

**BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION**

**TECHNICAL CONFERENCE ON )  
IMPLEMENTATION ISSUES UNDER THE )  
PUBLIC UTILITY REGULATORY POLICIES ) DOCKET NO. AD16-16-000  
ACT OF 1978 )  
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I wish to thank the Commission for the opportunity to appear at the Commission’s PURPA technical conference on the panel addressing “mandatory purchase” obligations.

The intent of the Public Utility Regulatory Policies Act (PURPA) of 1978 was to reduce the Nation’s dependence on foreign oil and to encourage the development of renewable power generation as an alternative to using fossil fuels. *FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982). To this end, PURPA requires electric utilities to purchase power from qualifying facilities (“QFs”), specifically cogeneration and small power production energy projects. In recent years, advances in energy efficiency and conservation, adoption of renewable portfolio standards (RPSs)<sup>1</sup>, falling prices for energy generating materials and equipment (e.g., solar panels and wind turbines), and federal and state tax incentives have caused a boom in the renewable energy markets. At the same time, utilities are experiencing flat or slight growth in loads, more distributed generation and net metering, more energy conservation and demand-side management projects, greater energy efficiency in appliances/lighting/construction materials to the extent that utilities are purchasing power from QFs under PURPA with unintended adverse consequences. While not a complete list, these consequences include: (1) PURPA generation

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<sup>1</sup> Although Idaho has no state RPS, the U.S. Energy Information Administration recently reported that 82% of Idaho’s net electric generation in 2014 came from renewable energy resources, with the fifth lowest average electric rates in the Nation. Idaho generates renewable energy from a broad array of resources including: hydro; geothermal; solar; wind; landfill gas; dairy digesters; cogeneration; and bio-waste.

that is not needed to serve loads; (2) large amounts of intermittent generation requiring standby generation; (3) long-term, fixed-price PURPA contracts that place greater risks on both the utilities and customers; (4) operating and reliability issues; and (5) planning issues caused by the “must purchase” obligations of PURPA, resulting in the procurement of large amounts of unneeded power.

State regulatory commissions, which are charged with implementing the Commission’s PURPA regulations and approving QF contracts under PURPA are also obligated to ensure reliability of service and reasonable rates to ratepayers. However, the available tools for state commissions to carry out their obligations under PURPA and state statutes are limited in number and precision. This comment addresses the adverse impacts of disaggregation, arising out of developers’ efforts to “game” state and federal regulations to maximize their returns while technically satisfying PURPA and PURPA regulations. The comment also discusses Idaho’s experience with the negative effects of PURPA’s purchase obligation. On behalf of the Idaho Public Utilities Commission (“Idaho PUC”), my comments suggest ways these negative effects can be mitigated by granting more authority and discretion to the states in accordance with parameters established by the Commission. My colleague, Commissioner Raper, will address the issues of avoided costs.

## **I. THE STATE REGULATORY AGENCY’S PERSPECTIVE**

The Idaho PUC is the state regulatory agency authorized under state law to regulate public utilities operating within Idaho. *Idaho Code* §§ 61-129, 61-501. The Idaho PUC is responsible for ensuring reliability of electric service at just and reasonable rates in Idaho, and for implementing PURPA in accordance with the Commission’s regulations.

PURPA obligates electric utilities to purchase power from QFs at rates no greater than a utility's "avoided cost" as approved by each state's regulatory commission. 16 U.S.C. § 824a-3. The avoided cost rate is the "incremental cost[ ] to an electric utility of [power] which, but for the purchase from the [QF], such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6). The avoided cost rate must be "just and reasonable to the electric consumers . . . and in the public interest" and "shall not discriminate against [QFs]." 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304. Thus, imbedded in PURPA and the Commission's implementing regulations – which define the avoided cost rate at which utilities are obligated to purchase QF power – are the concerns of ratepayers and the public interest, which state commissions are obligated to protect.

