

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Implementation Issues Under the Public
Utility Regulatory Policies Act of 1978**

**Docket Nos. RM19-15
AD16-16**

**Responsive Comments of the
Solar Energy Industries Association**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”),¹ the Solar Energy Industries Association (“SEIA”)² submits these Responsive Comments for the record.³ SEIA filed Opening Comments in this proceeding,⁴ as did more than 100 other entities across the electric power industry.⁵ In those Opening Comments, SEIA expressed in great detail its broad and specific concerns with the Commission’s proposal to fundamentally revise its regulations implementing Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (“PURPA”).⁶ In the Opening Comments, SEIA specifically highlighted the continued relevance of PURPA and how the Notice of Proposed Rulemaking (“NOPR”) departs from the Congressional intent and statutory language of PURPA, is

¹ 18 C.F.R. §§ 385.212, 385.213 (2019).

² The comments contained in this filing represent the position of SEIA as a trade organization on behalf of the solar industry, but do not necessarily reflect the views of any particular member with respect to any issue.

³ Qualifying Facility Rates and Requirements, Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, 168 FERC ¶ 61,184 (September 19, 2019). (“NOPR”). *See also*, Electronic Tariff Filings, 130 FERC ¶ 61,047, P 16 (2010) (explaining that when the Commission establishes new root dockets, intervention is required to become a party to the new root docket).

⁴ Solar Energy Industries Association, Comments in Response to Notice of Proposed Rulemaking by the Solar Energy Industries Association, Docket Nos RM19-15; AD16-16 (Dec 3, 2019) (hereinafter “SEIA Opening Comments”).

⁵ See FERC Docket No. RM19-15.

⁶ Public Utility Regulatory Policies Act of 1978, Pub. L. No 95-617 (Section 210 is codified at 16 U.S.C. § 824a-3 (2012), Section 201 is codified at 16 U.S.C. § 796 (2012)).

unsupported by the record, and fails to address the fact that many regions in the United States do not have competitive wholesale electricity markets.

The purpose of these Responsive Comments is not to reiterate SEIA’s comprehensive Opening Comments, but rather to highlight and expound more fully on four specific issues for the record based on developments in response to the NOPR and to also provide a response to certain themes found across comments submitted to the Commission. Many commenters, for example, misleadingly tout the importance of granting states flexibility to promote competitive practices, while failing to acknowledge continuing utility and state-level discriminatory practices. Others highlight that in vertically-integrated regions, Independent Power Producers (“IPPs”) are limited by the lack of a competitive market.⁷ In many states PURPA offers the only source of competitive pressure on monopoly utilities, and further, in many non-competitive regions or previously non-competitive regions, it has been a useful tool in encouraging and creating the framework for competitive policies by state regulators and policy makers. Accordingly, SEIA submits that the Commission’s rules implementing PURPA should be strengthened rather than weakened.

I. Responsive Comments

Qualifying cogeneration and small power production facilities (“Qualifying Facilities” or “QFs”) further PURPA’s important statutory goals of fuel diversity and national security, contribute

⁷ See Comments of the Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, Renewable Energy Coalition, and Oregon Solar Energy Industries Association, 14-19, Docket No. RM 19-15 (Dec. 3, 2019) (“Effective Competition in the Wholesale Electric Markets Remain Elusive, Especially in the Northwest”) (hereinafter “Northwest Coalition Comments”); see also Comments of the Southern Environmental Law Center, North Carolina Sustainable Energy Association, Alabama Interfaith Power & Light, Alabama Solar Industry Association, Inc., Appalachian Voices, Energy Alabama, Georgia Interfaith Power & Light, Georgia Solar Energy Association, Greater-Birmingham Alliance to Stop Pollution, North Carolina Chapter of the Sierra Club, North Carolina Interfaith Power & Light, North Carolina Justice Center, South Carolina Coastal Conservation League, South Carolina Interfaith Power & Light, Southern Alliance for Clean Energy, Southface Institute, Tennessee Interfaith Power & Light, Upstate Forever, and Vote Solar, 3, Docket No. RM 19-15 (Dec. 3, 2019) (“contrary to arguments raised in the NOPR, the same problems Congress enacted PURPA to remedy still exist in many states - especially in the Southeast”) (hereinafter “Southeast Public Interest Parties Comments”).

to the resilience of the system, and simultaneously place downward pressure on the utility's incremental cost to serve.⁸ As SEIA has consistently explained, despite some significant advances in competition in the electric power industry since 1978, in vertically-integrated territories PURPA remains critical to maintaining a minimal level of competition with monopoly utilities. Competition for generation supply is essential to reduce costs and drive innovation for the benefit of ratepayers. The Commission opened this docket almost four years ago, and that this is a story about competition has only become more evident as time has passed. PURPA remains crucial to providing market access for independent generators competing against incumbent utilities that vehemently work to maintain their monopoly utility status and limit the availability of competitive supply.⁹ These Responsive Comments highlight four specific areas of concern.

