also noted that ERCOT had the support of the Public Utilities Commission of Texas.[46] In this case, NARUC on behalf of the public utilities commissions is affirmatively seeking a pathway for utilities outside of the seven RTOs to be eligible for the market exemption. NARUC cannot obligate its members unanimously to meet a yardstick that FERC proposes; indeed, as noted previously, although a majority of states require or encourage competitive solicitations, some do not. But FERC should provide an avenue for states who want to rely on competitive practices, such as a robust competitive solicitation, to use those instead of PURPA to fulfill the federal law's underlying policy objectives.

Most states are members of an organized wholesale market, and through Sec. 210(m)(1), utilities in all of the RTO/ISO regions have been able to receive an exemption. However, that should not mean that utilities outside of those regions are ineligible to receive an exemption. Only Sec. 210(m)(1)(B)(i) even mentions "a Commission-approved regional transmission entity" and that is only in reference to transmission and interconnection services. None of the references to "wholesale markets" are tied to them being "Commission-approved" markets; thus, utilities in markets that have monopolies on load-service obligations, but that nevertheless make the requisite showing of competitiveness, should be granted the exemptions. In fact, utilities in two of the RTOs/ISOs, those in CAISO and SPP, had to seek separate determinations that they were in competitive markets because FERC's regulations established only that CAISO and SPP had satisfied the criteria of the first part of subparagraph (B).[47] For a renewable developer, there is little salient difference between obtaining a long-term power purchase agreement from a vertically integrated utility in the SPP footprint as versus obtaining one from a vertically integrated utility in the non-RTO Western Interconnection. Each rely more on long-term procurement regulations established and overseen by state regulators, as opposed to the wholesale market that was never designed to provide revenues sufficient to signal the entry and exit of resources over a longer time step. The determinations on exemption regarding the utilities in CAISO and SPP can provide examples of the characteristics for a yardstick, as can the examples of utilities that did not receive an exemption.[48] In any case, although NARUC concedes that RTOs can provide many substantial benefits, FERC should not be hidebound in retaining a false dichotomy between RTO/non-RTO when it comes to PURPA. Non-RTO areas should be able to qualify for Sec. 210(m)(1)(C) through other means.

44 "ERCOT does not administer a centralized day-ahead market for energy, but Reliant submitted testimony that ERCOT's real-time market has been sufficient to support a robust market-based (as opposed to administratively-created) day-ahead market for sale of electricity." Order 688 at P. 177.

45 Order No. 688 at P. 174 and p. 176.

46 Order No. 688 at P. 179.

47 The first part of subparagraph (B) reads: "transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers." The Commission granted five utilities in SPP exemptions under subparagraph (B) because they provided, among other things, data on actual transactions and identified a number of RFPs for capacity and energy purchases. *Xcel Energy Servs*., Inc., 122 FERC ¶ 61,048, reh'g denied, 124 FERC ¶ 61,073 (2008). Three utilities in California were granted exemptions under Section 210(m)(1)(C), and not subparagraph (B). *Pacific Gas and Electric Company*, 135 FERC ¶ 61,234 (2011).

48 The Commission denied Public Service Company of New Mexico's application for an exemption under section 210(m)(1)(C) because at the time, there was not sufficient development of competitive procurement opportunities in the West. *Public Service Co. of New Mexico*, 140 FERC ¶ 61,191 (2012).

CONCLUSION

The Commission should create a yardstick of characteristics that describe in detail how a utility could qualify for an exemption under subparagraph (C). This would then allow utilities and state regulators to respond to that yardstick by considering which, if any, practices should change in an attempt to "meet" that yardstick. Utilities and regional groups of utilities that already meet, or will meet, the yardstick can then apply for an exemption in a separate proceeding under Sec. 210(m)(1)(C).

Providing a clear and fair pathway for utilities outside of RTOs/ISOs to qualify for the exemption would give public utilities commissions the choice to use competitive measures instead of the trial-like administrative proceedings to arrive at the least-cost procurement of resources for consumers; thus, relieving them of the administrative burdens of PURPA. FERC, meanwhile, would obtain an opportunity to use subparagraph (C) to provide states an option to promote competition policy and closer intraregional cooperation. This would be a way to better fulfill the goals of both EPAct '05 and PURPA.

APPENDIX

CFR RED-LINE

18 CFR § 292.309 Termination of obligation to purchase from qualifying facilities.[49]

(a) After August 8, 2005, an electric utility shall not be required, under this part, to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility if the Commission finds that the qualifying cogeneration facility or qualifying small power facility production has nondiscriminatory access to:

(1)(i) Independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) Wholesale markets for long-term sales of capacity and electric energy; or

(2)(i) Transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) Competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term, and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(3)Wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in paragraphs (a)(1) and (a)(2) of this section. A utility or group of utilities can prove that these conditions are met by demonstrating that there is (i) a competitive short-term market and (ii) a competitive long-term market, each of which provides technologies that qualify as QFs with a meaningful opportunity to sell their output.

49 Sections 292.309(a)(1), (2), and (3) of the Commission's regulations codify the directives of Sections 210(m)(1)(A), (B), and (C) of PURPA. 18 C.F.R. §§ 292.309(a)(1), (2), (3) (2018).