

SUMMARY OF TESTIMONY BY KARL R. RÁBAGO, RÁBAGO ENERGY LLC

PURPA and its implementing regulations have special significance to the emerging, job-creating small renewable power producer sector. As important today as ever, PURPA acts as a bulwark against monopoly utilities' market power abuse and improper discrimination against these private-sector power producers. FERC and states have the authority they need to keep it so.

The "PURPA Modernization Act of 2017," H.R. 4476, proposes three significant and problematic changes to PURPA and should be rejected in favor a more measured and competition-friendly approach to addressing perceived concerns about electricity markets.

H.R. 4476, Section 2 would eliminate the FERC's 1-mile rule and instead mandates a rebuttable presumption, inviting utilities to use FERC litigation as a tool for discouraging and discriminating against small power producers. The resulting uncertainties would make project financing more expensive or impossible for private-sector small power competitors that, unlike monopoly utilities, cannot pass their litigation costs onto captive ratepayers.

H.R. 4476, Section 3 would create a presumption that all facilities 2.5 MW or greater in size have non-discriminatory access to transmission and interconnection services and wholesale markets. H.R. 4476 would burden an important segment of the small power production sector with market access discrimination, stifle competition, and harm the public.

H.R. 4476, Section 4 is about putting the utility fox in charge of the small power sector henhouse. Rather than maintaining proven FERC and state PURPA implementation processes, H.R. 4476 would empower utilities to effectively eliminate PURPA's competitive market. Under H.R. 4476, the monopoly utility can unilaterally determine the size of its competitors' market, particularly in states with no competitive procurement requirements. Section 4 would also provide no opportunity for FERC or states to combat a utility's uncompetitive actions.



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INTRODUCTION

Thank you, Chair Upton, Ranking Member Rush, and Members of the Subcommittee.

For nearly 40 years, Section 210 of the Public Utility Regulatory Policies Act, commonly referred to as PURPA, has served as a critical foundation and backstop in Congress' drive to increase reliance on competitive market forces in the electricity generation sector. Today, PURPA and its implementing regulations have special significance to the emerging market for privately owned small renewable energy power producers. This emerging market is driving job growth in the United States—these smaller facilities create more local jobs per MW than utility-scale fossil fuel plants. Small, privately owned power producers enjoy more siting flexibility, thus enabling their contributions to grid resilience, reliability, and cost reductions. PURPA also ensures that homes and small businesses can take advantage of solar energy, for example, by ensuring that solar generation receives compensation at the avoided cost rate, and that the charges for consumed energy at the home or business are reasonable, by ensuring a reasonable opportunity to interconnect to the grid, and the right to not be charged unfair charges by utilities.¹

Today, PURPA operates in a context of competitive wholesale markets—markets that PURPA helped to establish and grow. PURPA's signature provision, the requirement that utilities must buy energy and capacity under contract terms based upon and not to exceed their avoided costs, remains vital as electricity markets develop for small, privately owned renewable power producers and cogenerators. Thanks to thoughtful and evolving regulatory implementation by the Federal Energy Regulatory Commission ("FERC") and the state regulatory authorities,

¹ See 18 C.F.R. § 292.304-.306.

PURPA, as currently implemented, continues to act as a bulwark against market power abuse and improper discrimination by monopoly utilities against small, privately owned renewable power producers and cogenerators. In short, PURPA is as important today as it has been for nearly 40 years. The FERC and states have the authority to make changes, and the heavy hand of Congress should be tempered.

The “PURPA Modernization Act of 2017” proposes three significant and problematic changes to PURPA implementation. I urge you to reject the changes proposed in H.R. 4476 in favor a more measured and competition-friendly approach that invites FERC and the states to address the perceived concerns motivating that legislation.

H.R. 4476, Section 2 would eliminate the FERC’s 1-mile rule for determining whether proximate power producers meet the definition of “small.” In place of the rule, the bill would mandate a rebuttable presumption that would empower utilities to use FERC litigation as a tool for discouraging and discriminating against small, privately owned renewable power producers. The resulting uncertainties would make project financing more expensive for privately owned small power competitors that, unlike monopoly utilities, cannot pass their litigation costs onto captive ratepayers.