First, since the issuance of the NOPR, SEIA's members – including capital market providers – have wrestled with the implications of the Commission's proposed "Ten Mile Rule." The Commission's proposed change from an irrebuttable presumption based on objective facts that provides owners and operators certainty as to the qualification of the facility for the duration of its useful life, to a rebuttable presumption based on amorphous considerations likely to be litigated, is already causing uncertainty and friction in the transaction markets ranging from single and portfolio project financings to mergers and acquisitions. This impact is not limited to QFs that sell to utilities pursuant to the Section 210 mandatory purchase obligation, but is also affecting all facilities that rely on QF status to reduce regulatory burdens associated with utility and holding company regulation. The proposed process by which QF status can be challenged, particularly allowing challenges to QF

⁸ See Comments of the Solar Energy Industries Association, Docket No. AD18-7 (May 9, 2018).

⁹ See, e.g., Robert Walton, *NV Energy to double renewable capacity — if voters reject retail choice*, UTILITYDIVE, June 1, 2018, <https://www.utilitydive.com/news/nv-energy-to-double-renewable-capacity-if-voters-reject-retail-choice/524716/>.

status to occur after transactions have closed, does not comport with the regulatory certainty required by the capital market investment this Commission has long encouraged. The lack of any appeal or review option is further concerning, given that an adverse finding could trigger severe economic consequences for the owners of the affected facilities. The proposed revisions within the Ten Mile Rule are not narrowly tailored to resolve the potential “gaming” concerns, but instead are so broad as to potentially consolidate numerous unrelated and separate generating facilities during their entire useful lives. SEIA urges the Commission to reconsider the proposed Ten Mile Rule.

Second, SEIA’s members developing facilities under 20 megawatts (“MW”) within an Independent System Operator (“ISO”) or Regional Transmission Organization (“RTO”) region continue to lack non-discriminatory access to the market. In its Opening Comments, SEIA explained why rolling back the MW threshold is inconsistent with Federal Power Act Section 210(m) because the record does not show that QFs have a meaningful opportunity to sell short- and long-term energy and capacity within these regions as the statute requires.¹⁰ Since the issuance of the NOPR, it has become more apparent that these smaller generating facilities continue to lack non-discriminatory access to the wholesale markets. This problem is particularly acute for distribution-connected resources, both QFs and Distributed Energy Resources (“DERs”), though DERs may choose to participate in wholesale markets for the excess portion of their on-site contracts, whereas QFs would be required to rely on market participation for the facility’s entire capacity. As the Commission explained in Order No. 688, it is the “existence of an open access transmission tariff (OATT)” governing the transmission and interconnection of the QF that supports the determination of non-discriminatory access.¹¹ Where utilities do not use OATT practices to interconnect and

¹⁰ See SEIA Opening Comments at 49.

¹¹ New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, Order No. 688, 117 FERC ¶ 61,078, at P 9 (“Order No. 688”).

transmit the power produced from distribution-connected QFs (no matter the size), then it is inappropriate to assume such QFs have non-discriminatory access to the market.¹² SEIA urges the Commission to reconsider its proposal that the Section 210(m) threshold for ISO/RTO markets should be lowered to 1 MW.

Third, SEIA responds to the questions on the need and role of PURPA in today's electric markets. A common theme across comments advocating for or against elements of the NOPR was that PURPA reform should support and broaden competition in the regions throughout the country. SEIA fundamentally agrees with this goal. Limiting PURPA implementation in regions where competitive markets do not exist, however, would frustrate rather than advance this goal. In the absence of some alternative form of competitive market structure, such as retail customer choice or mandated competitive procurement of a substantial portion of the generation resources, PURPA provides the only competitive pressure on vertically-integrated utilities whether within or outside of ISO/RTO markets. SEIA calls attention to South Carolina where, in 2019, the legislature found that PURPA was the appropriate tool to use in response to the challenges arising from the fallout associated with the costly abandonment of the V.C. Summer nuclear project. In its current form, PURPA functions as a successful tool to increase competition, particularly in regions that have been immune from competitive entrants.

