

***Powering America: Reevaluating PURPA's Objectives  
and its Effects on Today's Consumers***

September 6, 2017

Before the Subcommittee on Energy,  
U.S. House of Representatives  
Washington, D.C.

Written Testimony of  
Kristine Raper, Commissioner  
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## SUMMARY OF TESTIMONY

PURPA and FERC regulations create a framework within which small renewable power generation can access the energy market, thereby providing an alternative to fossil fuels. Compensation for the energy sold by QFs to the utilities is supposed to represent the costs that the utility avoids by purchasing the QF power. Rates for purchases from QFs are to be just and reasonable to ratepayers and in the public interest. At the same time, the rates cannot discriminate against QFs.

FERC regulations and early case law provide state regulatory commissions with broad discretion regarding how to implement PURPA. In the last decade, however, FERC has admonished state commissions who attempt to use their discretion to manage the negative consequences of PURPA within their state. PURPA's "must purchase" requirement leaves states with limited alternatives to balance the requirements of the Act with the responsibility to ensure reliable service and ratepayer indifference as to the energy resource.

Shorter contract lengths are necessary to ensure that the "avoided costs" paid for QF energy can be periodically updated to reflect changes in the dynamic energy market. Gaming and disaggregation should be addressed and disallowed as contrary to the intent of PURPA. If the energy imbalance market (EIM) provides a competitive opportunity within which QFs can participate, then the 20 MW rebuttable presumption that applies in organized markets should apply within the EIM – relieving the utilities of the "must purchase" obligation for projects 20 MW and larger. Curtailment provisions must be made available to the utilities in order to ensure reliability of the grid remains paramount. Serious consideration should be given to whether battery storage qualifies as a renewable resource under the provisions of PURPA. And, finally, the discretion afforded to states to determine how avoided costs are calculated should remain with the states.

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Chairman Upton, Ranking Member Rush, and other distinguished Representatives, thank you for the opportunity to submit written testimony in anticipation of our discussion of the Public Utility Regulatory Policies Act of 1978 (PURPA).

A quick overview of the pertinent history and corresponding Federal Energy Regulatory Commission (FERC) rules for implementation of the Act is instructive. PURPA was passed as part of the National Energy Act of 1978. The Act's goals include the encouragement of electric energy conservation, efficient use of resources by electric utilities, and equitable retail rates for electric consumers, as well as the improvement of electric service reliability. 16 U.S.C. § 2601 (Findings). Congress's stated intent was to reduce the Nation's dependence on foreign oil and to encourage the development of renewable power generation as an alternative to using fossil fuels. *FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982).

To encourage the development of renewable power, PURPA requires that electric utilities purchase the power produced by designated qualifying facilities (QFs). "This mandatory purchase requirement is often referred to as the 'must purchase' provision of PURPA." *Id.*, 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.303(a). The rate paid by the utility for power produced by the QF is generally referred to as the "avoided cost" rate. The avoided cost rate represents the 'incremental cost' to the purchasing utility of power which, but for the purchase of power from the QF, such utility would either generate itself or purchase from another source. *See* 18 C.F.R. § 292.101(b)(6). This mechanism was intended to "make ratepayers indifferent as to whether the utility used more traditional sources of power or the newly encouraged alternatives." *Southern Cal. Edison, San Diego Gas & Electric*, 71 FERC ¶ 61,269 at 62,080 (1995).

Under the Act, FERC is charged with prescribing “broad, generally applicable rules” for PURPA’s implementation. *Portland General Electric Co. v. FERC*, 854 F.3d 692, (D.C. Cir. 2017); 16 U.S.C. § 824a-3(a), (b). The Act also “requires state public-utility commissions to implement FERC’s rules at the local level.” *Portland General Electric*, 854 F.3d 692; 16 U.S.C. § 824a-3(f). State commissions have “discretion in determining the manner in which the rules will be implemented.” *Idaho Power Company v. Idaho Pub. Util. Comm.*, 155 Idaho 780, 782, 316 P.3d 1278, 1280 (2013).

