

**Implementing the Public Utilities Regulatory Policies Act:
FERC Must Preserve the Foundation of Competitive Markets
Written Comments by Todd Glass, Wilson Sonsini Goodrich & Rosati,
on behalf of the Solar Energy Industries Association (SEIA)¹**

The Commission should have no doubt about the continuing importance of the Public Utility Regulatory Policies Act of 1978 (PURPA) to the solar industry in the United States. Some argue that PURPA is an anachronism, that independent power generation has matured to the point that PURPA is now obsolete. PURPA's fundamental purpose of ensuring that independent generation owners can compete with incumbent utilities – which are natural monopolies that may not have an incentive to lower costs and benefit consumers – remains as necessary today as it was in 1978. PURPA's mandates have fostered the surge in independent renewable generation that is the vanguard of America's clean energy future, and these mandates remain the foundation of competitive electric markets in the United States.

**I. THE U.S. SOLAR INDUSTRY WANTS TO COMPETE AS AN ABUNDANT,
RENEWABLE, DOMESTIC ENERGY RESOURCE**

SEIA is the national trade association for the solar industry in the United States. SEIA represents all organizations that promote, manufacture, install and support the development of solar energy. The Solar Foundation estimates that there are more than 208,000 such jobs in the U.S. solar workforce. This number is poised for further momentous growth: in 2015, solar employment grew 12 times faster than the overall U.S. economy. SEIA strongly believes that the Commission's continued support for and enforcement of PURPA is a necessary component of maintaining the impressive growth of this domestic industry.

As a starting point, SEIA calls attention to the often-repeated assertion that PURPA compels utilities to purchase "high cost" or "overpriced" energy. This is false; by definition, the

¹ The comments contained in this filing represent the position of SEIA as an organization, but do not necessarily reflect the views of any particular member with respect to any issue.

avoided cost-based pricing of PURPA contracts can be no higher than the cost the utility would otherwise pay.² This misconception dates from a prior era, before current technological innovations and efficiencies drove down solar power prices such that the market price for solar power purchase agreements (PPAs) is now competitive with other forms of new generation.³ Indeed, the plummeting installed cost of solar systems has created an environment where solar-based energy generation is cost competitive with fossil fuel-based avoided cost calculations.

PURPA and the Qualifying Facilities (QFs) it supports offer something that incumbent utilities are otherwise often immune to: mandatory competition. Independent developers are motivated to take advantage of the opportunities that PURPA creates and drive further innovation and cost reduction; their efforts in turn push utilities to modernize and lower costs. The belief that PURPA facilitates purchases of uneconomic generation is false, and the truth of the economics illuminates the continuing tension between PURPA-backed independent power and utility business models. The Commission should focus its review of PURPA on ensuring that competition and innovation can continue and that incumbent utilities are not impeding these breakthroughs with anticompetitive conduct. The Commission should also use its enforcement authority to safeguard PURPA's implementation by both utilities and state commissions.

II. NEW GENERATION RESOURCES WILL NOT BE CONSTRUCTED IF THE PURPA FOUNDATION IS ERODED

Almost every new generation resource that has been constructed by independent developers over the past twenty years has used a project finance model. PURPA provides crucial legal and regulatory support for these development and project financing efforts. Limiting PURPA and its mandates will create regulatory and economic uncertainty and will significantly

² 18 CFR 292.101(b)(6).

³ This falsehood might also have gained traction due to improper conflation between renewable projects seeking (1) PURPA-grounded, avoided cost-based contracts and (2) contracts pursuant to state legislative policy-driven renewable portfolio standards (the latter of which were not tied to avoided cost-based prices).

curtail the construction and financing of new generation resources. PURPA and QF status provide key exemptions from federal and state regulations.⁴ In unorganized markets and for projects 20 megawatts and smaller in organized markets, PURPA's mandatory purchase obligation is a vital backstop that financing parties require as a necessary condition of investment.

QFs bring many other substantial benefits to the grid and to consumers in all markets. For example, solar QFs can often be sited closer to load than traditional central station generators, lowering costs to ratepayers due to the efficient use of utility transmission and distribution assets and reduced construction and operations and maintenance costs. Solar QFs also complement existing generation resources and provide opportunities for continued technological developments, including energy storage and software/hardware grid management technologies. These benefits will be lost if PURPA and its mandates are weakened.