Fourth and directly related to the third, SEIA opposes offering new flexibility to states that have not provided for a PURPA-compliant program to-date. There are still large areas of the country where vertically-integrated utilities are insulated from any real competition and the landscape remains largely the same as it was in 1978. As SEIA has highlighted in its comments to

¹² Order No. 688 at P 52 (explaining that the rebuttable presumption of access to wholesale markets *requires* an OATT or a Commission-approved reciprocity tariff).

the record over the past four years, in some states with vertically-integrated electric utilities, there has been discrimination against QFs. Many commenters discussed the importance of offering states “flexibility.” In states with PURPA programs that enable and encourage the development of QFs, SEIA supports flexibility for states to develop programs that promote real competition tailored to their individual needs. Where the Commission proposes to grant further flexibility to those states that have a pattern of discriminating against QFs and ignoring PURPA’s statutory mandates, SEIA strongly opposes such flexibility. Such additional flexibility would be akin to a *de facto* waiver of the must purchase obligation in certain regions where PURPA non-compliance has been tacitly endorsed. In lieu of offering non-compliant states flexibility, the Commission should offer these states only the additional flexibility to adopt SEIA’s August 28, 2019 Counterproposal for fair and safe all-source competitive solicitations in which utilities and their affiliates could participate alongside QFs and other market participants.¹³

A. The Proposed Ten Mile Rule Has Already Raised Both Process and Substantive Uncertainty in the QF Development Market

In its Opening Comments, SEIA explained its broad opposition to the proposed changes from an *irrebuttable* presumption that facilities that are located more than one-mile apart are separate facilities that can each qualify as QFs (“One Mile Rule”) to a *rebuttable* presumption that facilities located between one mile apart and ten-miles apart are separate facilities (“Ten Mile Rule”).¹⁴ The proposed Ten Mile Rule adds unnecessary regulatory burdens on QFs, including those that do not

¹³ See Supplemental Comments and Counterproposal by the Solar Energy Industries Association, Docket No. AD16-16 (Aug. 28, 2019) (hereinafter “SEIA Counterproposal”). See also, John D. Wilson et al., MAKING THE MOST OF THE POWER PLANT MARKET: BEST PRACTICES FOR ALL-SOURCE ELECTRIC GENERATION PROCUREMENT (April 2020), (hereinafter “All Source Whitepaper”); William Driscoll, *Solar Beats Gas When Utilities Use All-Source Procurement*, PV MAGAZINE, Apr. 29, 2020, <https://pv-magazine-usa.com/2020/04/28/solar-beats-gas-when-utilities-use-all-source-procurements/>.

¹⁴ See SEIA Opening Comments at 51-56. SEIA’s prior proposals have included suggestions for tests that would achieve the Commission’s goals without such severe, and unintended, consequences.

sell pursuant to the Section 210 mandatory purchase obligation, and are not necessary. Based on experience to-date, SEIA calls to the Commission’s specific attention that the proposed rule is inconsistent with the statutory goals of encouraging the development of QFs and relieving regulatory burdens in a manner that attracts capital market investment in the industry.¹⁵ The proposed rules have caused friction and delay for capital market investment in, and financing of, portfolios of QFs and companies that own QFs. SEIA strongly encourages the Commission to reconsider the need for revisions to its regulations defining the “same site.” SEIA renews its request for the Commission to consider, as an alternative to the proposed Ten Mile Rule, revisions to the One Mile Rule as proposed by SEIA in both its October 2018 and August 2019 submission.¹⁶

The factors the Commission has proposed to evaluate as part of the “same site” determination are not narrowly tailored to resolve the identified challenge (*i.e.* the potential “gaming” of PURPA’s limitations on QF size). If adopted, these proposed factors will discourage independent generators from taking advantage of economies of scale, will harm local business interests that service QFs within geographic regions, and risk consolidating numerous unrelated – and separate owned and financed – projects developed over different periods. Specifically:

- **Physical Characteristics:** The Commission should not discourage the use of shared facilities or existing transmission infrastructure by similar projects. While the use of entirely separate infrastructure tends to show that projects are likely separate, the

¹⁵ As the 1978 Conference Report makes clear, burdensome public utility regulation was one of the main barriers impeding the development of independent generators that the statute’s drafters sought to relieve through the passage of PURPA. *See* H.R. Rep. No. 95-1750 at 9 (1978) (Conf. Rep.).

