

**CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA**

December 3, 2019

Ms. Kimberly Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

**RE: Implementation Issues Under the Public Utility Regulatory Policies Act of
1978 (Docket Nos. RM19-15-000 and AD16-16-000)**

Dear Secretary Bose:

The U.S. Chamber of Commerce (“the Chamber”) appreciates the opportunity to submit these comments in response to the Notice of Proposed Rulemaking issued by the Federal Energy Regulatory Commission (“FERC” or “Commission”) titled “Implementation Issues Under the Public Utility Regulatory Policies Act of 1978” (the “PURPA NOPR”).¹ While the Commission does not have the authority to unilaterally modify the statutory text of the Public Utility Regulatory Policies Act of 1978² (“PURPA”), it rightly now proposes to update the Commission’s regulations implementing sections 201 and 210 of that act. Given that PURPA is now more than forty years old, it is long overdue for a modernization of its terms and conditions – consistent with FERC’s authority – as such is set forth in the PURPA NOPR. The Chamber generally supports the Commission’s efforts, and asserts that the modifications proposed by FERC will serve to maintain the benefits provided by PURPA for small power producers and cogeneration facilities while ensuring that states have greater flexibility in ensuring that the rates paid by customers for Qualifying Facility (“QF”) power are not unreasonably inflated compared to the applicable market-based rates for such electricity.

I. Background

PURPA was enacted by Congress in a very different time, when domestic energy supplies – especially oil and natural gas – were seen as dwindling and genuine national security goals merited a robust framework to facilitate the development of non-traditional electric generation resources. Forty years later, however, and the shale revolution, combined with other energy innovations, have turned the scarcity paradigm of the 1970s on its head, resulting in the energy

¹ 168 FERC ¶ 61,184 (2019).

² 16 U.S.C. 796(17)-(18), 824a-3.

abundance of today. Not only is this abundance characterized by unprecedented levels of domestic oil and natural gas extraction, but also by dramatic increases in both the quantity and cost-competitiveness of renewable energy resources such as those motivated by the wind or powered by the sun. Combined with nuclear, coal, biomass, hydroelectric, and emerging battery storage resources, America's overall energy security has reached unprecedented – and until recently unforeseen – levels. One of the most impactful results of this new energy reality has been overall low electricity prices in an environment of high levels of electric reliability and reduced carbon emissions.

Given the about-face in America's energy picture, in addition to various state and federal programs that support increased development of renewable energy resources,³ a renewed look at the Commission's 1980 regulations implementing PURPA is long overdue. A full Congressional review of PURPA at this point would also be prudent, but absent an immediately viable pathway for such action, FERC's effort to modernize the PURPA implementing regulations under its purview should be applauded.

In recognition of the significant passage of time and the dramatic improvements in the nation's energy posture, FERC issued its PURPA NOPR at its September 19, 2019 open meeting. The PURPA NOPR proposes the following reforms to FERC's regulations implementing PURPA:

- 1) To grant the flexibility for states to require that QF power sale contract energy rates vary in accordance with the purchasing utility's avoided costs at the time that the QF energy is delivered. PURPA NOPR at P 32.
- 2) To grant the flexibility for states to allow fixed energy rate contracts for QFs that are based upon the projected energy prices throughout the entire term of such power sale contract, based on anticipated energy delivery dates. PURPA NOPR at PP 63-81.
- 3) To grant the flexibility for states to set "as available" QF energy rates at either the locational marginal price (LMP) within organized electric markets or, for QFs selling energy outside of such markets, at either the competitive prices realized at liquid market hubs or based upon calculations from a formula based on natural gas price indices and specified heat rates. PURPA NOPR at PP 43-60.
- 4) To provide an electric utility with a reduction in their QF purchase obligation to the extent that the utility's electricity supply obligations have been reduced by a state retail choice program. PURPA NOPR at PP 89-92.
- 5) To modify the current "one-mile rule" and the scope of the rebuttable and irrebuttable presumptions attached thereto, which serve to identify when facilities are deemed to be a single facility or separate, for the purposes of PURPA. PURPA NOPR at PP 93-117.

