Testimony of James Danly
General Counsel
Federal Energy Regulatory Commission
Before the Committee on Energy and Commerce
Subcommittee on Energy
United States House of Representatives
January 19, 2018

Introduction

My name is James Danly, and I am the General Counsel of the Federal Energy Regulatory Commission (FERC or the Commission). I appear before you as a staff witness, and the views I present are not necessarily those of the Commission or any individual Commissioner.

I have been asked to testify on three bills that, between them, would amend both the Natural Gas Act and the Public Utility Regulatory Policies Act of 1978 (PURPA).

H.R. 4476

The One-Mile Rule. PURPA defines a small power production facility as a facility which has a power production capacity which, *together with any other facilities located at the same site (as determined by the Commission)*, is not greater than 80 MW. FERC's PURPA regulations provide that qualifying small power production facilities (QFs) are considered to be at the same site if they are located within one mile of each other, share the same energy resource, and are owned by the same person(s) or its affiliates. The proposed bill would convert the Commission's rule to a rebuttable presumption.

Non-Discriminatory Access. The Energy Policy Act of 2005 allowed the termination of the "mandatory purchase obligation" enjoyed by QFs if the Commission finds that the QF has nondiscriminatory access to the market. In implementing EPACT 2005, the Commission determined that larger QFs typically have better access to markets than smaller QFs and established a rebuttable presumption that QFs with a net capacity above 20MW have non-discriminatory access. The proposed bill would reduce the size threshold to which that principle applies to 2.5MW.

State or Local Determinations of Need. PURPA established a nationwide policy that electric utilities be required to purchase electric energy from QFs at rates set by state regulatory agencies. The proposed bill would eliminate the nationwide policy and replace it with a state-by state regime in which state agencies can relieve utilities of their obligation to purchase electric power from QFs upon certifying to FERC that there is no need for the QFs' electric power. This bill would fundamentally alter PURPA and is a question properly assigned to the consideration of Congress.

H.R. 4605 & 4606

H.R. 4605 and 4606 primarily concern the authorities of the Department of Energy. The DOE has delegated to FERC the responsibility for authorizing and overseeing construction and operation of on-shore and near-shore LNG terminals. The DOE has retained the responsibility for authorizing the import or export of natural gas. H.R. 4605 would remove that responsibility from the DOE. H.R. 4606 also primarily concerns the DOE, establishing a threshold quantity of natural gas export below which the export is to be deemed by the DOE to be in the public interest.

Thank you for the opportunity to appear before the subcommittee to offer my thoughts on these bills. I look forward to answering any questions you may have and to working with the subcommittee going forward.

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Introduction

Mr. Chairman, Ranking Member Rush, and members of the Subcommittee: Thank you for inviting me to testify today. My name is James Danly, and I am the General Counsel of the Federal Energy Regulatory Commission (FERC or the Commission). I appear before you as a staff witness, and the views I present are not necessarily those of the Commission or any individual Commissioner.

I have been asked to testify on three bills that, between them, would amend both the Natural Gas Act and the Public Utility Regulatory Policies Act of 1978 (PURPA) and also direct the Commission to publish in the Federal Register a final rule amending its regulations implementing section 3(17)(A)(ii) of the Federal Power Act.

H.R. 4476

Section 2: One-Mile Rule

Section 3 of the Federal Power Act, as amended by PURPA, defines a small power production facility as a facility which has a power production capacity which, *together*

with any other facilities located at the same site (as determined by the Commission), is not greater than 80 MW.[1] Implementing that provision, section 292.204(a) of the Commission's PURPA regulations provides that qualifying small power production facilities (QFs) are considered to be at the same site if they are located within one mile of each other, share the same energy resource, and are owned by the same person(s) or its affiliates.[2] This regulatory provision is commonly referred to as "the one-mile rule," and is used to calculate the size of a small power production facility and thus to distinguish one facility from a separate facility. The Commission has stated that the one-mile rule for determining whether small power production facilities are "at the same site" is a rule, that is, an irrebuttable presumption, that facilities within one mile are "at the same site" and that facilities more than a mile apart are not.[3]

H.R. 4476 would direct the Commission, within 180 days, to issue a Final Rule providing that the one-mile rule is a *rebuttable presumption* that any person has the opportunity to rebut.[4]

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[1] 16 U.S.C § 796(17)(A)(ii) (2012).