¹⁶ *See, e.g.*, SEIA Counterproposal at 54-56. SEIA proposed that the One Mile Rule could be revised to achieve the same goals articulated by the Commission. A revised rule would provide: Facilities located one mile or more away from each other are located at the same site if the Commission finds that:

- (A) The owners or operators of the facilities are affiliated or associated with each other, or are under the control of the same company or person;
- (B) The aggregate nameplate capacity of the facilities exceeds 80 MW;
- (C) The owners or operators of the facilities have treated the facilities as a single project;
- (D) The facilities have a common generator lead line or connect at the same interconnection points or substations; and
- (E) The owners or operators of the facilities have a common land lease or land rights with respect to land on which the facilities are located.

converse does not hold true. As explained by multiple commenters, there are efficiencies to be gained when projects are sited in geographic regions near existing or planned distribution and transmission infrastructure points.¹⁷ These resource efficiencies should not be applied in such a way to discourage such economies of scale in electricity infrastructure development.

- Ownership and Other Characteristics:
 - The employment of common contractors, such as grading and electrical contractors, has nothing to do with whether two otherwise distinct generation facilities are located at the “same site,” and much more to do with the availability of experienced, qualified contractors in a given region. In addition, there are often a limited number of qualified maintenance providers and other service contractors in a region, particularly rural regions. Use of the same vendors should not be relevant to the assessment of common ownership.¹⁸
 - The fact that two facilities are constructed by the same entity within a period of twelve months is also irrelevant for a “same site” determination and could instead, as Northwest Coalition, noted, reflect a market opportunity in that region at the time.¹⁹
 - Since unquestionably distinct QFs, including QFs in multiple states, are frequently financed – and re-financed – as part of a common investment portfolio, common financing should not be part of the “same site” determination.

1. Ten Mile Rule Threatens Investment in Existing Assets and Should Not be Adopted

The NOPR states that the Ten Mile Rule will apply to certifications and *recertifications* of facilities submitted after the effective date of the final rule in this proceeding.²⁰ While SEIA acknowledges that challenges based on the new ten-mile rule “could only be made to QF

¹⁷ See Comments of the North Carolina Public Utilities Commission - Public Staff at 6, Docket No. RM 19-15 (Dec. 3, 2019) (“For example, interconnection policies in North Carolina favor siting of distributed generation facilities in close proximity to substations, so projects naturally appear in clusters surrounding T&D infrastructure.”); see also Northwest Coalition Comments at 73-74 (“The Northwest Coalition strongly opposes use of common interconnection facilities as a factor because separately owned facilities are likely to share interconnection facilities to reduce costs and build off of existing infrastructure. Doing so makes sense and the Commission should not discourage project development by looking to common interconnections to conclude that two facilities are located at the same site.”)

¹⁸ See Northwest Coalition Comments at 74 (“Additionally, given that there are only a limited number of qualified maintenance providers and other service contractors, the fact that two facilities use the same contractors should not be relevant to common ownership and control of two facilities.”)

¹⁹ See *id.* (“the fact that two facilities are constructed within 12 months of each other could merely be evidence that the market conditions at the time favored construction of the facilities, not that the facilities are intended to be one facility.”)

²⁰ NOPR at P 100.

certifications and recertifications that are submitted after the effective date of the final rule in this proceeding,”²¹ this framework still leaves every existing and future QFs open to challenge upon any future recertification. If the proposed rules are adopted, and the Ten Mile Rule is implemented without revision, a QF could be subject to challenge throughout the facility’s entire useful life based on overly broad factors that are not related to preventing a QF from “gaming” the same-site determination and development of other QFs long after a QF is starts operation.

The Commission’s rules provide that recertification filings are to be made when either there is a change to the physical operating characteristics of the QF or any change in material facts and representations previously made in a previous certification.²² By definition, the recertification filings are made *after* the ownership change has been consummated. In one scenario, the Commission could approve an application pursuant to Section 203 for an acquisition of one or more QFs and, after receiving Commission approval and consummating the transaction, the “same site” determination could then be exposed to challenge upon the recertification filing. In this hypothetical, an adverse determination on the recertification could cause the parties to unwind an already-approved and already-consummated transaction. While the Commission clarified in Order No. 732 that it will not consider a change in ownership to be a change in material facts and representations if no owner increases their equity interest by at least 10 percent from the equity interest previously reported,²³ both new and existing QF ownership entities are frequently bought and sold in transactions that generally involve the transfer of equity stakes greater than 10 percent. This threat of challenge at recertification therefore is present for both QFs that have been installed

²¹ *Id.*

²² Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility, 130 FERC P 61,214, P 58 (March 19, 2010) (“Order No. No. 732”).