³ The Production Tax Credit (PTC) for wind and the Investment Tax Credit (ITC) for solar and other resources, along with state-level renewable portfolio standards and even regional greenhouse gas reduction targets all serve to drive the development and operation of the types of facilities supported by PURPA through non-market mechanisms.

- 6) To lower to 1 MW the rebuttable presumption applicable to QFs – but exclusive of cogeneration facilities – that such facilities now have nondiscriminatory access to organized markets if their net capacity is at or below 20 MW. PURPA NOPR at PP 118-130.
- 7) To require that QFs demonstrate commercial viability and a financial commitment to construct their proposed generation facility before a QF is deemed eligible for a power purchase contract or other legally-enforceable obligation (LEO) under PURPA. PURPA NOPR at PP 134-142.
- 8) To permit individuals or entities the ability to participate in a QF’s self-certification or self-recertification at FERC without the expense and formality of filing a separate petition for declaratory order under the Commission’s rules. PURPA NOPR at PP 143-152.

With certain clarifications and modifications, the above proposals would address many of the shortcomings facing FERC’s implementation of PURPA today, and the Chamber supports their codification as part of FERC’s PURPA implementing regulations. Furthermore, these reforms are consistent with the Commission’s authority and the Congressional direction within PURPA that the Commission revise its regulations “from time to time.”⁴

II. FERC’s NOPR Maximizes the Tools Available for States to Set Avoided Cost Rates Under PURPA

PURPA currently provides a QF with two options with respect to the pricing for its sale of energy to an electric utility. The first option permits a QF to sell its energy on an “as-available” basis and at a rate calculated at the time of such sale.⁵ The second option, which is often preferred by QF developers, enables a QF to sell its energy under a fixed-term contract.⁶ When a QF elects the fixed-term contract, the pricing is either calculated at the electric utility’s avoided costs at the time of energy delivery, or fixed at the avoided cost rate calculated at the time that the LOE under PURPA is incurred.⁷ While the former pricing method is largely consistent with the modifications proposed in the PURPA NOPR, the often-used fixed-price option serves to freeze the applicable avoided cost rate at the time of inception which has, in practice, led to QF pricing that exceeds future competitive market prices. While transparent, competitive market pricing was a rarity upon PURPA’s inception in 1978, it is commonplace today.

The first three reforms highlighted in the PURPA NOPR aim to square the Commission’s PURPA implementing regulations with the maturity of today’s competitive markets.⁸ Importantly, however, the proposed modifications to these regulations do not take off the table any of the options currently available to states in establishing QF avoided costs rates (e.g., anticipated or

⁴ 16 U.S.C. 824a-3(a).

⁵ 16 CFR 292.304(d)(1).

⁶ 18 CFR 292.304(d)(1).

⁷ 18 CFR 292.304(d)(2).

⁸ PURPA NOPR at PP 5-7.

actual marginal costs identified by the utility) whether in an RTO or non-RTO market.⁹ Since some existing state processes can be applied to effectively establish avoided cost rates in both RTO and non-RTO markets, the NOPR simply provides additional tools that a state may implement in establishing such rates with the underlying goal of ensuring that such QF contracts don't become an unduly bad deal for consumers as they mature. Meanwhile, the proposed reforms would continue to provide for the long-term contracts that QFs often rely upon to undergird the financial viability of their project.

State public service commissions are usually vested with the authority and the obligation to establish the avoided costs rates applicable to QFs domiciled therein. These state commissions are also best situated to understand the energy resources within their state, the costs attributable to both new and existing generation units, and what most appropriately represents a reasonable avoided cost rate for the utilities subject to their oversight. As such, the Commission's common sense reforms serve to empower state commissions with an expanded suite of options to ensure that QF energy rates are just and reasonable for both QFs and end-use customers. With respect to cogeneration facilities and other QFs that also purchase electricity from their utility, the proposed reforms will also serve to protect their electricity purchase rates from the adverse impacts stemming from inflated and outdated fixed price avoided cost contracts.