H.R. 4476, Section 3 would create another presumption that would work against small privately-owned power competitors—a presumption that all facilities 2.5 MW or greater in size have non-discriminatory access to transmission and interconnection services and wholesale markets. The FERC established a similar presumption at the 20 MW level under FERC Order 688, issued in 2006, based on an extensive record and regulatory proceeding. There is no comparable factual or analytical congressional record to support the change in the presumption

threshold proposed in H.R. 4476, Section 3. The change proposed in H.R. 4476 would burden the burgeoning the small power production sector with market access discrimination that still exists and stifle the growth of this competitive sector.

H.R. 4476, Section 4 is about putting the monopoly utility “fox” in charge of their small, privately owned production competitor’s “henhouse.” Rather than maintaining the current FERC and state PURPA framework, which has been developed, adapted, and approved over the past nearly 40 years, section 4 of H.R. 4476 would effectively eliminate the must-buy provisions of PURPA. In place of that requirement, which currently works well to ensure a competitive opportunity for small, privately power producers, H.R. 4476 would grant utilities full control to determine the size or existence of their competitors’ market. Under H.R. 4476, a utility could refuse to purchase energy or capacity from a qualifying small power facility if the utility unilaterally determines it has “no need” for the energy or capacity in an Integrated Resource Planning (“IRP”) process that the utility controls and was not designed to serve as a resource procurement process. H.R. 4476 provides for only limited state regulatory oversight, and no oversight at all for non-regulated electric utilities or those operating in states that do not require IRPs.

H.R. 4476 is not only unnecessary, but it would cripple competitive opportunities by qualifying small privately-owned power producers. The statutory changes proposed in H.R. 4476 take aim at problems that, in fact, are not problems to anyone but monopolist utilities. H.R. 4476 would take market opportunities for these generators back more than 40 years, to a time when utility anti-competitive behavior necessitated the passage of PURPA.

BACKGROUND

I am currently the Executive Director of the Pace Energy and Climate Center at the Pace University Elisabeth Haub School of Law in White Plains, but I appear before you today in my capacity as principal of Rábago Energy LLC, a consulting business that I own and operate in New York. I bring you greetings from one of my colleagues and the founder of the Pace Energy and Climate Center, former Congressman Richard (Dick) Ottinger, who represented Westchester County in this body, and who helped draft and co-sponsored PURPA some 40 years ago. In the past 30 years, I have worked in the electricity sector in the United States and around the world. That involvement has included service as a public utility commissioner in Texas, a deputy assistant secretary at the U.S. Department of Energy, a regulatory affairs director with a multi-national power company, a utility executive, an advocate, and a law professor.

My experience includes hundreds of on-the-record decisions as a commissioner, research and development management, renewable energy development practice, advocacy on behalf of not-for-profit organizations, testimony in several PURPA and avoided cost cases around the country, and years of practice in electricity market development.

ASSESSING THE NEED FOR PURPA “MODERNIZATION”

This testimony will address some key points that I believe you should keep in mind when considering whether changes are needed to modernize PURPA. PURPA plays a vital and unique role in facilitating competition in the electricity sector. Indeed, it is the only federal statute that requires competition in the electricity sector. Changes to the statute that would weaken this role are unnecessary and inappropriate. Changes that grant preferential status or advantage to

monopoly utilities are anti-competitive. Changes that unnecessarily and unjustifiably displace the careful and balanced regulatory processes in FERC and in the state utility regulatory commissions risk frustrating PURPA's goals of advancing competition in electric markets.

The States' Role in Setting Avoided Costs - As a former state utility regulator, member of development teams, and utility executive, and in my current role of frequent expert witness in regulatory proceedings, I have the greatest respect for the process of cooperative federalism that drives the implementation of PURPA in our nation. FERC honors Congressional intent through regulations and adjudications, evolving the PURPA regime based on facts in real cases and rulemaking in which parties and advocates have full and fair opportunities to make their cases and state their views. The states play a major role in implementing PURPA, reflecting the special and diverse concerns of their legislatures and regulatory environments through the process of establishing just and reasonable avoided cost rates. All this has resulted in a body of law and practice—and an electricity market—that is more competitive, more affordable, and more balanced than would have been the case without PURPA.