²³ *Id.*

and operating for years, as well as new QFs that will be installed after the Commission issues its final rule. The threat applies to QFs that sell to utilities pursuant to a Section 210 mandatory purchase obligation, but also includes QFs that sell under voluntary arrangements and rely on QF status to maintain exemption from burdensome utility-style regulation. This risk will persist for every facility that elects QF status at any future recertification regardless of whether its owners had executed contracts based on its QF status or governed by PURPA's mandates.

Applying new certification rules to existing facilities during recertification is a clear departure from precedent. In Order No. 671, for example, as intended by Congress, the Commission applied new cogeneration certification rules only to new facilities, clearly exempting those which had previously certified with the Commission.²⁴ SEIA agrees with the comments from the Northwest Coalition that allowing a future regulatory challenge based on new equity ownership to undermine existing valid contractual relationships – even when all other information about that project which originally qualified it as a QF has not changed – risks creating an unjust and unreasonable retroactive effect, for which there is no evidence Congress ever had any intention to create.²⁵

Numerous investment decisions and contractual relationships for existing and future QFs are and will likely be dependent on the facility maintaining QF status. Regardless of whether a project can ultimately withstand a challenge based on the Commission's physical or common ownership factors, the additional regulatory burden, threat of challenge, and associated uncertainty will change

²⁴ Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order No. 671, 71 Fed. Reg. 7,852, at 7,865 (Feb. 15, 2006) (“there is a rebuttable presumption that an existing QF does not become a “new cogeneration facility” for purposes of the requirements of newly added section 210(n) of PURPA merely because it files for recertification.)

²⁵ See Northwest Coalition Comments at 75, Docket No. RM 19-15 (Dec. 3, 2019) (“the Supreme Court has explained that “statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass that power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” See *Bowen v. Georgetown Hosp.*, 488 U.S. 204, 208-09 S. Ct. 468, 471-72 (1988)).

the economics of future QF development and create friction in the capital markets for existing resources, of which there are thousands. Due to a variety of banking and securities regulations and reporting requirements, many investors are prevented from holding facilities that do not qualify as a QF within their investment portfolios. Accordingly, the ambiguity and uncertainty introduced by the proposed Ten Mile Rule will stymie the development of QFs by discouraging potential financiers, investors, and owners who cannot risk losing QF status.

The proposed regulatory process is too broad, overly burdensome, and is not consistent with the clear statutory direction. There is no justification for extending a threat of reclassification upon recertification to the thousands of owners of QFs that are not selling to the utility under a mandatory purchase obligation but instead rely on QF status to maintain exemption from burdensome state and federal regulatory regimes. The proposed Ten Mile Rule does not provide QFs, and the investors that finance the assets, the clear, objective guidelines necessary to make informed decisions. The only clear way to avoid a recertification challenge is to completely isolate a project from all other projects within a ten-mile radius. The NOPR has already created a financial risk for owners and operators of existing QFs, including those that do not sell to the incumbent utility pursuant to Section 210. That challenges could be raised to a facility's QF status at every recertification over the entire operating life of the installed project, without any clear pathway for appeal from an adverse determination is discriminatory and is not a just and reasonable, or efficient, outcome.²⁶

2. A Bright-Line Test is Essential and Should be Adopted

The One Mile Rule currently applies a bright-line test for determining what constitutes location at the same site: facilities that are commonly owned and using the same energy resource, located within one mile of each other. Those that are more than a mile apart are deemed to be at

²⁶ NOPR at P 100.

separate sites and thus to be separate facilities.²⁷ SEIA is concerned that replacing a bright-line rule with a rebuttable presumption will lead to protracted case-by-case disputes. The ever-present possibility of a costly defense or the loss of QF status injects uncertainty into the transaction process in such a way that will discourage continued and future investment in QFs. SEIA renews its request for the Commission to consider, as an alternative to the proposed Ten Mile Rule, the following proposal that was included in two prior submissions:

One Mile Rule

Facilities located one mile or more away from each other are located at the same site if the Commission finds:

- (A) The owners or operators of the facilities are affiliated or associated with each other, or are under the control of the same company or person;
- (B) The aggregate nameplate capacity of the facilities exceeds 80 MW;
- (C) The owners or operators of the facilities have treated the facilities as a single project;
- (D) The facilities have common generator lead line or connect at the same interconnection points or substations; *and*
- (E) The owners or operators of the facility have a common land lease or land rights with respect to land on which the facilities are located.