An abundance of federal court decisions, FERC orders, and state court and commission decisions exist that reiterate the discretion FERC affords the States in implementing PURPA. However, it has been Idaho’s experience that when a state’s discretionary decisions are challenged by the QF at FERC the state is admonished that its actions are not consistent with PURPA and FERC regulations. Consequently, states have been left with very few tools in the toolbox to respond to increasingly sophisticated QFs who are attempting to manipulate PURPA to their financial advantage and to the detriment of ratepayers. In a “must purchase” environment, the state commissions cannot balance the requirements of PURPA with the responsibility to ensure reliable service all while doing no harm to customers if the state commissions are denied the discretion provided by the Act and FERC regulations.

In a dynamic energy market, with advances in energy efficiency and conservation, declining loads, and low market prices, the “must purchase” obligation under PURPA must be revisited. “Must purchase” does not consider the utility’s need for the energy or ability to absorb and balance it. Utilities prepare detailed integrated resource plans and make investments based on perceived need. QFs step in when the market favors them and change many factors that led to the utility’s original conclusions. New QF resources are not contemplated by integrated resource plans because they are not known or measurable by the utility.

Unanticipated small power production facilities are more easily integrated into a utility's existing transmission and distribution network without negatively impacting reliability. However, adding generation from multiple 100 MW QFs (disaggregated into 20 MW projects) to a utility whose system peaks in a shoulder month at 1300 MW creates obvious reliability concerns. Moreover, even with the addition of large QF resources, the QF energy rarely displaces the need for a utility-scale project because renewable QF energy is largely intermittent – requiring baseload resources to ensure reliable service. So the question must be asked: what costs are being avoided and how are ratepayers held harmless? Just because the large-scale QF projects have found a way to avail themselves of a law that was clearly intended to benefit small power production facilities does not mean that they should be permitted to continue a practice that violates the spirit and intent of PURPA and causes harm to ratepayers.

Modifications to avoided cost rates can ameliorate some of the negative consequences of a “must purchase” obligation. However, the long-term contracts that QFs claim to need to finance projects will increasingly misrepresent the actual avoided cost to the utility the longer the contract term. Shorter, consecutive contracts, which allow for updates to the avoided cost paid to the QF by the utility, are much more consistent with the intent of PURPA to encourage renewable development without harming ratepayers. Financing should be attainable because, as long as the “must purchase” obligation under the Act exists, the QF can sell its energy to the utility indefinitely. Moreover, neither PURPA nor FERC regulations mandate that the terms of a QF contract allow the project to be financeable. If the market cannot support the cost of the project, then the project should not be built. The backstop provided by PURPA is that the avoided cost rates be set so that ratepayers are indifferent as to the source of their energy and without discriminating against QFs.

Even if avoided cost rates are set in a balanced way, QFs can game the regulations to their advantage – complying with the letter of the law but not the spirit of the Act. As Idaho has experienced first-hand, wind and solar QFs can easily disaggregate in order to maximize profit. A 120 MW wind project exceeds the size to qualify for PURPA – but two 60 MW wind projects (adjacent to one another, sharing interconnection with the utility’s system, with a single source of financing, and shared materials) can self-certify as individual QFs and compel the utility to purchase their power. If a more favorable avoided cost rate is achievable with a smaller QF project, two 60 MW QFs can become six 20 MW QFs. FERC’s one-mile rule has not been an impediment to such behavior by QFs in the West. Because of the nature of particularly wind and solar resources, one mile can be mapped between projects without fatally impairing the project. PURPA only applies to projects that are 80 MW or smaller. A 120 MW wind farm spread out over six miles is certainly in violation of the spirit of an Act whose stated purpose is promoting the development of small renewable generation as an alternative to fossil fuels.