A. PROJECT FINANCING REQUIRES A BASIC SET OF REASONABLE TERMS THAT ENSURE PREDICTABLE CASH FLOW

In passing PURPA, Congress established a regulatory structure that brought financial investors, both debt and equity, into the independent power industry. Without access to capital, construction of new generation resources will grind to a halt. As the Commission has noted, "in order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility."⁵ A PPA that provides a basis for this reasonable certainty is an absolutely essential prerequisite for the developer to obtain long-term project financing. For a project to be financeable, the developer must obtain a PPA that includes:

- *Fixed Price*: A predictable stream of revenue from the project asset is the fundamental basis of any project financing. Most solar QF developers elect the

⁴ 18 CFR 292.601-602.

⁵ See *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 30,868 (1980).

option under 18 CFR 292.304(d)(2) to provide energy and/or capacity pursuant to a PPA over a specified term.⁶ Developers need rates for such sales of energy and/or capacity to be fixed, based on avoided costs calculated at the time the obligation (of the QF to sell and the utility to buy) is incurred, rather than varying over time.

- *Financeable Term*: Most financing partners expect a PPA with a 20 year term. Very short term contracts (e.g., two to ten years⁷) simply are not financeable; in fact, most short term arrangements do not allow developers to recoup even initial capital costs. The Commission should establish a minimum PPA term of 20 years.
- *Limited, Non-Discriminatory Curtailment*: Curtailment by buyers must be limited to narrow circumstances and must be imposed in a non-discriminatory manner. Unduly broad provisions that allow utilities to require QFs to cease generating for reasons other than a system emergency, or provisions that allow for unlimited curtailments, are neither consistent with the fundamental intent of PURPA nor financeable. The circumstances of allowable “system emergency” curtailments should be codified and curtailments for other reasons should be impermissible.
- *Equitable Security Requirements*: There is no requirement in PURPA or FERC’s implementing regulations that QF developers provide security, but many utilities use security requirements to block QF development. SEIA members have observed a specific manifestation of this issue: PacifiCorp, operating in multiple states, mandates that QFs accept a development security provision that provides that the applicable PacifiCorp utility – not the lenders, as is customary – is able to seize the project in the event of a default. PacifiCorp seldom (if ever) agrees to exclude the provision, and developers have been forced to abandon projects as a result. Solar QF developers are willing to have reasonable security requirements imposed on their efforts, but the security provisions must allow flexibility to the developer as to the form of security and be expressly secondary to the project financing party’s security interests.
- *No Change in Law Risk or “Regulatory Out” Provisions*: Some utilities try to limit

⁶ As there is a separate panel on avoided costs, here we note that the Commission should carefully review and, where appropriate, move to correct utility avoided cost calculation metrics and other policies that do not satisfy the letter or the intent of PURPA.

⁷ See, e.g., Idaho Public Utilities Commission, Case No. PAC-E-15-03, *In the Matter of Rocket Mountain Power Company’s Petition to Modify Terms and Conditions of PURPA Purchase Agreements* (addressing the application of PacifiCorp d/b/a Rocky Mountain Power Company to reduce the maximum PURPA contract length from 20 years to 2 years; in Order No. 33357, issued August 20, 2015, and affirmed on reconsideration in Order No. 33419, issued November 5, 2015, the Idaho Commission ordered a maximum term for PPAs with QFs of 2 years); Public Service Commission of Wyoming, Docket No. 20000-481-EA-15, *In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities* (addressing the application of PacifiCorp d/b/a Rocky Mountain Power to reduce the maximum contract term of PPAs with QFs from 20 years to 3 years); Public Service Commission of Utah, Docket No. 15-035-53, *In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities* (addressing the application of PacifiCorp d/b/a Rocky Mountain Power to reduce the maximum contract term of PPAs with QFs from 20 years to 3 years; on Jan. 7, 2016, the Utah Commission ordered that the maximum term for PPAs with QFs may not exceed 15 years).