As proposed, the Ten Mile Rule does not provide QFs the clear, objective guidelines necessary to make informed decisions for QF projects within 10 miles; rather, the *only* clear test to avoid recertification litigation is to not develop or own a project within 10 miles of any other existing or future QF. The factors included in the proposed Ten Mile Rule are not narrowly tailored to resolve the identified challenge (*i.e.*, the potential “gaming” of PURPA’s limitations on QF size) and do not provide objective criteria on which developers and financiers can make reasoned decisions. Rather, these proposed factors will discourage independent generators from taking advantage of economies of scale and good solar resources, will harm local business interests that

²⁷ See *Northern Laramie Range Alliance*, 138 FERC ¶ 61,171 (2012); *De Wind Novus, LLC*, 139 FERC ¶ 61,210 (2012).

service QFs within geographic regions, and risk consolidating numerous unrelated – and separate owned and financed – projects. If the proposed rules are adopted, and the Ten Mile Rule is implemented without revision, a QF could be subject to challenge through the facility’s entire useful life based on overly broad factors that are not related to preventing a QF from “gaming” the same-site determination.

3. Unintended Consequences of Ten Mile Rule Should be Corrected

The Southeast Public Interest parties submitted a map of North Carolina qualifying facilities created by the North Carolina Sustainable Energy Association which illustrates the possible effects of extending the One Mile Rule to a Ten Mile Rule.²⁸ As would be expected within the territory of a vertically-integrated utility, many of these unquestionably separate QFs are selling to the same utility, have contracted under the utility-provided form contract, and have a common fuel source (solar). It is highly likely that many of these facilities used a common construction firm, the same subject matter expert, and have contracts with the same vendors for plant operations and maintenance.²⁹ If the proposed rules were adopted and any one of these QFs recertified, then this could trigger the consolidation of scores of unrelated QFs at separate sites into the “same site.” In the case of North Carolina, a state which has consistently made policy choices to enable electric market competition with the incumbent vertically integrated utility, the prospect of consolidating unrelated projects and leading to QF-decertification will have a profound impact upon solar businesses, vendors in the solar space, and electric competition in the state. Adopting the Ten Mile Rule will impose a significant disruption of capital and vendor markets. If the criteria are adopted,

²⁸ Southeast Public Interest Parties comments at 31.

²⁹ The pool of qualified third-party construction firms, subject matter experts, and operations and maintenance vendors for the very particular asset of solar farms becomes relatively limited at the regional and state level, and so it should be expected by FERC that smaller firms that hire vendors to develop and operate solar farms will hire similar companies.

and unrelated QFs are subject to potential consolidation, then many QFs and their financing parties face years of potential decertification litigation risk and the risks that could be triggered by a recertification of any facility within ten miles. It is essential that the Commission adhere to the statutory direction to ensure that its regulations issued under PURPA do not impose unnecessary regulatory burdens that slow the investment of private capital in electric infrastructure.

In the event the QF was unjustly consolidated, the proposed rule does not provide a pathway to seek agency reconsideration or judicial review. Given an adverse determination, and a loss of exemption from burdensome utility-style regulation, the QF owner's only choice may be to offer the facility at a "fire sale" price to the vertically integrated utility. This cannot be what the Commission intended. As SEIA explained in its Opening Comments, the One Mile Rule provides a clearly-established method for issuing declaratory orders and seeking review of the same. In providing for a different challenge process, one arising out of a QF self-certification docket, the proposed rule has left vital procedural questions unanswered and it is unclear if the QF would have a path to relief if the Commission erred in its determination. The proposed rule has caused friction and delay for capital market investment in, and financing of, portfolios of QFs and companies that own QFs and SEIA strongly encourages the Commission to reconsider the need for revisions to its regulations defining the "same site."

4. The Ten Mile Rule Will Affect QFs that Do Not Sell Pursuant to Section 210

The risks and consequences described *supra* are not confined to QFs selling pursuant to PURPA's Section 210 mandatory purchase obligation (the focus of the proposed rule); rather, the regulations capture *all* certified QFs including those that do not sell to the incumbent utility and have self-certified to maintain exemptions from burdensome regulations, including regulations under the Public Utility Holding Company Act of 2005 ("PUHCA 2005"). As the Commission explained in

issuing Order No. 667, PUHCA requires that the Commission exempt from regulation persons that are holding companies solely with respect to one or more QFs.³⁰ In Order No. 667, the Commission recognized the importance of this exemption to capital market investors and ensured that upstream owners of QFs would be able to maintain exemption from regulation under PUHCA 2005.³¹ The Commission’s regulations that relieve QFs of the burden of traditional utility regulation – both exemptions from PUHCA 2005 as well as certain sections of the Federal Power Act – remain vital if the Commission wishes to encourage the continued investment of private capital.