I can cite no stronger example of the wisdom of the PURPA system of laws and regulations than we have recently experienced in Michigan. I was pleased to serve as an expert witness on behalf of the Environmental Law and Policy Center (“ELPC”) in those cases, advocating for the Commission’s adoption of state-level PURPA avoided cost determination processes that would advance competition through improved non-discriminatory access to markets for qualified small power producers.

Two extracts from the Michigan Public Service Commission’s (“MPSC”) Opinion and Order in the Case No. U-18090, establishing the method and avoided cost calculation for

Consumers Energy Company, entered on November 21, 2017,² reflect the careful and reasoned way in which state commissions approach their responsibilities under and ensure compliance with PURPA. The proceeding took 18 months and involved hundreds of pages of testimony, hearings, and pleadings by several parties, including the utility, power producers, consumer representatives, and advocates like ELPC. In its Opinion and Order, the MPSC documented how the state process under PURPA has stayed abreast of market changes:

The Commission also acknowledges the difficulty associated with setting new avoided costs and the need to monitor the development of PURPA projects going forward, given potential changes in capacity needs, fuel costs, and technology and construction costs. It has been 40 years since PURPA was enacted into law, and much has changed during that time—wholesale markets and retail competition have developed, stagnant load growth makes it more difficult to absorb costs without putting pressure on utility rates, and economic forces and technological advancement have driven the shift from electricity generated using coal to natural gas and renewables. Although the world has changed dramatically, PURPA has historically used conventional, fossil-fueled generating plants as a proxy for a utility’s avoided cost, even though it may be more expensive than how the utility would actually secure equivalent amounts of incremental energy and capacity needed to meet customer demand.³

² Mich. Pub. Svc. Com’n., “In the matter, on the Commission’s own motion, establishing the method and avoided cost calculation for Consumers Energy Company to fully comply with the Public Utility Regulatory Policies Act of 1978, 16 USC 2601 et seq.,” Case No. U-18090, Opinion and Order of Nov. 21, 2017.

³ *Id.* at pp. 29-30.

The MPSC also addressed an issue germane to this hearing, the relationship between state-level utility IRP processes and the assessment of need for energy and/or capacity:

Going forward, the Commission believes that PURPA avoided costs should be integrated with capacity demonstration and IRP proceedings in order to more accurately assess capacity needs. The IRP proceedings are conducive to updating avoided costs, because the Commission will already be evaluating, in detail, utility-specific plans for any incremental generation or purchases along with their associated costs.

Michigan also adopted a 2-year cycle of avoided cost review, as is also the practice in North Carolina, for example. Frequent updating of avoided costs protects utility customers and small power producers from the negative effects of regulatory lag. The record in Michigan, and similar proceedings in many states confirms that the state regulatory commissions can be counted on to play a vital role in keeping PURPA “modern” and markets fair.

The Role of Market Prices in Informing PURPA Avoided Costs – It is frequently asserted that the case for PURPA modernization is established by the fact of organized wholesale markets. Indeed, the successful operation of the markets and independent transmission organizations justified major changes in the PURPA in 2005. The argument against the continuation of PURPA’s must-buy provisions goes too far, however, when it is applied to qualifying small power producers, and when it is suggested that market prices are equal to utility avoided costs. Prices are not the same as costs. Prices are an artifact of a wide range of issues, including costs, but also bidding strategies, contracting obligations, and the operation of tax credits and other factors impacting operational economics.

Further, the price set in day-ahead and short-term capacity markets like MISO or PJM do not accurately capture the value of the power provided because most or all of the market participants are regulated utilities who do not rely on that same market to recover its costs. In a traditional market, market participants recover their costs and earn a profit through the revenues they earn in the market. In contrast, utilities are guaranteed cost recovery and profits from their ratepayers—not from the market. As a result, the market pressures that exist in a traditional market are not the same when the market is composed of utilities. Asserting that qualifying small power producers should only be paid market prices, and not full avoided costs, means that these competitors can only enter the market under terms that incumbent utilities do not even apply to themselves.

An illustration of the above phenomena can be found in Michigan’s recent update to its PURPA implementation policies. The MPSC Staff rejected a utility’s argument that its avoided costs are the same as MISO market prices and stated:

Under the utility cost recovery framework in Michigan, the utility does not rely on market cost recovery. At the lower Tiers (1 and 2), Consumers proposed method does discriminate in that the Company is proposing to compensate [qualifying small, privately owned power producers] in a manner that is inconsistent with the way it recovers capacity costs for its own generation plants . . .