[2] 18 C.F.R. § 292.204(a) (2017).

[3] *Northern Laramie Range Alliance*, 139 FERC ¶ 61,190, at PP 22-24 (2012).

[4] I note that certification of QFs is vested exclusively with the Commission, and the Commission receives thousands of certification requests each year. Changing the one-mile rule from a rule to a rebuttable presumption could greatly increase the amount of litigation at the Commission and would require a greater commitment of resources by the Commission.

At a technical conference held in June 2016 addressing various aspects of the Commission's implementation of PURPA, and in subsequent written comments, the Commission received input on the one-mile rule from all segments of the electric industry. Broadly speaking, while QFs generally supported retention of the one-mile rule as it provides regulatory certainty, electric utilities generally opposed the rule as arbitrary and not necessarily the right measure alone to determine whether generating facilities were separate QFs or together constituted a single QF. Many of the factors discussed at the technical conference appear in H.R. 4476, in the list of factors the Commission is to consider in determining if facilities are located at the same site.

The one-mile rule is a matter that the Commission has the authority to change, as it is a Commission-adopted rule. While the technical conference gave the Commission a head-start as to how it might be changed, including identification of factors that might be considered, the Commission could further flesh out what factors should be considered in a Notice of Proposed Rulemaking, which would likely generate comments from across the electric industry, allowing the Commission to further refine its thinking before issuing any Final Rule.

That being said, Congressional guidance as to what changes, if any, that Congress believes the Commission should make to the one-mile rule would be helpful.

Section 3: Nondiscriminatory Access

In 2005, in the Energy Policy Act of 2005, [5] Congress added subsection (m) to section 210 of PURPA.[6] Subsection (m) allowed the termination of the otherwise-applicable requirement that an electric utility must purchase electric energy from QFs (often referred to as the "mandatory purchase obligation") if the Commission finds that the QF has nondiscriminatory access to one of three categories of markets defined in section 210(m)(1) of PURPA. In 2006, in response to EPAct 2005, the Commission issued Order No. 688,[7] in which the Commission revised its regulations to implement section 210(m). The regulations promulgated in Order No. 688 established a process for determining whether a QF has nondiscriminatory access to the markets identified in section 210(m), and thus whether a QF has access to a power sales market that provides meaningful opportunities to sell its output.[8] Of relevance here, the Commission adopted rebuttable presumptions that, broadly speaking, larger QFs have nondiscriminatory access to robust competitive markets and smaller QFs would not have nondiscriminatory

[5] Pub. L. No. 109-58, 119 Stat. 594 (2005) (EPAct 2005).

[6] 16 U.S.C. § 824a-3(m) (2012).

[7] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, 71 Fed. Reg. 64342 (Nov. 1, 2006), 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).

[8] 18 C.F.R. § 292.309(a)(1)(e) (2017).

access to such markets, notwithstanding the availability of transmission service under an OATT. The Commission determined that a reasonable definition of smaller QFs were those with a net capacity equal to or less than 20 MW.

For QFs with net capacity above 20 MW, the rebuttable presumption that such QFs have nondiscriminatory access to the relevant markets sufficient to warrant termination of the mandatory purchase obligation effectively means that QFs objecting to the lifting of the mandatory purchase obligation have the burden of demonstrating that, in fact, they do not have such access. While the regulations permit a utility to seek relief from the mandatory purchase obligation even for those QFs with net capacity equal to or less than 20 MWs, there is a rebuttable presumption that such QFs do not have nondiscriminatory access to the relevant markets and thus the burden is on the utility to demonstrate that such QFs do indeed have nondiscriminatory access to the relevant markets.