The PURPA NOPR provides for state commission consideration of market-based pricing options such as LMPs within organized markets administered by Regional Transmission System Operators (RTOs) and Independent System Operators (ISOs), as well as the ability to reference liquid market hub prices and formulas tied to efficient natural gas combined-cycle generating facility operations.¹⁰ FERC's provision of these additional tools to enhance a state commission's determination of "as-available" QF rates will readily tie QF energy rates to as-delivered competitive market prices, further insulating electric utility customers from out-of-market QF power pricing.

Similarly, the proposed provision to state commissions of the option to establish *fixed-term* QF contracts that are reflective of anticipated *future* prices provides the revenue certainty sought by many QFs without locking customers into paying solely the avoided cost rate calculated at the time that an LOE materializes with respect to a particular QF. While FERC's original implementing regulations do provide greater simplicity with respect to contract pricing, the PURPA NOPR's varied-rate option more appropriately balances the business needs of the QF with the reality that avoided costs may change over time. While future rate levels are not guaranteed to materialize, projected rates are likely to more accurately reflect those actually realized than a single avoided cost rate set at the inception of a QF contract.

Consistent with good governance and federalist principles, the PURPA NOPR simply provides additional tools through which state commissions can set and implement avoided cost rates applicable to QF energy pricing. These tools seek to more evenly balance customer rates and QF revenues over the period of energy sales, either by contract or on an as-available basis. Given that these proposals add options for QF pricing, without taking off the table the contracting options

⁹ PURPA NOPR at PP 79-81.

¹⁰ PURPA NOPR at PP 46, 56-59.

available since FERC first developed its PURPA implementing regulations in 1980, these additional options should be retained in the final rule.

III. The PURPA NOPR is Reasonable to Mitigate a Utility's QF Purchase Obligation Consistent with State Retail Choice Rules

The PURPA NOPR proposes that an electric utility's QF energy purchase obligation may be reduced to the extent that such utility's supply obligation has been reduced through the operation of a state retail choice program.¹¹ While the limited discussion on this topic omits details regarding the actual implementation of this true-up with respect to provider of last resort service obligations and QF power purchase commitments, the concept is reasonable on its face. Further explanation as to the implementation of this provision should be provided in a final rule in this proceeding. Such explanation should also clarify that the reduction in a utility's QF purchase obligation should be measured against the amount of a utility's load which has actually elected an alternative supplier, rather than merely against the share of load that is eligible to shop elsewhere for electricity. In some states, only a portion of a utility load is eligible to shop for competitive electricity suppliers, so this percentage of eligibility for third-party procurement would naturally serve as the ceiling for any corresponding reduction in a utility's QF purchase obligation.

IV. The Presumptions Associated with the Geographic Proximity of Facilities Should be Realigned as Proposed in the PURPA NOPR

The Commission's current regulations implementing PURPA provide an irrebuttable presumption that affiliated small power production facilities using the same energy source qualify as separate facilities for the purposes of PURPA if they are located more than one mile in distance from each other.¹² This presumption has been significant, because it enables large merchant generation projects, if spaced more than one mile apart, to be geographically subdivided to fit under the 80 MW PURPA eligibility cap, thereby qualifying for PURPA's mandatory purchase obligation. The PURPA power purchase guarantee can thereby render a project economic in circumstances where competitive market forces might dictate otherwise. As a result, enterprising (and often sophisticated) renewable developers have been known to configure their projects to fit just outside of PURPA's one-mile rule with project segments sized just under the 80 MW single-facility cap in order to benefit from an irrebuttable presumption in their favor.