Consumers and other utilities in the MISO footprint forecast capacity needs well into the future and build or enter into long-term contracts to meet these capacity requirements. The PRA was established for balancing functions to make up small zonal resource credit (ZRC) shortfalls in the upcoming or following year and is

not intended to support resource investment decisions. It would be prudent for a regulated utility to plan to build a plant should a large capacity need be required, not purchase this capacity shortfall from the PRA. The PRA prices tend to be especially low compared to the cost of adding new capacity given that over 85% of the utilities in the MISO footprint are rate-regulated and are able to recover generation plant costs through traditional rate making. The PRA was never intended for an unregulated market as a mechanism for generation plants to recover capacity costs. Due to these market characteristics, the PRA does not function as a “true” market as it will likely never produce price signals that prompt capacity build-outs. The utility itself would never utilize the PRA as the sole source of capacity cost recovery for long-lived generation plant investments absent traditional regulated cost recovery.⁴

(Original citations omitted.)

Procedures to Address Distribution-Level Avoided Costs – There is a need for modernization of PURPA application in the states in assessing how qualifying small power production facilities avoid distribution-level utility costs.

PURPA operates on a cooperative federalism framework where the Federal Energy Regulatory Commission (“FERC”) promulgates regulations and states implement them.

Recognizing that electricity regulation and policy priorities vary state-by-state, PURPA put states

⁴ Revised Direct Testimony of Jesse J. Harlow, Public Utilities Engineer in the Renewable Energy Section of the Electric Reliability Division at the Michigan Public Service Commission, Case No. 18090, Testimony at 6-7 (Nov. 18, 2016).

in the driver's seat to experiment and craft implementation plans that take into consideration their specific needs.

In this country, a small but exciting new market for small, privately owned distributed energy resources is emerging. PURPA plays a major role in several states in supporting the emergence of this market, alongside of but distinct from integrated resource planning processes and utility project development initiatives. As already described, some states, through their expert regulatory commissions, are beginning to revise their PURPA-related avoided cost methodologies and calculations in an effort to create non-discriminatory opportunities for this new market.

These small-scale resources, especially small solar plants, small wind farms, and biomass-based generation plants, create important benefits for local economies—especially new jobs and increased private investment. Industry experts recognize that these facilities avoid a wide range of costs. These avoided costs, often a feature of the specific location in which the generation is sited, include time-specific benefits associated with utility operations, avoided marginal costs associated with peak demand and the infrastructure required to serve it, reduced marginal line losses that increase with peak demand, and avoided marginal pollution emissions that also increase with peak demand, among others. For example, Value of Solar and Value of Distributed Energy Resource studies conducted or under way in several states are beginning to quantify these benefits. Integrating these values into avoided cost calculations is the next major step required.

The electricity industry in the United States still varies quite significantly from state to state, therefore this modernization should be addressed by the state regulatory commissions with

jurisdiction over utility resource development and acquisition. Given the jurisdictional division of authority between states and the federal government in electricity regulation, these local and distributed avoided costs are difficult to capture through federal law and regulation. The cooperative federalism model in which PURPA operates appropriately puts the states in the driver's seat for addressing these kinds of local, distribution-level issues.

I recommend that this Subcommittee ask the Department of Energy to establish a program to work with state commissions to assist them in developing processes for assessing, quantifying, and internalizing distribution-level avoided costs. Such work would accomplish much needed modernization in state-level PURPA practice and support the growth of a vital market and the jobs that go with it.

COMMENTS ON SELECTED PURPA ISSUES

Given the broad reach of the Committee's charge in evaluating the status of and practice under PURPA, this testimony overviews a number of key PURPA-related issues. Issues relating to H.R. 4476, already introduced, are also addressed in this section of these comments.

1. *The Must-Buy Provision* - A frequent complaint by opponents of PURPA is that it requires utilities to buy energy and capacity from small renewable power producers. The must-buy provision of PURPA is critical to its effectiveness. This complaint, however, ignores a fundamental reality of PURPA and FERC practice: No utility can be required to buy energy or capacity from a small qualifying facility at a price higher than the utility's avoided cost. PURPA forces utilities to buy resources that cost less, and it always has. It still needs to do that. As already explained, setting purchase rates based on avoided costs puts qualifying small power

producers on an even footing with monopoly utilities in regard to the costs incurred for energy and capacity, and is categorically different from short-run marginal prices revealed in organized markets.