their obligations under PPAs if changes in law reduce the benefits in comparison to what the utility believed when it first executed the agreement. Others include “regulatory disallowance” provisions that reset power prices and/or require “refunds” from the QF to the utility if the utility is denied certain rate recovery treatment that it desires.⁸ Such provisions raise the possibility of a mid-term interruption in project cash flows, and most financiers will not lend into such uncertainty; none of these provisions are consistent with the right of QFs to elect avoided cost-based rates determined at the time the must purchase/must sell obligations are incurred.⁹

B. THE MANDATORY PURCHASE OBLIGATION SHOULD BE RETAINED FOR QFs (1) 20 MEGAWATTS AND BELOW IN ALL MARKETS AND (2) REGARDLESS OF SIZE IN THE NON-ORGANIZED MARKETS

In implementing Section 210(m) of PURPA, the Commission adopted a rebuttable presumption that QFs 20 megawatts and below (Small QFs) do not have non-discriminatory access to any market, and therefore maintained the mandatory purchase obligation with respect to such Small QFs.¹⁰ The factors that led the Commission to establish the rebuttable presumption still exist today. Small QFs often interconnect to distribution lines, requiring technical enhancements to access the wholesale market; they also often face jurisdictional issues, pancaked delivery rates, and administrative burdens to access distant buyers.¹¹

Additionally, QFs in markets that do not satisfy the requirements of all elements of PURPA Section 210(m)(1)(A), (B) or (C) do not have access to non-discriminatory markets, because such markets simply do not exist. As Congress and this Commission have recognized, the inherently monopolistic nature of the generation and delivery of electricity yields structural barriers to the development of independent power because developers, unlike public utilities, are not guaranteed a return of their costs, much less a return on their investment. Moreover, independent power projects remain difficult to develop in the non-organized markets – often

⁸ See, e.g., State of North Carolina Utilities Commission, Docket No. E-100, Sub 127, *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities* at 20-22 (Jul. 27, 2011) and State of North Carolina Utilities Commission, Docket No. E-100, Sub 136, *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities* at 43-46 (Feb. 21, 2014).

⁹ See 18 CFR 292.304(d)(2)(ii).

¹⁰ Order 688, P. 72; Order 688-A, P. 94.

¹¹ Order 688, P. 96.

impossible to develop, given the unworkable provisions that many utilities attempt to introduce into PPAs. PURPA remains critical to the continued growth and development of independent power, in both the organized and non-organized markets.

Additionally, the mandatory purchase obligation provides a necessary financial backstop for QFs selling to non-utility buyers pursuant to bilateral PPAs. Developers can pursue such arrangements with third parties because PURPA provides a temporary alternative in the event the market-based arrangement fails. Project financiers rely upon this PURPA backstop when agreeing to invest in projects. PURPA thus remains a keystone of the ongoing development of independent power, even when QFs are engaging in market sales to third parties.

C. THE NASCENT WESTERN ENERGY IMBALANCE MARKET DOES NOT SATISFY THE PURPA § 210(m) STANDARDS

The developing Energy Imbalance Market (EIM) in the West does not provide a sufficient structure to limit utility mandatory purchase obligations for QFs of any size. While there are operational benefits to the EIM, those benefits do not satisfy the Section 210(m) market standards required to eliminate the must-purchase obligation. The current structure of the EIM does not provide market access to generators; the “market” functions as an exchange of schedules between Balancing Authorities (BA), and individual projects have no ability to submit bids into the EIM. Moreover, the need for a financeable PPA exists in all markets for both large and small QF projects, and the developing EIM will not resolve this concern. The Commission should continue to monitor EIM development, but it should not limit the mandatory purchase obligation, at any project size, based on the development of the EIM.