While PURPA states its purpose was to encourage the development of renewable energy resources, the Act unmistakably recognizes that such encouragement shall not be paramount to ensuring that avoided costs shall be just and reasonable to ratepayers, in the public interest, and not discriminatory to QFs. The promotion of renewable energy and protection of ratepayers are competing interests under PURPA for which the Commission issues guidance through regulations. But the routine balancing of those interests and resolving disputes happens in the states, in cases brought before the state commissions. State commissions such as the Idaho PUC currently have limited tools with which to fulfill their obligations under PURPA and state laws governing the regulation of electric utilities.

## **II. DISAGGREGATION AND GAMING**

A troublesome though inevitable outcome of the utilities' "must purchase" obligation is disaggregation or "gaming," which occurs when a developer seeks the benefits afforded under PURPA, but breaks the spirit of PURPA. The capacity maximum thresholds for qualifying

facilities in the Commission’s regulations reflect PURPA’s goal to encourage development of **small** power production facilities. 18 C.F.R. §§ 292.204(a) (setting 80 MW threshold), 292.309(d)(1) (rebuttable presumption that a QF with capacity of 20 MW or less does not have nondiscriminatory access to a competitive market). A developer that is precluded from pursuing a PURPA contract because its project exceeds the 80 MW threshold is incentivized to disaggregate into two or more projects that fall under the threshold.

Disaggregation also occurs when a developer divides one PURPA project into several smaller projects to obtain a more favorable standard (or published) rate, required for QFs with a smaller design capacity set by the state commission.<sup>2</sup> 18 C.F.R. § 292.304(c)(1). These projects often are developed by a single manager, use a common point of interconnection, order generation equipment for all the projects at the same time, and submit a single-unified site plan to local/state siting authorities.

The Commission’s distance separation requirement, referred to as the “one-mile” rule, 18 C.F.R. § 292.204(a)(2), was thought to be an answer to the problem of disaggregation. However, the rule has resulted in disaggregated projects that are simply spaced a mile apart to satisfy the rule. Unlike other portions of the United States, open space is plentiful in parts of the West, and PURPA developers readily move projects apart to satisfy the rule. Efficiencies that might be gained by locating **small** projects in close proximity to each other – to the benefit of ratepayers, developer, and utility alike – are lost for the sake of complying with the one-mile rule.

A prime example of the disaggregation problem is illustrated by a case that came before the Idaho PUC, involving Cedar Creek Wind LLC. In that case, the sole developer, Cedar Creek Wind LLC, disaggregated a single 151 MW wind project into two 78 MW projects in 2010.

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<sup>2</sup> State regulatory agencies may, in their discretion, set the threshold for standard rate QFs higher than 100 kW, under 18 C.F.R. § 292.304(c)(2).

However, the avoided cost rates were not favorable to the QF so the project was divided again into five projects – spaced a mile apart – to take advantage of Idaho’s then standard (or published) rates for projects at or below 10 average MW (“aMW”).

Many state commissions, including the Idaho PUC, set their eligibility thresholds for standard or published rate contracts at greater than 100 kW for all or a certain type of QF project. Before December 2010, the Idaho PUC set standard rates for all PURPA projects at 10 aMW or smaller. In 2010, we received applications to approve more than 500 MW of wind projects – all sized at 10 aMW using 20-year contracts with a projected total cost to ratepayers of \$2.169 billion. Most if not all of these projects – including the Cedar Creek projects – were one-mile apart. In response to petitions from our three utilities (Avista Corporation, Idaho Power Company, and PacifiCorp), the Idaho PUC reduced the eligibility cap for wind and solar standard rate contracts to 100 kW. The Idaho PUC approved several of these wind projects at an estimated cost to ratepayers of about \$236 million.

The Idaho PUC has also observed gaming when a PURPA developer relocates a project from one state to another state where the utility’s avoided cost rates are higher in the second state. We have seen projects move from one utility in one state, to the same utility in another state, or from one utility in one state, to a different utility in another state. This violates the spirit of evenhandedness where the first state may be allocated 95% of the utility’s costs, including PURPA power costs.

