

Testimony on behalf of the
National Association of Regulatory Utility Commissioners (NARUC)

by

The Honorable Travis Kavulla
Vice Chairman, Montana Public Service Commission

before the

United States House of Representatives
Committee on Energy & Commerce
Subcommittee on Energy

hearing entitled

**“Legislation Addressing LNG Exports and PURPA
Modernization”**

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**Summary for Testimony of the Honorable Travis Kavulla
On Behalf of
The National Association of Regulatory Utility Commissioners (NARUC)
On
H.R. 4476, the “PURPA Modernization Act of 2017”**

- NARUC supports H.R. 4476 the “PURPA Modernization Act of 2017,” as currently drafted.
- The provisions in Section 4 are of greatest importance to NARUC.
 - Subsection 4(B) straightforwardly acknowledges that a competitive process should be allowed to substitute for PURPA’s mandatory purchase obligation using administrative-forecast pricing.
 - QFs would be protected because the provision’s applicability is tied specifically to a requirement for such competitive processes to be open to PURPA resources.
 - Consumers would be protected by only having to pay for resources that had offered the least cost, or the greatest value.
 - Subsection 4(A) acknowledges situations of flat or declining demand – when utilities have greater supply than demand – conforming 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.
- Section 3 of H.R. 4476 provides necessary changes to the nondiscriminatory access provisions of PURPA by limiting the exemption for nondiscriminatory access to 2.5 MWs. This exemption is more in line with the realities of modern power generation than is the current exemption of 20 MWs and fairly provides a threshold which protects smaller QFs while encouraging competition among larger projects.
- NARUC is pleased that H.R. 4476, in Section 2, addresses PURPA’s current disaggregation problem by reforming the “one-mile rule.” Some QF developers have been able to work around the FERC small renewable QF criteria by disaggregating their projects into multiple smaller projects, thereby availing themselves of more advantageous avoided cost calculations to the detriment of retail ratepayers.

Good morning, Chairman Upton, Ranking Member Rush, and members of the Subcommittee on Energy. Thank you for the opportunity to testify today on H.R. 4476, the “PURPA Modernization Act of 2017.” My name is Travis Kavulla and I am Vice Chairman of the Montana Public Service Commission. I am here today on behalf of the National Association of Regulatory Utility Commissioners (NARUC), where I served as the President in 2016 and am currently a member of the Executive Committee.

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.

I would like to commend Congressman Walberg and his staff on their efforts to update and reform the Public Utility Regulatory Policies Act of 1978 (PURPA), which have culminated in the introduction of H.R. 4476, the “PURPA Modernization Act of 2017.” On behalf of NARUC, I would like to express our support for this legislation and the legislative effort to address concerns we have with PURPA as it pertains to today’s electricity sector.

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, 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 guess at future market prices, allowing QFs to lock in rates that often substantially overstate the actual avoided cost.² 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.³ It is almost universally acknowledged that a competitive process, where generators with a profit motive

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 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 See Exhibits A and B to this testimony, for examples from Idaho and Montana of how administratively forecast avoided-cost rates have dramatically overstated the actual market price of electricity.

³ 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).

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.

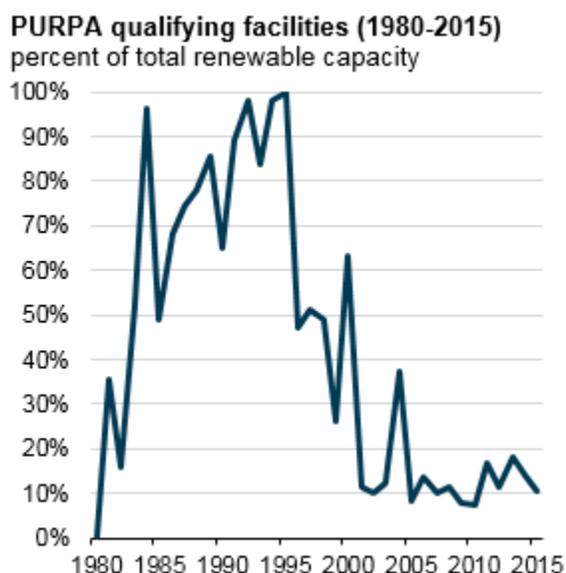
In addition to the flaws underlying so-called avoided-cost pricing, PURPA's mandatory purchase obligation is a poor match for the relatively flat, and sometimes even declining, customer demand for electricity. In many parts of the United States, new power plants of any kind may simply not be needed—a 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.”⁴ 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

⁴ 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.

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.⁵ More than half of States, including Montana, 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.⁶



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

⁵ 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>.

⁶ 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>.

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 previously recognized that as the sector changes, so too must PURPA.⁷ 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 (EPAct '05). That is why the moment is ripe for your consideration of H.R. 4476, which builds on the successes of EPAct '05 by encouraging competition as a means toward renewable development.

The provisions in Section 4 are of greatest importance to NARUC. Subsection 4(B) straightforwardly acknowledges that a competitive process should be allowed to substitute for PURPA's mandatory purchase obligation using administrative-forecast pricing. QFs would be protected, because the provision's applicability is tied specifically to a requirement for such competitive processes to be open to PURPA resources. Consumers, meanwhile, would be protected by only having to pay for resources that had offered the least cost, or the greatest value. Similarly, Subsection 4(A) acknowledges those occasions, caused by flat or declining demand, when utilities have greater supply than demand. This provision hews to

⁷ 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.

PURPA's original principle of conservation by not requiring consumers to pay for the construction of new power plants that simply are not needed.

