UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Qualifying Facility Rates and Requirements	* * *	**Docket No. RM19-15**
Implementation Issues Under The Public Utility Regulatory Policies Act of 1978	* * *	**Docket No. AD16-16**

December 3, 2019

COMMENTS OF THE STATE ENTITIES

Pursuant to the Federal Energy Regulatory Commission's (the Commission) Notice of Proposed Rulemaking (NOPR), issued September 19, 2019 in the above-captioned proceedings, Maura Healey, the Attorney General of the Commonwealth of Massachusetts, the attorneys general of Delaware, the District of Columbia, Maryland, Michigan, New Jersey, North Carolina, Oregon, the New Jersey Board of Public Utilities, and the Rhode Island Division of Public Utilities and Carriers (together, the State Entities) submit the following comments regarding the NOPR's proposed amendments to chapter 18 C.F.R. Parts 292 and 375 of the Commission's regulations implementing the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. ch. 46 § 2601 *et seq.* (PURPA).

I. THE STATE ENTITIES' COMMON POSITIONS

The State Entities represent states with diverse experiences of wholesale and retail electricity markets. The States are located both within and outside organized electricity markets administered by Commission-approved system operators. Some of the States maintain vertically-integrated public utility service models, others have opened retail electricity sales to the competitive market. Each State also has implemented and administers PURPA pursuant to its own set of state laws and regulations. The State Entities, however, share the positions set

forth below regarding the Commission's authority in this proceeding and PURPA's role in facilitating the development of renewable energy generation resources, while better ensuring just and reasonable rates for ratepayers. The State Entities request that the Commission consider these common positions in this proceeding.

A. The Commission Only May Amend The Regulations In A Manner That Is Consistent With The Statute.

The Commission only may amend its regulations in a manner that is consistent with and furthers PURPA's aims, including (1) encouragement of qualifying facilities (QFs); (2) prevention of discrimination against QFs by incumbent utilities; and (3) to ensure just and reasonable rates for ratepayers.[1] Agency action contrary to those aims is arbitrary and capricious, and unlawful. In his dissent, Commissioner Glick warned against any final Commission action that would "effectively gut" PURPA.[2] The State Entities agree. Congress is the appropriate body to weigh and consider PURPA's continued importance, not the Commission.

The NOPR's proposed elimination of QF access to a fixed energy rate is one such change that may result in outcomes that are not consistent with PURPA, at least in some electricity markets, effectively gutting the law's intent. For states with established and robust clean energy policies and markets that encourage generation development, the absence of a fixed energy rate option for certain QFs may not overly diminish the ability of project developers to finance construction of small power production facilities.[3] In states without such advantages, however, a blanket elimination of the fixed energy rate may threaten such facilities' ability to rely on a

[1] *See* 16 U.S.C. § 824a-3.

[2] Dissent in Part of Commissioner Glick at P 1.

[3] There is insufficient record evidence in this proceeding to support that conclusion, and the State Entities do not adopt that position in these comments.

stable PURPA revenue stream to better ensure project investment. That result is contrary to the statute's intent to encourage development of QFs, including renewable generation resources like solar and wind power.

The NOPR's proposed reduction of the new power generating production capacity amount at which the PURPA regulations establish a rebuttable presumption that small power production facilities lack nondiscriminatory market access from 20 MW to 1 MW also may have market-specific effects that are contrary to PURPA. As modified to reflect the Energy Policy Act of 2005,[4] the Commission's regulations recognize that where a QF is located within and has access to a competitive electricity market, it may be unnecessary to obligate a public utility to purchase QF energy and capacity to meet the intent of the law.[5] The Commission implemented the rebuttable presumption, however, because QFs of smaller nameplate capacity faced greater obstacles than larger facilities in securing such market access.[6] Whether and to what extent such market barriers still remain, however, likely depends on conditions within individual markets, including but not limited to whether the market is an RTO/ISO. Thus, the extent to which a modification of the rebuttable presumption is consistent with PURPA, if at all, is likewise an issue that will vary by market and by state. A uniform revision of the rebuttable presumption to make it applicable only to facilities of 1 MW or below fails to account for this difference, and is thus contrary to PURPA.

B. PURPA's Role In Achieving State Climate Change Objectives

The State Entities share a fundamental interest in combatting climate change and ensuring that ratepayers receive the benefits of clean energy resources. Their states have adopted

[4] 42 U.S.C. §§ 42301, *et seq*.

[5] *See* 18 C.F.R. § 292.309.