2. *Utility Self-Build Incentives* - Complaints about the must-buy provisions of PURPA raise another important point. One might ask: Why would a utility ever want to build and operate its own more expensive power plant, when it could instead procure energy and capacity from a small qualifying facility for less than or equal to its own actual avoided cost? The answer, of course, is related to shareholder profits and market power.

Utilities pass qualifying facility-related costs through rates to customers as an expense, but utility power plant investments are recovered on a cost-plus-profit basis. Utilities have a strong financial bias toward building and owning their own power plants. This was a major problem that led to the adoption of PURPA, and the utility desire to build and operate their own more expensive plants, and it continues today, even where organized markets operate.

The problem of utility discrimination against small non-utility power producers and the utility preference for self-build options remains today. In Michigan, DTE Energy has simultaneously told the MPSC that they need no new capacity for purposes of PURPA compliance, and that they want to build a brand new 1,100 MW natural gas-fired power plant. It is worth also noting that DTE Energy does not propose for itself or its shareholders that it will limit its revenue requirement recovery for the plant to what it can earn in wholesale markets; rather, the utility seeks rate-base treatment and utility rate of return on the investment.

3. *Renewable Energy Market Growth* - Opponents of PURPA often cite remarkable year over year growth in the renewable energy sector as a justification for change. Renewable energy

growth must be seen in the right light, however. **First**, the largest sectors of growth are in the development of large-scale renewable energy by utilities, by the unregulated affiliates of utility companies, and by other large-scale renewable energy developers. This growth is not PURPA growth.

Second, the growth of renewable energy has been dramatic in percentage terms. But observers should beware the law of small numbers: Even dramatic growth of a very small fraction of total energy supply mix is still a very small portion of the total energy mix. The right focus on market scale is even more important when the discussion is about small qualifying facilities. Solar qualifying facilities, for example, average about 8-10 MW in size, as compared with utility-scale solar farms that are 100 MW or more in size. The Energy Subcommittee received competent evidence that that total solar energy represents about 1% of total US electrical energy. The growth in small scale renewable energy development has not reached the point that it justifies a finding that small renewables have non-discriminatory access to markets.

4. *Non-Discriminatory Access to Markets* - Ensuring non-discriminatory access to markets for small qualifying facilities is a key component of PURPA and has been since its creation. Many monopoly utilities complain that the must-buy requirements of PURPA interfere with how they prefer to procure renewable energy. Utilities typically take the position that they should be able to privately negotiate with small renewable facilities over contract terms, and/or use Integrated Resource Planning processes as the mechanism for determining when and how they will procure more energy and capacity. Some utilities even claim that they cannot manage the integration of small scale renewable energy generation and an integrated resource planning process at the same time.

We need to be clear what this position really is: It is the argument by a non-competitive monopolist that they should be able to exercise what is called market power, and have complete control over the negotiations with much smaller renewable energy generators, or use IRP processes that are non-binding planning—not procurement—exercises almost entirely in the control of these same monopolists. To tell small non-utility renewable energy generators that they can always negotiate one on one with a behemoth monopoly or make their case in the IRP is the equivalent of saying to these small would-be competitors that they can just eat cake.

4. *Integrated Resource Planning processes and Small Generation* – Opponents of PURPA and proponents of section 4 of H.R. 4476 take the position that state-level IRP and IRP-related competitive procurement processes are an effective substitute for the must-buy requirement indexed to utility avoided costs. This position is wrong. **First**, the must-buy provision overcomes the severe economic and financial disadvantages that small qualifying facilities face in negotiating with monopoly utilities. Utilities have almost complete control over their integrated resource planning and procurement processes. Regulatory approval of utility planning processes does not entail approval of procurement decisions. Regulators do not prescribe or review utility competitive procurement and selection terms and processes.