In our experience, disaggregation has adverse consequences for which state commissions lack sufficient tools to craft an appropriate remedy. Disaggregation has allowed developers to obligate utilities to purchase vast amounts of energy from a single source, thereby limiting utilities’ load diversification. Also, disaggregation thwarts utilities’ ability to attain the least-cost

resource, to the detriment of customers in the form of raised rates.<sup>3</sup> In addition, those benefitting from gaming are often large multi-national corporations – rather than small developers – whose interests in developing their projects are seemingly limited to reaping the federal tax advantages.<sup>4</sup> The undermining of reliability, impact on rates, and bolstering of large rather than small power producers, are unacceptable outcomes from our state regulatory perspective.

To address the problems associated with disaggregation, the Idaho PUC proposes that the Commission establish multiple criteria, to be evaluated by the state regulatory commissions on a case-by-case basis. The criteria could include whether the generation source within the project:

- Uses the same motive force or fuel source
- Is owned or controlled by the same person(s) or affiliated person(s)
- Is placed in service within 12 months of an affiliated project’s commercial operation dates as specified in the power sales agreement
- Shares a common point of interconnection or interconnection facilities
- Shares common control, communications, and operation facilities
- Shares a common transmission interconnection agreement
- Has a power sales agreement executed within 12 months of a similar facility in the same general vicinity
- Is operated and maintained by the same entity
- Is constructed by the same entity within 12 months
- Uses common debt or equity financing
- Is subject to a revenue sharing arrangement

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<sup>3</sup> Utilities assert that gaming to meet thresholds results in “costly, often above-market contracts that will cost customers billions of dollars in rate hikes.” R. Kress, *Gaming PURPA?*, Energy Biz (December 9, 2015), <http://www.energybiz.com/article/15/12/gaming-purpa>. The reason for the rate hikes, according to PacifiCorp, is that utilities are locked into “unneeded electricity contracts at rates [far above] market price.” *Id.*

<sup>4</sup> *See id.*

- Obtains local, state and federal land use permits under a single application or as a single entity
- Shares engineering or procurement contracts
- Shares common land leases
- Is in close proximity to other similar facilities

Also, the Commission should consider reducing the 80 MW threshold to encourage truly small PURPA projects. When the threshold was set at 80 MW, energy was generated very differently. Now, through advances in energy efficiency technologies and market transformation, appliances and other essential equipment use far less energy. A megawatt goes much further, thus the 80 MW maximum accommodates a much larger project than what was envisioned in 1978. A lowered threshold may achieve today, what the 80 MW threshold was intended to achieve decades ago.

### **III. PURPA'S MUST PURCHASE OBLIGATION**

Our experience in Idaho supports that the “must purchase” obligation under PURPA has yielded adverse consequences to utilities, and ultimately to ratepayers. Under the obligation, utilities must purchase power regardless of need. This has resulted in 20-year contracts with fixed, long-term avoided costs well above actual avoided costs in the later years of the PURPA contract. The purchase obligation has also yielded a lack of diversification in utilities’ loads, where much of the load is tied up in intermittent power, resulting in less reliability and greater risk (due to outages or higher rates).

Absent discretion to waive a mandatory purchase obligation, the Idaho PUC has three tools to address concerns raised by a flood of PURPA projects: (1) adjust avoided cost; (2) adjust the project size eligible for published rates; or (3) adjust contract length. These tools have proven to be blunt instruments. As will be discussed in the later panel, calculating avoided cost

is not a simple endeavor. As to project size, the Idaho PUC lowered the project size eligibility for published rates in 2010, in effort to manage the flood of proposed projects seeking to secure the favorable published rates. The flood was not abated.

