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N A R U C
National Association of Regulatory Utility Commissioners

December 18, 2017

The Honorable Kevin J. McIntyre, Chairman
The Honorable Cheryl A. LaFleur
The Honorable Neil Chatterjee
The Honorable Robert F. Powelson
The Honorable Richard Glick
Federal Energy Regulatory Commission
888 1st Street, NE
Washington, DC 20426

Re: Public Utility Regulatory Policies Act of 1978 Regulatory Reform

Dear Chairman and Commissioners:

On behalf of the National Association of Regulatory Utility Commissioners ("NARUC"), I am writing to express how pleased we are that then-Chairman Chatterjee has said that the Federal Energy Regulatory Commission ("FERC") will be actively pursuing reform of the Public Utility Regulatory Policies Act of 1978 ("PURPA")[1] regulations. As the primary point of responsibility for PURPA's on-the-ground implementation, the States have a strong interest in the reform of PURPA's associated federal administrative regulations and we hope this reform will continue to be a priority under the leadership of Chairman McIntyre.

Much has changed since PURPA was originally enacted in the late 1970s. First, robust wholesale electricity markets exist in many parts of the country, administered by Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs"). The Energy Policy Act of 2005 ("EPAct 2005") updated PURPA to reflect this development, allowing exemptions from PURPA where qualifying facilities ("QFs") had access to these markets.[2] FERC has exempted each of the ISOs and RTOs from PURPA's mandatory purchase obligations for projects over 20 megawatts ("MWs") in size.[3] EPAct 2005 also provided a generic provision that allows FERC to ascertain whether developments in the wholesale markets outside of RTOs have provided QFs avenues to contract formation similar to those in RTOs and ISOs, and FERC has the legal authority to declare those areas similarly exempt from PURPA.[4] The second major change is that throughout the nation, not just in ISOs and RTOs, States have encouraged through legislative enactments and Commission decisions the growth of renewable energy in the name of

[1] 16 U.S.C. § 2601 et seq. (2012).
[2] Energy Policy Act of 2005 § 1253, 16 U.S.C.A. § 824a-3(m) (2017).
[3] *See New PURPA Section 201(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Final Rule, Docket No. RM06-10-000, Order No. 688 (October 20, 2006).
[4] 16 U.S.C.A. § 824a-3(m)(1)(C) (2017).

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fuel diversity, lowering emissions, national security, and low-cost energy.[5] To the degree PURPA was enacted at a time when QF technologies were not the norm, that norm has changed profoundly. Third, because of FERC's open-access regulations, each public utility has on file an Open-Access Transmission Tariff ("OATT").[6] Moreover, the generator interconnection procedures FERC has adopted are a powerful tool to prevent utilities from discriminatorily blocking access to QFs and other independent generators.[7] Finally, and perhaps most importantly, most State Commissions have required the utilities subject to their jurisdiction to make use of competitive solicitations as a means of selecting projects, opening an avenue for competition—even outside of those places with ISOs and RTOs—in the wholesale market. Indeed, most renewable projects throughout the country, regardless of a place's RTO/ISO status, are developed in the context of procurement by load-serving entities and not because of the RTO/ISO's market design.

These four changes—the rise of wholesale markets, the place of QF technologies as a commonplace source of power, the open-access regulation of the transmission system, and the use of competitive methods to select projects throughout the States—suggest that PURPA's administrative regulations should be aligned to these developments, instead of obstructing them. Despite these changes, many States incur significant transaction costs administering PURPA pursuant to the law's arcane, twentieth-century mandates.[8] In this letter, NARUC offers three ways to reform PURPA, all of which are documented in the record accumulated in AD16-16-000.[9] Each of these approaches allows FERC to work within existing law to make meaningful changes to PURPA, while remaining committed to the law's underlying goals of competition and encouragement of QF technologies.

The first reform would be for FERC to adopt regulations that move away from the use of administratively determined avoided costs to their measurement through competitive solicitations or market clearing prices. This could be done by expanding the administrative regulations at 18 CFR 292.309 to include other places where QFs have competitive access to the market or at 18 CFR 292.304 to include other ways to determine avoided costs, such as through a utility's competitive solicitation process. In his testimony at the PURPA Tech. Conf., Commissioner Travis Kavulla, Montana Public Service Commission, proposed that to expand the types of access to competitive markets, "FERC could adopt interpreting regulations that relax

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[5] *See* U.S. Department of Energy's Renewable Energy Production by State map (https://energy.gov/maps/renewable-energy-production-state) and the Database of State Incentives for Renewables & Efficiency's Policies & Incentives by State map (http://www.dsireusa.org/) both showing renewable energy production and programs in every state.