Second, utility resource planning processes are designed for and around large-scale resource evaluation, and not even resource procurement. That is, IRPs do have something to offer the overall PURPA process in informing large-resource avoided costs. But the electricity industry is only beginning to develop planning processes that capture the comparative costs and benefits of small scale electricity resources. The Distribution System Implementation Plans process in New York, a leading example, is still only emerging. The complex and expensive

computer models used by most utilities, for example, have not be modified to fairly value and evaluate small scale renewable energy resources.

Third, IRP is not even the law in some 10 states, and there is no regulatory oversight of non-regulated electric utilities, like cooperatives and federal power authorities.

Fourth, there is a wide variation among states in IRP requirements and practice. IRPs do not seek or obtain regulatory approvals for specific resource acquisitions. Most states do not require regulatory approval of the IRP, or even submission of a plan at all. The timing cycle for IRP submission and review is set at intervals as long as five years in some states, guaranteeing that IRPs in these states will be stale on not representative of actual market conditions.⁵

5. *The Problem of Capacity Requirements Gaming* - When the utility builds a plant, its capacity will typically be in excess of any immediate needs due to the lumpiness of their preferred technologies. The utility will then have a capacity surplus for a number of years and could claim that they have no need for capacity from PURPA qualifying facilities. Then, when capacity is once again needed the Company will again build excess capacity beyond immediate needs and the cycle will be repeated. This process would change if, on the next occasion when a utility needed capacity, it sourced the annual increment of capacity needed through a truly competitive bidding process—not just a non-committal IRP—and then continued to do that annually going forward. Improved competitive procurement processes that provide non-discriminatory market opportunities to small generators could serve as a state level alternative to

⁵ For a summary of IRP approaches among the states, *see* Rachel Wilson & Bruce Biewald, “Best Practices in Electric Utility Integrated Resource Planning,” Regulatory Assistance Project (Jun. 2013).

PURPA must-buy contracting, but until fully developed, must be backed by the PURPA must-buy contract at avoided costs.

6. *Project Finance and Operational Footing* – Small qualifying facilities do not yet stand on an equivalent financial and operating footing as large monopolistic utilities. Utilities enjoy ratepayer supported debt-to-equity ratios, Constitutional protections on capital investment recovery, franchised market share and service territory, and close operational relationships with regulators. PURPA-related contract provisions for small qualifying facilities, including long-term planning periods, standard contract terms, long-term contracts, and other provisions are necessary to put these small would-be competitors on a non-discriminatory footing with utilities.

7. *State Regulatory Experience with PURPA* - Since the last utility challenge to PURPA was resolved almost 35 years ago, state regulatory commissions and state legislatures have fully come to terms with PURPA and its requirements. There is no state regulatory crisis justifying PURPA repeal or elimination of the must-buy requirement.

8. *FERC has the Expertise and Experience to Continue Federal Oversight of PURPA and Effectuation of Congressional Intent* – FERC has used its regulatory authority to ensure that Congressional intent to advance generation market competition. As described by the FERC in Northern Laramie Range Alliance Pioneer Wind Park, 139 FERC 61190 (June 8, 2012),

Title II of PURPA— section 201 of PURPA, which provides rules for certification of QFs and is codified in the Federal Power Act (FPA) at sections 3(17) through 3(22), and section 210 of PURPA, in which Congress required the Commission to prescribe rules as the Commission determined necessary to encourage cogeneration and small power production, including rules requiring electric utilities to offer to purchase electric power

from and sell electric power to QFs— was intended to encourage “the development of cogeneration and small power production facilities and thus to reduce American dependence on fossil fuels by promoting increased energy efficiency.” Prior to the enactment of PURPA, a cogenerator or small power producer seeking to establish interconnected operation with a utility faced three major obstacles. First, utilities generally were not willing to purchase their electric output or were not willing to pay an appropriate rate for that output. Second, utilities generally charged discriminatorily high rates for back-up service to cogenerators and small power producers. Third, a cogenerator or small power producer providing electricity to a utility's grid was treated as a public utility and subjected to extensive federal and state regulation. The Commission enacted its regulations against this background.

(a) *FERC's 1-mile Rule* - FERC adopted the 1-mile rule under 18 CFR § 292.204(a)(2)(i) in 1980, establishing a rule for determining whether a facility was entitled to be certified as a “qualifying small power production facility. That rule provides that:

§ 292.204 Criteria for qualifying small power production facilities.