The deluge of PURPA projects reflects a nationwide trend. A recent article from the Northwest Power and Conservation Council commented, “Improving technologies have made [solar] installations more efficient, productive, and durable, while incentives from state legislation and the federal Clean Power Plan have also encouraged development.”<sup>5</sup> The article also noted, “In late 2015, Congress approved an extension to the federal Investment Tax Credit, extending lucrative financial incentives to developers through 2022.”<sup>6</sup>

In 2015, Idaho’s three electric utilities filed a case before the Idaho PUC seeking relief from the large influx of PURPA projects.<sup>7</sup> In that case, Idaho Power and PacifiCorp disclosed that they were negotiating with several PURPA projects with a cumulative nameplate capacity that exceeded their operational needs by a wide margin. In a three-month period in late 2014-early 2015, Idaho Power agreed to purchase more than 430 MW of solar power for a utility with a minimum load of about 1,070 MW. PacifiCorp had purchased enough PURPA power to supply more than 100% of its average retail load and 275% of its minimum Idaho retail load in 2014.<sup>8</sup> In these circumstances, the Idaho PUC found it was no longer reasonable for the utilities to be obligated to enter 20-year contracts to purchase QF power. More specifically, we found it

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<sup>5</sup> Gillian Charles, *Solar Power Grows in the Pacific Northwest: The solar industry is heating up and its future has never been brighter*, Nw. Power & Conservation Council (May 12, 2016), <http://www.nwcouncil.org/news/blog/solar-power-in-the-nw/>.

<sup>6</sup> *Id.*

<sup>7</sup> In late 2014, Idaho Power Company filed Applications to approve 13 contracts for QF-projects (proposed by 3 developers) for nearly 400 MW of solar generation, expected to be on-line and producing power by the end of 2016. 2015 WL 6958997 (Idaho PUC) (Order No. 33357).

<sup>8</sup> PacifiCorp’s Paul Clements testified that “electricity and natural gas markets have fallen dramatically in the past year as oil prices have also declined.” Specifically, “The 10 year electricity market declined 17 percent in just six months.” Clements testified that, if PacifiCorp had purchased “100 MW of this ten year fixed price electricity on August 1, 2004 . . . , just six months later the Company would have a mark-to-market loss of \$68.0 million on the contract.”

was unreasonable and unjust to ratepayers to purchase unnecessary power at a 20-year obligation at a time when avoided cost rates were decreasing. The unnecessary purchases created greater risks and produced unreasonable rates for customers.

Based on the record, the Idaho PUC determined it was necessary – in order to protect ratepayers and ensure that avoided costs did not exceed the incremental cost to utilities – to reduce contract lengths from 20 years to two years. As Commissioner Raper will explain, our Order allows flexibility: the Idaho PUC can evaluate requests to exceed the general two-year limit on a case-by-case basis; standard rate contracts are still eligible for 20-year contracts; and most importantly, utilities must still purchase PURPA power. The Idaho Commission believes that the same flexibility to address the purchase obligation is warranted at the state-level.

The Idaho PUC proposes that case-by-case evaluation of PURPA's must purchase obligation by state regulatory commissions, is necessary to address PURPA's competing concerns for encouraging renewable energy, and protecting ratepayers and the public interest. Specifically, the Idaho PUC suggests that the Commission establish parameters so that state commissions may grant a waiver of the purchase obligation. 18 C.F.R. § 292.402. Granting discretion to state commissions would allow them to determine whether such parameters are satisfied based upon the facts and circumstances presented in each case.

Possible parameters include:

- What is the utility's need for additional capacity? When will it become capacity surplus?
- What is the average load and need for generation?
- What is the utility's mix of generating resources? Will reliability be affected?
- Are avoided costs increasing, decreasing, holding relatively steady?

- What are the utility’s hedging or risk-management practices? What length of contract?

#### **IV. CONCLUSION**

There is little doubt that PURPA has been successful, especially in recent years, at “encouraging development” of renewable energy projects. Arguably, that goal has been achieved many times over since the Act’s inception in 1978. But assuming that PURPA’s goal is an evolving rather than a fixed-target, the fast-changing market demands accompanying changes to the regulatory framework so that PURPA and its implementing rules/regulations can continue to effectively and efficiently reach for that evolving goal. The Idaho PUC, perhaps more than other state commissions, has grappled with how to foster the renewable energy industry while still ensuring reliable service and reasonable rates to customers. As proposed in this comment, allowing state commissions greater discretion – with clear Commission-established parameters – to address implementation issues, would provide the needed regulatory agility to advance PURPA well into the future.