The Commission's identification of a threshold – currently set at 20 MW – recognizes that, in practice, it is likely that a smaller QF will have greater difficulty obtaining nondiscriminatory access to markets due to the tendency for smaller QFs to be interconnected to lower voltage radial lines, and the need to overcome potential obstacles to nondiscriminatory access, such as local distribution access rules (rules that are not within the Commission's jurisdiction, and that may not provide for open access), pancaked delivery rates and additional administrative burdens to obtain access. The Commission set this threshold line at 20 MW reflecting its understanding of

interconnection practices and of the relative capabilities of smaller QFs.

H.R. 4476 amends section 210(m) with respect to qualifying small power production facilities and not qualifying cogeneration facilities. H.R. 4476 changes the current 20 MW threshold to 2.5 MW for qualifying small power production facilities, which would shift the rebuttable presumption such that those qualifying small power production facilities above 2.5 MW would be presumed to have such access (where, before, the presumption has been that QFs above 20 MW have such access), and the burden would be on the small power production facility above 2.5 MW to demonstrate that, in fact, it does not have such access (where, before, the burden was on QFs above 20 MW to demonstrate that they had no such access).

Section 4: State or Local Determinations of Need

PURPA adopted, nationwide, a requirement that electric utilities purchase electric energy from QFs, with the actual rates set by the relevant state regulatory agency (or by the electric utility itself, if the electric utility is not subject to state regulation) considering the factors identified by the Commission.

Similar to Section 3, H.R. 4476 changes the mandatory purchase obligation for qualifying small power production facilities and not for qualifying cogeneration facilities. H.R. 4476 proposes to amend section 210(m) of PURPA to provide that no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying small power production facility if the appropriate state regulatory

agency or non-regulated electric utility finds, and submits to the Commission a written determination, that: (1) the electric utility has no need to purchase electric energy from such qualifying small power production facility in the amounts to be offered within the timeframe proposed by the qualifying small power production facility, consistent with the needs for electric energy and the timeframe for those needs as specified in an electric utility's integrated resource plan; or (2) the electric utility employs integrated resource planning and conducts a competitive resource procurement process for long-term energy resources that provides an opportunity for qualifying small power production facilities to supply electric energy to the electric utility in accordance with the integrated resource plan of the electric utility.

In contrast to the two proposals discussed above which focus on Commission implementation of PURPA, this proposal fundamentally changes PURPA from a national energy program to, essentially, a state-by-state energy program – with a likelihood of substantially varying potential outcomes state-by-state. The proposal would, in effect, eliminate PURPA's directive of mandatory purchases by electric utilities of electric energy produced by qualifying small power production facilities, as it would leave it up to each relevant state regulatory agency or non-regulated electric utility to determine if there is a need for QF power and thus whether utility must purchase from a qualifying small power production facility. This fundamental change in PURPA is decidedly a matter beyond the Commission's authority under PURPA, and one more appropriate for Congressional consideration and action, as Congress deems appropriate.

H.R. 4605 & 4606

Because the Subcommittee today is also considering two bills related to exportation of liquefied natural gas (LNG), I also would like to comment briefly on the Commission's role with respect to that subject.

DOE has delegated to the Commission responsibility for authorizing and overseeing the construction and operation of on-shore and near-shore LNG terminals. The Commission does not authorize the import or the export of natural gas, including LNG, as a commodity. Instead, DOE has retained that responsibility. Accordingly, applications for authority to import or export the commodity of natural gas must be submitted to the DOE, while applications for the construction and operation of the facilities necessary to perform such imports or exports must be submitted to the Commission.

HR 4605 would change DOE's authorities under the Natural Gas Act by removing any requirement for a commodity authorization.

Notably, the bill as drafted would delete section 3(a) which includes a public interest standard for judging whether to approve LNG terminals. Congress may wish to reintroducing such a standard as it considers this bill. If it would be of assistance to the Committee, Commission staff would be happy to provide technical assistance as you move forward.

Thank you for the opportunity to appear before the subcommittee to offer my thoughts on these bills. I look forward to answering any questions you may have and to working with the subcommittee going forward.