H.R. 4476 also assists State commissions by modernizing the nondiscriminatory access provisions of PURPA in Section 3 of the bill. 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 competitive markets. However, the current exemption of 20 MWs badly overstates the size threshold.⁸ A provision limiting the exemption to 2.5 MWs 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 MWs, so such a size conservatively and fairly provides a threshold which protects smaller QFs while encouraging competition among larger projects.⁹

NARUC is also pleased that the legislation addresses, in Section 2, 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 MWs that PURPA defines as the maximum capacity for a QF, so developers sometimes will break such projects into several QFs in order to avail each of the mandatory purchase obligation at an administrative-forecast rate. Similarly, a developer might break one larger project

⁸ 18 CFR § 292.309(d)(1) (2017).

⁹ "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>.

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.¹⁰ This legislation would allow a fact-dependent investigation by FERC to police such abuse.

In closing, on behalf of NARUC, I would again like to thank Congressman Walberg and his staff for taking up the challenge of reforming PURPA. Much has changed since PURPA was originally enacted in the late 1970s and State commissions need new tools to deal with the current issues. Although we have reached out to our FERC colleagues on some of these issues, this legislation is an important and significant leap forward in providing us with the ability to secure a reliable and affordable energy future for the nation. We look forward to working with this Committee to reform PURPA. Thank you for the opportunity to appear before you today and I look forward to your questions.

¹⁰ 18 C.F.R. § 292.204(a)(2) (2017).

Exhibit A

Idaho PUC's administrative-forecast avoided cost for Idaho Power Company compared to actual and settled future prices of the Mid-Columbia wholesale electricity price (2015)

Excerpted from Testimony of R. Allphin, Idaho Power Co., Exh. No. 10;
Case No. IPC-E-15-01, Idaho Public Utilities Commission

Average PURPA Price vs. MidC Index

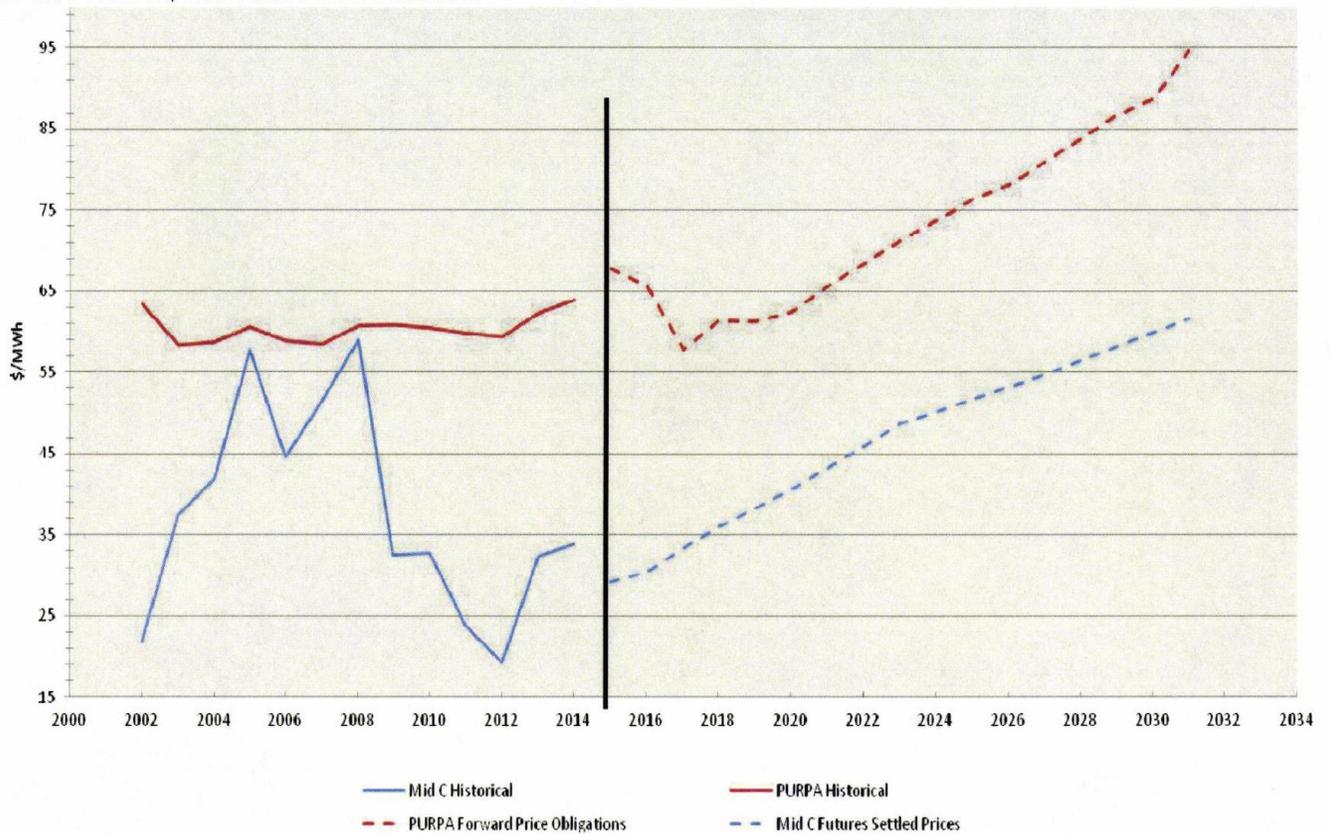


Exhibit B

Montana PSC’s administrative-forecast avoided cost for NorthWestern Energy (in black solid line and dotted line, for wind and solar respectively) compared to actual prices of the Mid-Columbia wholesale electricity price (2017)