The PURPA NOPR proposes to simply shift the *irrebuttable* presumption of separate facilities to one that is instead *rebuttable* given the specific facts applicable to the project(s) seeking QF status.¹³ The irrebuttable presumption of separate facilities would then reattach to projects located more than ten miles from each other,¹⁴ rendering this provision much less susceptible to abuse. Facilities located closer than one mile apart or greater than 10 miles apart will continue to be treated the same as under PURPA's current implementing regulations.

¹¹ PURPA NOPR at P 92.

¹² 18 CFR 292.204(a)(1).

¹³ PURPA NOPR at P 102.

¹⁴ PURPA NOPR at P 101.

This common-sense proposal serves to reduce the potential for developers to “game” the applicability of PURPA to a large-scale project while retaining the full benefits of the PURPA mandatory power purchase obligation for all projects that truly qualify for PURPA’s benefits. If a QF applicant can indeed demonstrate – through a variety of physical and ownership characteristics¹⁵ – that their geographically proximate facilities should be considered separate facilities for the purpose of PURPA’s 80 MW cap, project developers are empowered to make that showing. Thus, the PURPA NOPR’s inclusion of a rebuttable presumption retains the PURPA mandatory purchase obligation for all eligible facilities under 80 MW that qualify as separate, while eliminating the PURPA power purchase burden stemming from creatively designed projects that Congress never intended to receive assistance through PURPA.

V. The Maturation of Markets Supports the Evolution of PURPA’s Market Access Presumption

Consistent with section 210(m) of PURPA, which was the result of 2005 Congressional amendments to PURPA, electric utilities can obtain relief from PURPA’s mandatory purchase obligation if the Commission finds that nondiscriminatory market access is available to the QF seeking PURPA benefits. FERC’s PURPA implementing regulations currently establish a rebuttable presumption that QF’s with a net power production capacity at or below 20 MW lack any such nondiscriminatory access.¹⁶ Electric utilities can seek relief from the mandatory QF purchase obligation for facilities smaller than 20 MW in net output, however the burden of proof rests with the petitioning utility to demonstrate nondiscriminatory market access.¹⁷ This market access determination was codified in the Commission’s Order No. 688.¹⁸

In the thirteen years since PURPA’s Section 210(m) regulations were codified, markets have matured and become far more inclusive and understood by a much greater number of market participants. In addition, many subsequent FERC rulemaking efforts have sought to expand nondiscriminatory market access to participants that are far smaller in size than the 20 MW presumption established in Order No. 688.¹⁹ Therefore, the presumption that generators below 20 MW lack nondiscriminatory access to RTO/ISO markets is largely contradicted by the many completed efforts by the Commission to provide nondiscriminatory access to small power producers.

¹⁵ PURPA NOPR at P 105.

¹⁶ 18 CFR 292.309(d)(1).

¹⁷ 18 CFR 292.310(d)(2).

¹⁸ *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, 117 FERC ¶ 61,078 (2006), *order on reh’g*, Order No. 688-A, 119 FERC ¶ 61,305 (2007), *aff’d sub nom. Am. Forest & Paper Ass’n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

¹⁹ Electric storage resources now have access to RTO/ISO markets all the way down to the 100 kilowatt output level, or lower. *See Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127, at P 265 (2018). Streamlined small generator interconnection procedures also provide certain exemptions and a fast-track interconnection process for generators that have up to 5 MW of output. *See Small Generator Interconnection Agreements and Procedures*, Order No. 792, 145 FERC ¶ 61,159 (2013), *clarifying*, Order No. 792-A, 146 FERC ¶ 61,214 (2014).