There have been no allegations in this proceeding that QFs that *do not* sell to the incumbent utility pursuant to Section 210 have engaged in any gaming of the Commission’s regulations and there is no justification in the record for subjecting such facilities to substantial financial and regulatory risk that will have a chilling effect on private capital investment. SEIA respectfully requests that the Commission reconsider its Ten Mile Rule and instead revert to the One Mile Rule framework, consistent with the proposal offered by SEIA’s October 2018 and August 2019 comments.

B. Distribution-Connected QFs Do Not Have Non-Discriminatory Access to the Wholesale Markets

As SEIA explained in its Opening Comments, QFs of all sizes within ISO/RTO markets face substantial barriers in accessing purchasers within the footprints of MISO, PJM, ISO-NE, NYISO, and SPP. These barriers are particularly acute for smaller QFs located within the bounds of an ISO/RTO that consists mainly of vertically-integrated utilities. In implementing EPC Act 2005, the Commission concluded that QFs with “a net capacity no greater than 20 MW may not have non-

³⁰ Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, Order No. 667, 113 FERC ¶ 61,248 (“Order No. 667”) (citing Section 1266 of PUHCA 2005).

³¹ Order No. 667 at PP 26, 123.

discriminatory access to any market, notwithstanding the availability of service under an OATT or their location within a “Day 2” market.”³² The Commission has likewise held that in each of the ISO/RTO regions, QFs that are larger than 20 MW are presumed to have non-discriminatory access to the wholesale markets. In Order No. 688-A the Commission explained that “[t]here is no perfect bright line that can be drawn” to distinguish a large QF from a small QF. As SEIA explained in its Opening Comments, the record of this proceeding is devoid of any steps that have “facilitate[d] additional opportunities for long-term contracting”³³ for QFs smaller than 20 MW and drawing the bright line for small QFs at 1 MW is arbitrary and capricious.

QFs larger than 1 MW, but smaller than 20 MW, are particularly burdened by the interconnection and market participation obligations required when participating directly with the RTO.³⁴ In this proposed rule, the Commission has overlooked key legal and factual aspects of the impact of such a reduction on the QF’s ability to access the wholesale markets, particularly when such a QF is located within the territory of a vertically-integrated utility. Since the issuance of Order No. 688, there have been substantial developments of generation assets connected to a utility’s distribution system. It is not uncommon for QFs, including those up to 20 MW, to attempt to interconnect to the utility’s distribution system. Yet, not all distribution utilities offer delivery service over the distribution wires needed to access the transmission (so-called “Wholesale Distribution Charges”). A QF that cannot obtain wholesale distribution service from the interconnecting utility does not have non-discriminatory access to the market. While there are leading utilities that have long-published wholesale distribution rates and charges, there are many more utilities within the ISO/RTO regions that have not done so.

³² Accounting and Financial Reporting for Public Utilities Including RTOs, Order No. 688-A, 18 CFR Part 101, P 4.

³³ *Id.* at P 28.

³⁴ See SEIA Opening Comments at 44-49.

Order No. 688 explained that when OATT service is not available, the presumption is that non-discriminatory access does not exist. It is arbitrary and capricious for the Commission to ignore the lack of open access over the distribution system that persists within many utility territories across the ISO/RTO regions. It is similarly arbitrary and capricious for the Commission to (1) depart from its settled precedent establishing a 20 MW demarcation without any evidence in the record or a change in any factors that supported such precedent and (2) to presume non-discriminatory access for QFs between 1 and 20 MW when many of these facilities are connecting at the distribution level where OATT service is unavailable.

SEIA acknowledges that there is no “perfect bright line” that can be drawn between a small QF and a large QF, as sophisticated developers can construct projects under 5 MW and an inexperienced developer can find success in bringing an 80 MW project to market. If the Commission feels that it must act to update the application of its PURPA regulations in ISO/RTO markets, SEIA encourages the Commission to draw the line between transmission-connected resources and distribution-connected resources. QFs that are connected at the transmission level, including those as small as 1 MW, should be presumed to have non-discriminatory access to wholesale markets operated by ISOs/RTOs. QFs that are connected at the distribution level, however, *should not* be presumed to have non-discriminatory access unless the distribution provider offers an OATT or similar reciprocity tariff providing QFs non-discriminatory interconnection and delivery service sufficient to access the wholesale markets.

