



N A R U C
National Association of Regulatory Utility Commissioners

February 22, 2018

The Honorable Lisa Murkowski
U.S. Senate
Chairman
Committee on Energy and Natural Resources
Washington, D.C. 20510

The Honorable Maria Cantwell
U.S. Senate
Ranking Member
Committee on Energy and Natural Resources
Washington, D.C. 20510

RE: February 8, 2018, Senate Committee on Energy and Natural Resources Hearing on Energy Infrastructure

Dear Chairman Murkowski and Ranking Member Cantwell:

During the hearing conducted by the U.S. Senate Committee Energy and Natural Resources on February 8, 2018, titled “The Evolution of Energy Infrastructure in the United States and How Lessons Learned from the Past Can Inform Future Opportunities,” there was discussion of the Public Utility Regulatory Policies Act of 1978 (PURPA). On behalf of the National Association of Regulatory Utility Commissioners (NARUC), I respectfully request that these comments regarding PURPA be included in that record.

NARUC is a non-profit organization founded in 1889. Our members are the public utility commissions in all 50 States, the District of Columbia, and the U. S. territories. NARUC’s mission is to serve the public interest by improving the quality and effectiveness of public utility regulation. Our members regulate the retail rates and services of electric, gas, water, and telecommunications utilities. We are obligated under the laws of our respective States to assure the establishment and maintenance of essential utility services as required by public convenience and necessity and to ensure that these services are provided under rates, terms, and conditions of service that are just, reasonable, and non-discriminatory.

NARUC encourages legislative and regulatory efforts to update and reform PURPA. Specifically, we would support reform of PURPA in ways that would address: the mandatory purchase obligation so that State utility commissions could better protect their ratepayers; modernizing the nondiscriminatory access provisions; and reform of the so-called “one-mile-rule.”

In 1978, Congress enacted PURPA in response to a national energy crisis. PURPA’s purpose was to promote the development of renewable energy and cogeneration technologies, as competitive alternatives to oil and other scarce sources of fuel. To do this, PURPA required electric utilities to purchase power produced by qualifying facilities (QFs), a requirement referred to as the *mandatory purchase obligation*.

PURPA mandated these power sales at a utility’s *avoided cost*, which conceptually meant consumers would pay no more and no less for PURPA resources than they would for non-PURPA alternatives. However, the Federal Energy Regulatory Commission (FERC) has long held that PURPA requires that States forecast a utility’s avoided cost into the future for the purpose of offering QFs a long-term contract at administratively determined rates.¹ This type of administrative pricing essentially requires States to

¹ *Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,218, 12,224 (Feb. 25, 1980); FERC Stats. & Regs. ¶ 30,128, *order on reh’g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff’d in part & vacated in part sub nom. Am. Elec. Power*

guess at future market prices, allowing QFs to lock in rates that often substantially overstate the actual avoided cost. This approach is fundamentally different when compared to procurements that use competitive mechanisms like auctions or requests for proposals to discover the least-cost resource.² It is almost universally acknowledged that a competitive process, where generators with a profit motive vie against one another for the business of the nation's consumers, is a best practice when compared with prices set by a State commission through a trial-like proceeding where the cost-reducing aspect of competition is absent.

In addition to the flaws underlying so-called avoided-cost pricing, PURPA's mandatory purchase obligation is a poor match for the relatively flat, and sometimes even declining, customer demand for electricity. In many parts of the United States, new power plants of any kind may simply not be needed—a testament in large part to the increasing efficiency of residential and commercial appliances that previously drove demand. Yet unneeded power plants are in some places nevertheless being brought online due to PURPA's mandatory purchase obligation, a legal provision which suggests that utilities must buy from QFs even when their consumers do not need additional energy supply. As one utility noted in a filing to the Wyoming Public Service Commission, QFs had requested pricing for 4,563 MWs of supply even while its integrated resource plan indicated “no need for any system resource until 2028.”³ In sum, PURPA's flawed approach to administrative pricing and its mandatory purchase obligation is harming consumers; ironically, it is at odds with the values of competition and conservation that are at the heart of PURPA itself.

PURPA is nearly four decades old, and it reflects the reality of another era when renewables were scarce, demand was booming, and the country looked for ways to diversify its energy portfolio and shield itself from overreliance on foreign sources of supply. Today, the world has changed dramatically. The U.S. Energy Information Administration reports that *nearly half* of utility-scale capacity installed in 2017 came from renewable resources.⁴ More than half of the States have their own renewable mandates, and even those which do not have shown substantial additions in renewables, not because of PURPA, but because of the falling cost curve of renewable technologies such as solar and wind.⁵

Serv. Corp. v. FERC, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

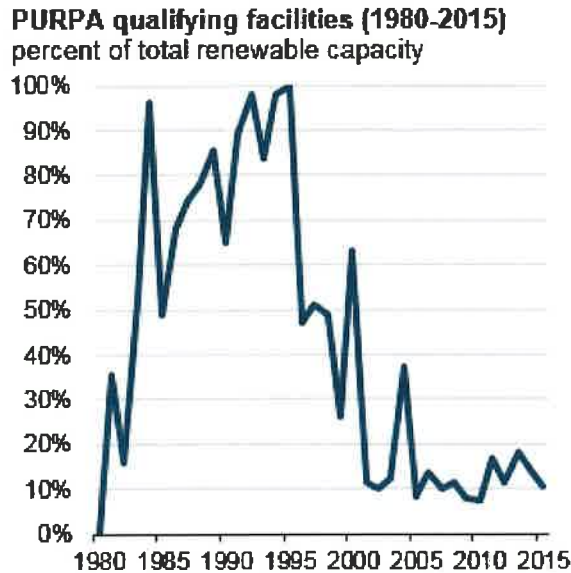
² State attempts to use competitive processes to comply with PURPA have been found unlawful. Most recently, California's use of a reverse-auction process to identify avoided-cost, awarding the lowest-bidders contracts, was declared invalid by a federal district court. *Winding Creek Solar LLC v. Michael Peevey, et al.*, Case 3:13-cv-04934-JD (N.D. Cal.) at 14 (Dec. 6, 2017).