[6] *See* NOPR at PP 119 – 125.

policies to reduce greenhouse gas (GHG) emissions, promote development of clean energy resources, modernize the electric grid, and facilitate a resilient power generation sector. PURPA plays a fundamental role in allowing the states to achieve these goals, by providing developers of clean energy generation an opportunity to contract with incumbent public utilities for the purchase of renewable generation. PURPA also has facilitated competition in the energy markets, particularly in markets served by vertically-integrated electric utilities, better ensuring just and reasonable rates for ratepayers. The Commission should avoid any rule change that reduces these benefits to the states and their residents.

C. The Commission Must Not Frustrate The States' Efforts To Reduce Dependence On Fossil Fuels.

The NOPR cites increased supply of domestic natural gas as a basis for modifying the PURPA regulations.[7] In general, increased reliance on natural gas will discourage development of clean, alternative sources of energy such as wind and solar, and is thus contrary to a primary aim of the law. The NOPR also ignores the important context in which the Commission proposes these changes, particularly the states' strong policies and ongoing efforts to combat the effects of climate change and protect the health and welfare of their residents. The Commission should not enact rule changes that would frustrate these important state laws, policies, and efforts. Any Commission action that has the purpose or effect of furthering the nation's reliance on natural gas and other fossil fuels rather than continued development of clean renewable resources would do exactly that and is not consistent with PURPA's objectives.

D. States Must Retain Broad Authority To Innovate Under PURPA.

[7] NOPR at P 29 ("[C]urrently there is an increased supply of natural gas resulting from advanced production techniques that have opened up large new natural gas reserves.).

The Commission should respect the states' roles as primary implementers of PURPA, *provided* that such state action is consistent with PURPA's objectives, including development of renewable energy generation. This role allows the states to incentivize and promote certain resources with state policy innovations. Changes to the Commission's regulations that limit the states' flexibility are contrary to the principles of cooperative federalism that guide regulation of the energy sector.[8] For example, reducing the rebuttable presumption that some QFs lack nondiscriminatory market access from 20 MW to 1 MW may ultimately impede a state from incorporating cost-effective renewable and low-carbon generation facilities of nameplate generation capacity less than 20 MW into its resource mix.[9] As set forth above, this proposed change fails to acknowledge key differences between markets that may render a change in the rebuttable presumption appropriate in one instance and not another, including for example, whether the small power production facility is located within an RTO/ISO or within a state with strong clean energy policies that already encourage construction of new generation. The Commission must avoid limiting the states' latitude in establishing creative policies to meet PURPA's goals.

E. This Rulemaking Must Not Undermine The Statutory Goal of Supporting Investment In Renewable Energy Generation Projects.

The PURPA purchase obligation plays an essential role in the development of QFs, including clean energy resources such as wind and solar generation. A QF that secures energy and capacity payments under PURPA gains a degree of financial certainty and is more viable. The availability of a PURPA contract offering a fixed price for energy may be critical to

[8] *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 780 (2016).

[9] NOPR at P 118. *See, e.g.*, Comments of the Massachusetts Attorney General of Massachusetts Maura Healey at 4-8.

ensuring project financing in certain markets.[10] The NOPR's proposed changes, including allowing states to eliminate the fixed energy rate option for QFs and removing the rebuttable presumption of no competitive market access for small power production facilities of nameplate capacity between 20 MW and 1 MW may have negative impacts on such financing arrangements.

Fundamentally, the Commission must enact no regulation that is contrary to PURPA's purposes, including development of solar and wind small power production facilities. To ensure that any such change affecting project finance is not contrary to statute, the Commission should, at minimum, provide substantial guidance upon consideration of stakeholder comments, and based on an adequate factual record. The State Entities respectfully request that the Commission provide for such administrative process in a follow-on, formal rulemaking proceeding.[11]

II. CONCLUSION

The State Entities respectfully request that the Commission consider these comments in making any revisions to its PURPA regulations.

Respectfully Submitted,

[10] *See* Dissent in Part of Commissioner Glick at P 9 (stating that the NOPR's "proposal to allow utilities to eliminate the fixed-price contract option will make it more difficult – or in some cases impossible – for QFs to obtain financing").

[11] PURPA requires that the Commission prescribe rules "after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments." 16 U.S.C. § 824a-3. In this rulemaking, the Commission has provided only for a single round of comments, and denied two motions requesting a reasonable extension to the comments deadline and the opportunity to submit reply comments. A follow-on proceeding as requested above thus may be required to ensure compliance with the statute, particularly given the substantial, potential impacts of the NOPR on the States.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. Section 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Liam J. Paskvan
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Dated at Boston, Massachusetts this 3rd day of December, 2019.