Consistent with the evolution of organized markets, the PURPA NOPR proposes to reduce the 20 MW presumption for most small power producers to a 1 MW level.²⁰ Given the above-noted organized market reforms and others, combined with 13-plus additional years of the maturation of these markets and their participants, it is reasonable to move the presumption of market access to a lower level, and a 1 MW threshold appears to be reasonable. Moreover, it is important to emphasize that this proposal reestablishes a *rebuttable* presumption at a lower level. The final determination with respect to whether a particular QF within a particular market has nondiscriminatory market access or not may very well be different, but for the sake of administrative efficiency a 1 MW level would now be a closer approximation of nondiscriminatory market access than the 20 MW level established in 2006.

The PURPA NOPR's proposal to not apply this new market access presumption threshold to cogeneration facilities is also commendable. Cogeneration facilities provide electricity for sale to a utility merely as a byproduct of their primary purpose of generating heat for industrial, commercial, institutional, or residential processes. Since the owners of these facilities are not in existence primarily to sell power at wholesale, and their electricity production is merely a byproduct of other activities, these entities are less likely to be well-versed in RTO/ISO market rules or employ the personnel or have in place the technical requirements needed to fully participate in these markets. This same rationale would apply to other forms of customer-owned generating facilities, such as on-site renewable resources (including biomass), microgrid schemes, or other behind-the meter resources that are primarily dedicated to self-supply. Therefore, in addition to maintaining a 20 MW net output presumption for nondiscriminatory market access for cogeneration facilities, the Commission should include facilities that are primarily intended for customer self-supply within that elevated presumption level.

VI. A Demonstration of Financial Viability is a Reasonable Prerequisite to the Establishment of a Legally Enforceable Obligation

FERC's currently effective PURPA implementing regulations provide that a QF can fix its energy rates at the avoided costs rate calculated either: (a) at that time of the delivery of energy or, (b) at the time that a LEO is incurred. While the Commission's regulations do not clearly set forth what constitutes a prerequisite for a state determination that a LEO has arisen, the Commission has invalidated proposed prerequisites of an executed interconnection agreement or power purchase agreement.²¹ Thus, there exists a fair amount of ambiguity as to what constitutes an LEO for the purposes of fixing PURPA's avoided cost rates, and what falls short.

The PURPA NOPR proposes to clarify the establishment of an LEO by amending its implementing regulations to require that a QF demonstrate its commercial viability and financial commitment to construct its generation facility *before* it is entitled to a LEO.²² The concept of an LEO was established to protect eligible QFs from being denied the benefits of PURPA by virtue

²⁰ PURPA NOPR at PP 126-130.

²¹ See, e.g., *FLS Energy, Inc.*, 157 FERC ¶ 61,211 at P 26 (2016) (rejecting a signed interconnection agreement requirement); *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145, at P 24 (2012) (rejecting a signed and executed offtake agreement with the purchasing utility LOE requirement as inconsistent with PURPA).

²² PURPA NOPR at P 136.

of a utility's refusal to sign any sort of power purchase or other agreement with an interconnecting QF.²³ However, the loose prerequisites tied to the formation of an LEO has turned the original QF protection intended here into an opportunity for facility developers to lock-in their future revenue projections before they decide to pursue a project's development. While the utility becomes obligated to accept a QF's power once an LEO arises, and must also consider the project in its long-term resource planning, the QF developer may or may not choose to move forward with their project. This lack of a commitment on the part of a QF can have adverse consequences on utility system planning and long-term electric reliability. In essence, generation developers have utilized the low bar for LEO formation to put the proverbial cart before the horse as they evaluate the commercial viability of a project.

The PURPA NOPR continues to provide states with the flexibility to establish what factors ultimately constitute commercial viability and a reasonable financial commitment to construct a project, but proposes an overdue baseline requirement for the establishment of a LEO. A project developer's procurement of site control, submission of an interconnection agreement, or obtainment of local permitting and zoning approvals each indicate a developer's good-faith intention to ultimately develop its proposed QF. It is more than reasonable for states to seek these demonstrations in advance of a LEO and the application to a utility of PURPA's mandatory purchasing obligation.