³ 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, p. 9.

In December 2017, Rocky Mountain Power filed an update reporting that more than 1,600 MWs of QFs had proposed online dates in 2018, 2019, and 2020. “Semi-Annual Qualifying Facility Queue Compliance Report,” (Dec. 27, 2017), Wyoming PSC Docket No. 20000-481-EA-15.

⁴ 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 online at: <https://www.eia.gov/todayinenergy/detail.php?id=34472>.

⁵ U.S. Energy Information Administration, *PURPA qualifying facilities as a percentage of total renewable capacity (1980-2015)*, “Today in Energy (Aug. 23, 2015),” available online at: <https://www.eia.gov/todayinenergy/detail.php?id=27632>.



To the degree that PURPA was enacted at a time when renewable technologies were not the norm, that norm has changed profoundly. There has been another significant transition, too: Nearly all States today require power generation to be procured through competitive means. Even in States that do not have consumer choice, monopoly utilities are typically required to procure resources through competitive solicitation. In short, other events have transpired that have accomplished PURPA’s twin goals of advancing QF technologies and introducing competition into the sector, rendering PURPA itself largely needless.

Congress has recognized previously that as the sector changes, so too must PURPA.⁶ Since its last revision of PURPA more than a decade ago, the electric industry has undergone an arguably more profound transition than it did from the time of PURPA’s enactment to the Energy Policy Act of 2005 (EPAAct ’05). That is why the moment is ripe for your consideration of reforming and modernizing PURPA in a way which builds on the successes of EPAAct ’05 by encouraging competition as a means toward renewable development.

As stated previously, NARUC believes that three areas of PURPA need to be addressed. First, and most importantly from our perspective, is the mandatory purchase provision. This provision ought to be amended to acknowledge that a competitive process should be allowed to substitute for PURPA’s mandatory purchase obligation using administrative-forecast pricing. QFs could be protected by tying applicability specifically to a requirement for competitive processes to be open to PURPA resources. Consumers, meanwhile, could be protected by only having to pay for resources that had offered the least cost, or the greatest value. Similarly, any legislative language ought to acknowledge those occasions, caused by flat or declining demand, when utilities have greater supply than demand. This would hew to PURPA’s original principle of conservation by not requiring consumers to pay for the construction of new power plants that simply are not needed.

Second, modernizing the nondiscriminatory access provisions of PURPA is now necessary. Very small resources may not have the ability, because of either market rules or because of the transaction costs associated with participating in such markets, to sell their energy and capacity efficiently into the existing

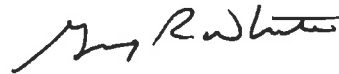
⁶ See Energy Policy Act of 2005 § 1253, 16 U.S.C.A. § 824a-3(m) (2017). These statutory changes, together with FERC’s implementing regulations, recognized that the emergence of regional transmission organizations (RTOs) that ran competitive wholesale auctions was achieving PURPA’s goals through more efficient means.

competitive markets. However, the current exemption of 20 MW badly overstates the size threshold.⁷ A provision limiting the exemption to 2.5 MW is more in line with the realities of modern power generation, where smaller resources are being developed and encouraged to participate in competitive wholesale markets. Seemingly all such markets have size thresholds smaller than 2.5 MW, so such a size conservatively and fairly provides a threshold that protects smaller QFs while encouraging competition among larger projects.⁸

Third, legislation needs to address an enduring problem where a single developer strategically disaggregates a project into multiple QFs. Larger projects might have to participate in a competitive solicitation, because they are larger than the 80 MW that PURPA defines as the maximum capacity for a QF, so developers sometimes will break such projects into several QFs to avail each of the mandatory purchase obligation at an administrative-forecast rate. Similarly, a developer might break one larger project into several small QFs so to enter into standard-offer contracts available only to smaller QFs, which tend to be more lucrative. This regulatory arbitrage is a form of gaming that ultimately disadvantages consumers. It represents an attempt by certain QFs to avoid competition by safe-harboring themselves in what has been called the “one-mile rule,” as FERC’s determination that a bright-line of one mile’s distance qualifies projects as separate QFs.⁹ Legislation should allow for a fact-dependent investigation by FERC to police such abuse.

Thank you for giving NARUC an opportunity to present our views on the current state of PURPA. We have reached out to our FERC colleagues on some of these issues; however, we believe legislation is necessary to provide us with the ability to secure a reliable and affordable energy future for the nation. We look forward to working with this Committee on meaningful PURPA reform legislation.

Sincerely,



Greg R. White
Executive Director, NARUC

CC: All Members of the Senate Committee on Energy and Natural Resources

⁷ 18 CFR § 292.309(d)(1) (2017).

⁸ “Considerations for Minimum Resource Size Threshold in the Capacity Market,” (July 2017), Alberta Electric System Operator, citing to CAISO, NEISO, NYISO, and PJM size thresholds at p.3. Available online at: <https://www.aeso.ca/assets/Uploads/20170704-Eligibility-Session-3-Minimum-Resource-Size-Presentation.pdf>.

⁹ 18 C.F.R. § 292.204(a)(2) (2017).