III. FERC SHOULD DETER UNFAIR UTILITY CONTRACTING PRACTICES

Solar QFs have experienced utility contracting practices that effectively undermine QF development across large portions of the country, particularly negotiations with vertically-

integrated utilities operating in multiple states outside of an ISO/RTO market. SEIA members have experienced unfair utility contracting practices at all stages of the contracting process: starting discussions, active negotiations, and addressing issues that arise after contracts are executed (and often after projects have been constructed and begun operation). In particular:

- *Failure to Respect Legally Enforceable Obligations*: The Commission’s regulations provide for sales by QFs pursuant to contracts or legally enforceable obligations, but utilities who refuse to come to reasonable terms in contracts (i.e., require the unfinanceable provisions discussed above) will not acknowledge a legally-enforceable obligation without actual, or at least threatened, litigation.¹²
- *RFP Abuses*: Some utilities force QFs (especially those above a certain very limited size, e.g., 3 MW) to seek contracts in a “request for proposals” (RFP) or similar process, ignoring the utilities’ must-purchase obligations.¹³ Such RFPs may only be available once in a multi-year period or may have limited procurement targets.
- *Gaming Avoided Cost*: While not a focus of this panel, we note that some utilities (1) do not provide avoided cost rates that represent the full array of costs avoided by purchasing from the QF and (2) delay negotiations so that developers are pushed into the next avoided cost determination period, often resulting in a lower rate than the QF could have obtained had its right to elect “avoided costs calculated at the time the obligation is incurred” been respected. The Commission should clarify that the “avoided cost” rate must include both the value of energy and capacity attributes unless otherwise agreed by the QF.
- *Discriminatory Interconnection Processes*:¹⁴ Utilities can engage in discriminatory practices because they control the interconnection process. Developers need

¹² SEIA members have also encountered instances where they have engaged in contested arbitration to obtain a reasonable, financeable PPA and, a few months later, asked for further draft PPAs based on the finally-agreed form, only to be told that the utility’s form had changed and presented with a totally new (and completely unfinanceable) PPA. See generally State of North Carolina Utilities Commission, Docket No. E-22, Sub 530, *In the Matter of Fresh Air Energy XIX, LLC, et al. against Virginia Electric & Power Co., d/b/a Dominion Power North Carolina*.

¹³ This is a means by which utilities ignore the QF right to elect to be paid avoided cost rates “calculated at the time the obligation is incurred.” 18 CFR 292.304(d)(2)(ii). See, e.g., Ga. Comp. R. & Regs. R 513-3-4-.04(3) (restricting QFs above 30 MW from selling energy except through participation in an RFP). See also *Hydrodynamics Inc., et al.*, 146 FERC ¶ 61,193 (March 20, 2014) (finding a 50 MW installed capacity limitation and a requirement that QFs above 10 MW obtain contracts through competitive solicitation processes inconsistent with PURPA).

¹⁴ SEIA and several of its members are participating in the Commission’s related interconnection docket (RM16-12) but bring one issue that is unique to a QF to this conference: the interplay between a mandatory purchase contract and an interconnection agreement. Two examples in particular: (1) SEIA members have entered into PPAs with PacifiCorp in Oregon (Pacific Power) and, during subsequent interconnection processes, been told that their projects are in a “load pocket” and that the projects would be subject to third party transmission charges in order to effect the sale of power to the utility, notwithstanding the QF is directly interconnected with the utility and in its service territory; and (2) PacifiCorp in Utah, Wyoming and Idaho (Rocky Mountain Power) has a separate interconnection procedure for QF projects, which requires developers to determined very early on in the development cycle if they are going to pursue a QF contract or participate in an RFP in order to seek the PPA required to build a given project.

assurances that the Commission will not allow a utility to use the interconnection process as a way to prioritize its own generation projects over those proposed by QF developers.¹⁵ To avoid any gamesmanship, there should be no distinction between the interconnection process requirements for QFs and non-QFs. Each QF should only be responsible for the costs to interconnect its project to the host's system; in particular, the Commission should prohibit requirements that QFs (1) construct, or assume cost responsibility for, any upgrades required for deliverability or (2) purchase long-term transmission from third parties.

Defending their PURPA rights against these practices is a major challenge for developers. Spending time, money, and other resources contesting unfair utility contracting practices is inefficient and reduces the resources that can be spent on development of needed projects. Many state commissions similarly do not have the resources to timely address QF complaints and some, quite frankly, do not have the desire. Given their limited resources, in the absence of quick resolution, developers are often forced to abandon otherwise worthwhile projects that face a lengthy delay and elect to pursue lesser projects that can proceed more rapidly.