VII. The PURPA NOPR Correctly Removes Barriers to Stakeholder Participation in the QF Certification Process

The Commission's QF self-certification process is designed to encourage QFs to pursue that administratively less burdensome approach to obtaining QF certification. This no-cost process is thereby utilized by the vast majority of projects seeking QF certification from the Commission.²⁴ However, the ability to challenge such certifications, to date, is quite expensive and cumbersome by requiring that any entity challenging such certification submit a petition for declaratory order with the Commission and remit such a petition's concomitant \$28,990 filing fee.²⁵

In order to remove the undue burden on stakeholder participation in QF certification proceedings, the PURPA NOPR proposes to allow any party to intervene in and/or file a protest contesting a QF's self-certification or self-recertification without the undue burden of developing a declaratory order or submitting the significant filing fee.²⁶ This modification aligns the QF self-certification process with the many other Commission rate and non-rate filings that are afforded a 30-day intervention and/or protest deadline. While the burden to undermine a QF's self-certification or self-recertification would remain with the intervening/protesting party, full stakeholder participation will be much more likely, resulting in Commission QF certification proceedings that result in QF determinations that are consistent with PURPA's intent.

²³ *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 (1980).

²⁴ PURPA NOPR at P 143.

²⁵ PURPA NOPR at P 146.

²⁶ PURPA NOPR at P 148.

VIII. The Changes Proposed in the PURPA NOPR Should be Prospectively Implemented.

Certain portions of the PURPA NOPR specifically note that the changes proposed therein, if ultimately included in a final rule, will apply prospectively from the effective date of said final rule. However, it is unclear from the text of the PURPA NOPR whether all proposed modifications to the Commission's implementing regulations for PURPA will only apply prospectively, or if certain modifications could be used to abrogate existing contracts. In particular, the PURPA NOPR's proposal with respect to a reduction of the PURPA mandatory purchase obligation in proportion to state retail choice elections specifically states that such reductions "would apply prospectively from the effective date of the final rule and would not disturb contracts in effect..."²⁷ The Commission also clearly states that its proposed modifications to the "one-mile rule" would be effective as of the date of the final rule.²⁸ But, the PURPA NOPR is silent as to whether existing contracts under PURPA will remain binding through their current terms, or whether existing contracts will be subject to rescission or modification as a result of FERC's proposed modifications to its PURPA implementing regulations.

In order to respect the sanctity of contracts and in order to maintain the predictability of the bargains in place under PURPA – both for the benefit of QFs and for the contracting utilities and their system planning efforts – the Commission should make it clear that the entirety of the reforms set forth in the PURPA NOPR will be implemented – if ultimately adopted – on a prospective basis only, and that the modifications to FERC's PURPA implementing regulations will not serve to undermine currently-enforceable contracts during the balance of their current contract terms.

IX. Conclusion

The Chamber supports the Commission's initiative to modernize its regulations implementing PURPA. Much has changed with respect to technology, markets, and America's overall energy posture since PURPA was passed by Congress in 1978. Though small modifications were made to PURPA in 2005, many of the mechanics behind PURPA have failed to keep pace with market dynamics and the designs of the facilities that have sought to take advantage of PURPA's mandatory purchase obligation. The PURPA NOPR proposes solid steps to retain PURPA's benefits where appropriate while mitigating the abuse of FERC's implementing regulations to benefit sophisticated developers who gerrymander their facilities to guarantee PURPA-mandated sales.

²⁷ PURPA NOPR at ¶ 92.

²⁸ PURPA NOPR at ¶ 100.

The Chamber appreciates the opportunity to comment on the PURPA NOPR. If you have any questions or need additional information, please contact Heath Knakmuhs, Vice President and Policy Counsel, at hknakmuhs@uschamber.com or 202-463-5874.

Sincerely,

A handwritten signature in black ink that reads "Marty Durbin". The signature is written in a cursive style with a large initial "M" and a distinct "D".

Marty Durbin
President
Global Energy Institute