(a) *Size of the facility* -

(1) Maximum size. Except as provided in paragraph (a)(4) of this section, the power production capacity of a facility for which qualification is sought, together with the power production capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

(2) Method of calculation.

(i) For purposes of this paragraph, facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought and, for hydroelectric facilities, if they use water from the same impoundment for power generation.

(ii) For purposes of making the determination in clause (i), the distance between facilities shall be measured from the electrical generating equipment of a facility.

(3) Waiver. The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

FERC has rejected efforts by utilities to interpret the rule as a rebuttable presumption, or to otherwise modify the rule. FERC's approach to the rule is sound and fair. Market participants have a clear, objective, and predictable standard in the rule, critical to financing small qualifying facility projects. A facility seeking status as a qualifying small power production facility must submit such facts as to meet the criteria of the rule, and then to build the facility in accordance with approved plans.

PURPA opponents cite the example of two financially affiliated wind farm projects located more than one mile apart as an example of so-called gaming of the system.⁶ Notwithstanding that the fact that the developers in that case met the clear and unambiguous terms of the FERC rule, the utility opponent maintained that the developers were "gaming" the rule. A critical element of the utility argument was that the two facilities shared the same

⁶ Northern Laramie Range Alliance Pioneer Wind Park 1, LLC and Pioneer Wind Park II, LLC, 139 FERC 61190 (Jun. 8, 2012).

interconnection equipment and facilities. The fact that two generation facilities, whether affiliated or not, chose to economize on interconnection investments does not, of course, indicate the presence of gaming or that the two facilities are a single entity. Both the FERC rule and the FERC decision rightly reflect that result.

Unwisely and unfairly, HR 4476 proposes to eliminate the objective and clear rule with a rebuttable presumption proceeding that would require FERC to make determinations based on seven different factors, and a case-specific interpretation of “affiliation,” “association,” and “control.” Instead of promoting competition in electricity markets through a time-tested, objective rule, H.R. 4476 would favor the litigious, and, in particular, utilities who can recover regulatory expenses from ratepayers. Small power producers do not stand on an equal footing with utilities in their ability to use FERC litigation for competitive advantage.

Finally, even if the pattern and practice under the FERC 1-mile rule revealed actual abusive behavior, the FERC has all the authority it needs to fix the practice and the rule. Inviting litigious and cost-insensitive utility protests to clog FERC’s already crowded docket and add cost and risk to small facility developer plans is not a wise or economic solution.

(b) *Presumption of Non-Discriminatory Access* – FERC performed its regulatory duty in response to Congressional direction reflected in PURPA § 210(m) in Order 688, establishing regulations applicable to small power production and cogeneration facilities. In particular, the regulations codified in 18 CFR § 292.309 establishing a rebuttable presumption that qualifying small power production facilities lack non-discriminatory access to transmission and interconnection services and wholesale markets. The regulations reflect careful consideration of market conditions, the characteristics of small power producers, impairments to non-

discriminatory access, and the arguments of a wide range of parties. The rule in 18 CFR § 292.309 stands as a fair balance of Congressional guidance to promote competitive markets, protect consumers, and treat utilities fairly.

H.R. 4476 section 3 would establish a presumption that all facilities equal to or larger than 2.5 MW have such non-discriminatory access to markets. As previously discussed, small power producers remain a small part of the generation landscape. The record is inadequate to support a legislative finding of non-discriminatory market access. Congress should continue to rely upon the regulatory expertise and experience of the FERC to evaluate market conditions and the appropriate threshold for any rebuttable presumption relating to non-discriminatory access.

SUMMARY

Now in its 40th year, the Public Utility Regulatory Policy Act and FERC's regulations implementing that law have demonstrated remarkable resiliency and effectiveness in realizing Congress' goal of facilitating competition and consumer savings in the electricity generation sector. FERC, today as in the past, has the expertise and experience to ensure that its rules adapt to the times and to evolving market conditions. State regulators are not facing a PURPA crisis; consumers are not being required to pay for any generation from small power producers at rates higher than utility avoided costs; and market conditions support PURPAs requirements and FERCs rulemaking authority today as they have in the past. This is not the time to grant advantage to incumbent monopoly utilities through legislation. This is not the time to repeal PURPA, in fact, or in effect.

Thank you for the opportunity to participate in this hearing on this important topic.