The options for developers to raise the profile of unfair contracting practices to FERC are limited. This effectively prevents FERC from having an opportunity to review (or even be aware of) unfair utility contracting practices and contract terms and conditions. The Commission should establish a new docket process where QFs can bring complaints of specific unfair contracting practices and provisions (especially those in PPAs that are presented to developers on a "take it or leave it" basis) and receive expedited resolution, ideally within no more than 60 days from filing. A new process for review at FERC would prevent gamesmanship, in particular of utilities operating in multiple states, which gives them the opportunity to undercut PURPA in different ways before different state commissions. A new process would also provide the Commission with direct insight into how PURPA is being administered on a going forward basis,

¹⁵ See, e.g., *USA Power v. PacifiCorp*, 2016 UT 20 (Ut. 2016) (upholding the trial court's determination that the utility had misappropriated trade secrets by terminating the negotiations with the developer and constructing a utility-owned plant following the same design and unique specifications as that proposed by the developer in its confidential negotiations with the utility).

so that it will be in the best position possible to monitor questions and areas of concern raised in this technical conference. It would also provide a forum for QF projects developed in municipal and cooperative utility territories (which are often exempt from state commission jurisdiction) to address alleged PURPA violations that otherwise escape regulatory review.

IV. LEGALLY ENFORCEABLE OBLIGATIONS

When faced with a utility unwilling to come to reasonable contractual terms to satisfy their mandatory purchase obligations, the developer's only recourse is to rely on the backstop of the utility's legally enforceable obligation to purchase a QF's power.¹⁶ The Commission spoke clearly on the establishment and effects of a legally enforceable obligation in *Cedar Creek Wind, LLC*, where it explained that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF."¹⁷ Despite this clear guidance, many utilities (sometimes with the approval of their state commissions) refuse to acknowledge that QFs can require the utility to commit to purchases, and the Commission should closely review the treatment of the obligation across the states (especially in unorganized markets).

Unfortunately, even if a developer establishes a legally enforceable obligation (which often requires sometimes lengthy proceedings before the state commission and/or litigation), the reward is a seat at the same unfair negotiating table discussed above. Further, even if a developer obtains a satisfactory contract through its litigation efforts, the litigation (or, more often, confidential settlement) only addresses the project at issue and nothing prevents a utility from employing the same recalcitrant strategies for all future projects proposed by the same developer, or projects proposed by other developers who will have to pursue separate costly and

¹⁶ See 18 CFR § 292.304(d). See also Order No. 69: "Use of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible facility merely by refusing to enter into a contract with the qualifying facility."

¹⁷ 137 FERC ¶ 61,006, at P 32 (2011) (emphasis added).

time-consuming litigation and settlement efforts. In practice, this allows a utility to drain developers' resources by forcing them to expend substantial legal and operational fees merely establishing what should be their PURPA-mandated rights to a legally enforceable obligation. The common result is that developers do not have sufficient resources (financial, time, etc.) to continue to pursue the reasonable PPA provisions discussed above and to otherwise resist the utilities' unfair contracting practices in individual project PPA negotiations or to pursue future projects with these utilities based on what should be settled issues.

V. CONCLUSION

SEIA appreciates the Commission taking this opportunity to inquire on the status of PURPA, and reiterates the following key points:

- (1) The Commission should provide clear guidance on the need for QF project PPAs to contain fixed prices, have financeable term lengths, strictly limit allowable curtailments, contain equitable security requirements, limit the opportunity to avoid obligations for changes in law or regulatory disallowance, and provide a mechanism to address changes necessitated by post-execution interconnection and transmission issues.
- (2) The rebuttable presumption that Small QFs do not have non-discriminatory access to any market must be maintained. The mandatory purchase obligations in the non-organized markets, including the still-developing EIM, should similarly be maintained.
- (3) The Commission should provide a limited, efficient forum for QF developers to raise utilities' abusive contracting practices, enabling the Commission to both monitor PURPA implementation and, where necessary, enforce its requirements.