[6] *Transmission Open Access. Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Final Rule, Docket Nos. RM95-8-000 and RM94-7-001, Order No. 888 (April 24, 1996).

[7] *Standardization of Generator Interconnection Agreements and Procedures*, Final Rule, Docket No. RM02-1-000, Order No. 2003 (July 24, 2003); *Standardization of Small Generator Interconnection Agreements and Procedures*, Final Rule, Docket No. RM02-12-000, Order No. 2006 (May 12, 2005).

[8] For example, PURPA issues consume more than one-quarter of the time that the Montana Public Service Commission commits to matters of electric utility regulation. PURPA Tech. Conf. Submittal of Commissioner Travis Kavulla ("Kavulla") at 1.

[9] FERC accumulated this record largely through submissions made at a Technical Conference titled *Implementation Issues under the Public Utility Regulatory Policies Act of 1978*, held on June 29, 2016 (Docket No. AD16-16-000) ("PURPA Tech. Conf."), and the associated submissions made afterwards in response to questions from FERC Staff.

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either the mandatory purchase obligation or make it clear that shorter-term avoided-cost calculations are acceptable for PURPA compliance in certain circumstances: Where solicitations are routinely held and genuinely competitive for the needs identified in a utility's IRP[(integrated resource plan)]; or, [w]here a utility, in its IRP, does not forecast the need for an additional owned or long-term-contracted energy resource for the next 5 or 7 years; or, [w]here a real-time energy market is operational, and where clearing prices and/or bids in that market are not subject to market-power mitigation to cost."[10]

The Commission could use its discretion to update the PURPA regulations to better reflect the current competitive access environment and to clarify the treatment of these alternative options. In 18 CFR 292.309(a)(3), an electric utility can have its obligation to purchase from a QF terminated if the Commission finds that the QF has nondiscriminatory access to "[w]holesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in paragraphs (a)(1) and (a)(2) of this section." Currently, only the Electric Reliability Council of Texas ("ERCOT") qualifies as a market described in §292.309(a)(3).[11] We propose that in certain circumstances, such as when a QF has both nondiscriminatory access under an OATT and exists in a region where public utilities routinely use competitive solicitation processes, such a construct would qualify as wholesale markets under 18 CFR 292.309(a)(3). Making this determination would allow FERC to erase the false dichotomy between RTO/ISOs regions, and those regions without such an RTO/ISO but where each public utility nevertheless has an OATT and where States oversee utility procurement and require the use of competitive solicitations. In addition to facilitating PURPA implementation and easing the onerous administrative burdens on State Commissions, this would promote competition in areas that are not in RTOs/ISOs, which allows for better price formation and clearer market signals.

Another important reform that would increase competition and reduce transaction costs to State Commissions would be to lower or eliminate the 20 MW threshold for the rebuttable presumption that QFs with a capacity at or below that size do not have nondiscriminatory access to the market.[12] In keeping with the goal that FERC should better align PURPA implementation with modern realities, this threshold should be lowered to whatever the minimum capacity requirement is for a resource to participate in an RTO/ISO.

Finally, NARUC supports the Commission's stated interest in addressing the disaggregation problem by making changes to the one-mile rule and other related reforms. There are a number of well-documented incidents where projects have forgone economies of scale to qualify themselves as individual QFs and evade other regulations; for instance, State Commissions requirements for competitive solicitations. The Commission should not encourage this form of regulatory arbitrage.

In contemplating changes to address the disaggregation issue, we request that the Commission consider carefully the testimony of Commissioner Paul Kjellander, Idaho Public Utilities Commission. Specifically, Commissioner Kjellander offers potential criteria that could be used

[10] Kavulla at 9.
[11] 18 CFR 292.309(f).
[12] 18 CFR 292.309(d)(1).

to determine whether a single project has been disaggregated for the purposes of creating multiple QFs under the generation size limit.[13] Such reforms would enable State Commissions the ability to improve PURPA implementation by being better able to balance the PURPA goals of rates that are just and reasonable for electric consumers and in the public interest and that do not discriminate against QFs.[14]

We appreciate the Commission turning its attention to PURPA reform amidst all the other issues that are before the Commission. The reforms we have proposed are important and necessary at this time and we respectfully request that the Commission carefully consider them as it develops changes to the regulations. We look forward to working with you on advancing these measures because they will help FERC achieve its goal of better aligning PURPA implementation with modern realities.

Thank you for your attention to these matters and for your consideration.

Sincerely,

John Betkoski III
of Connecticut
NARUC President

[13] PURPA Tech. Conf. Submittal of Commissioner Paul Kjellander at 6-7.
[14] 16 U.S.C. § 824a-3(c) (2012).

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