The same gaming could occur in an organized market with respect to the 20 MW rebuttable presumption. A QF that calculates a greater return through the “must purchase” path could disaggregate to less than 20 MW in order to avoid the presumption altogether. State commissions must be provided the discretion to examine the underlying facts and evidence to determine if a QF (or series of QFs) is attempting to exploit loopholes for their financial advantage and to the detriment of ratepayers. Criteria that might be considered in determining whether a series of QF projects are attempting to game the system include:

- Use of the same motive force or fuel source
- Owned or controlled by the same person or entity
- Share a common point of interconnection
- Share common control, communication and/or operation facilities

- Share a common transmission interconnection agreement
- Use of common debt or equity financing
- Subject to a revenue sharing agreement/arrangement
- Obtain local, state or federal land use permits under a single application
- Share engineering or procurement contracts
- Share common land leases
- In close proximity to other similar facilities

Whether a rebuttable presumption regarding access to the energy market is set at 20 MW or 10 MW or 5 MW, the opportunity exists for manipulation. However, setting a lower threshold to apply a rebuttable presumption that QF projects have access to a competitive market would properly recognize larger developers who should be participating in an organized market. Larger generators, no matter the technology, should not be allowed to work around the provisions of PURPA to the detriment of ratepayers.

Consideration should also be given as to whether an energy imbalance market (EIM) provides similar opportunities to QFs as a fully organized regional transmission operator/independent system operator (RTO/ISO) in order to apply a rebuttable presumption regarding access to the market. The EIM allows participation by any merchant generator within the balancing authority. Lower rates available to the QFs through such participation should not be determinative. A stated goal of PURPA is providing market access to energy resources that are alternatives to fossil fuels, despite the utilities' monopoly. If the EIM provides a competitive market within which a QF can participate, then PURPA's goals are met and the "must purchase" obligation should cease.

With so much energy entering the electric grid, curtailment provisions are vital to maintaining a reliable system. Rule 304(f) provides that a utility may curtail its purchase of

energy or capacity from a QF when, “due to operational circumstances, purchases from [QFs] will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.” 18 C.F.R. § 292.304(f)(1). On its face, FERC’s rule appears adequate to not only maintain reliability but also ensure that ratepayers are not harmed. However, FERC has since held that a “utility may not curtail unilaterally where the QF electric energy is purchased . . . pursuant to a long-term obligation.” *Idaho Wind Partners I, LLC*, 140 FERC ¶ 61,219, citing *Entergy*, 137 FERC ¶ 61,100 at p. 56. The desire for renewable resources should never overshadow or outweigh reliability. Therefore, reasonable allowances for curtailment should be reevaluated.

PURPA and FERC regulations currently allow the states great discretion in how avoided costs are calculated. It is important to continue this practice in order for states to be able to respond to local interests, needs, economies, and circumstances. A one-size-fits-all approach would be disastrous in an energy environment that includes regulation, deregulation, organized markets, bilateral markets, and divergent interests and goals between the states.

Neither PURPA nor FERC’s regulations specifically identify battery storage as a renewable resource eligible for QF status and the benefits provided by the Act. However, FERC issued one decision in 1990 that summarily included battery storage as a renewable resource under PURPA. *Luz Development and Finance Corporation*, 51 FERC ¶ 61,078 (1990). FERC provides that “. . . in order for a storage facility to be a QF the primary energy source for generation of this energy must be one of those contemplated by the statute for conventional small power production facilities. . . .” *Id.* In other words, energy storage facilities are not renewable resources/small power production facilities *per se*. FERC went on to clarify that “. . . the primary energy source of the battery system is not the electro-chemical reaction. Rather, it is the electric energy which is utilized to initiate that reaction, for without that energy, the storage



facility could not store or produce the electric energy which is to be delivered at some later time. Since this energy is the primary energy source of the facility, it is necessary to look to the source of this energy as the ultimate primary energy source of the facility.” *Id.* at 61,171. When PURPA was passed in 1978, battery storage on a utility scale was not realistic. This is no longer the case. I urge this Subcommittee and Congress to address whether and to what extent battery storage facilities should be included within the parameters of PURPA.