C. PURPA Drives Competitive Market Reforms in Otherwise Non-Competitive Vertically-Integrated Territories

Throughout the NOPR proceeding, from utility comments, to state commission comments, to industry comments, there is a strong focus on the importance of competition in the electricity sector. Many of these commenters rightly point out that in many regions of the country, the provision of

electricity has become far more competitive since PURPA's passage in 1978. They then, however, incorrectly argue that this movement toward competition *in some places* means that traditional PURPA implementation is no longer necessary *in all places*. As SEIA discussed at length in its Opening Comments, the movement toward competition across the United States since PURPA's passage has not been uniform.³⁵ While many regions of the country participate in competitive wholesale electricity markets run by ISOs or RTOs, each with an Independent Market Monitor, the Commission is well-aware that the Southeast and much of the Pacific Northwest, Desert Southwest, and Mountain West regions have largely resisted changes in generation ownership and increased competition in wholesale generation. In these locations, a small amount of wholesale electricity changes hands at thinly-traded hubs, dominated by vertically-integrated utilities, and without any active independent monitoring. There remains a strong need for tools that directly promote competition in regions that are still vertically-integrated.

PURPA has been and continues to be such a tool. PURPA is often directly credited for the expansion of regional competition in electricity markets since its passage. It continues to move vertically-integrated regions toward consideration of competitive electricity markets. Recent developments in the Carolinas illustrate this point. In 2017, construction of the V.C. Summer nuclear project in South Carolina, which had incurred at least \$9 billion in costs and was abandoned, was halted.³⁶ Following the frustration and fallout associated with the management of this project, in 2019 the South Carolina legislature passed the Energy Freedom Act, which found PURPA to be the best tool to respond to the immediate challenges. The Energy Freedom Act directs the state commission to open dockets to determine the avoided cost and standard form documents to begin a

³⁵ See SEIA Opening Comments at 15-20.

³⁶ Brad Plumer, *U.S. Nuclear Comeback Stalls as Two Reactors Are Abandoned*, NEW YORK TIMES, July 31, 2017, (<https://www.nytimes.com/2017/07/31/climate/nuclear-power-project-canceled-in-south-carolina.html>).

PURPA program.³⁷ The South Carolina legislature is now considering two bills to study market reforms, including participation in a Regional Transmission Organization (S.998) and the institution of retail choice (H.4940). PURPA also drove market reform in North Carolina. In 2016, North Carolina had the most solar PURPA QF solar projects in the country,³⁸ and in 2017 the state legislature mandated passed House Bill 589 that required the vertically-integrated utility to implement competitive procurement processes.³⁹ Like South Carolina, North Carolina is also now actively considering creating a Regional Transmission Operator in the region.⁴⁰ That PURPA is playing an integral role in driving competitive market reforms in regions that have not otherwise experienced competition is undisputable. PURPA remains relevant.

D. Non-Compliant States Should Not be Provided Additional Flexibility

FERC is mandated by statute to enforce PURPA and, to the extent a state has been non-compliant, that state should not be afforded additional “flexibility in key respects to incorporate competitive market pricing in the rates paid by electric utilities to qualifying small power production facilities and qualifying cogeneration facilities under PURPA.”⁴¹ While the NOPR posits that this flexibility will comport with the statute while addressing concerns regarding the Commission’s existing PURPA regulations,⁴² the proposed rule wholly ignores the numerous instances in which states, or their regulated utilities, engage in discriminatory behavior despite PURPA’s mandates.

³⁷ This includes, for example, streamlining the contract process, requiring that the Public Service Commission approve PURPA contract templates, and ensuring that avoided cost calculations for small power producers include energy, capacity and ancillary services. See SOUTH CAROLINA OFFICE OF REGULATORY STAFF, SUMMARY OF THE SOUTH CAROLINA ENERGY FREEDOM ACT 2 (SEPT. 2019), http://www.energy.sc.gov/files/view/SC%20Energy%20Freedom%20Act_summary%2009.012.2019.pdf

³⁸ Manussawee Sukunta, *North Carolina has more PURPA-qualifying Solar Facilities than any other State*, ENERGY INFORMATION ADMINISTRATION, Aug. 23, 2016, <https://www.eia.gov/todayinenergy/detail.php?id=27632>

³⁹ Brian Murray, *Reforming the Carolinas’ Power Markets: Producing A Panacea or a Pandora’s Box?*, FORBES, Oct. 11, 2019, (<https://www.forbes.com/sites/brianmurray1/2019/10/11/reforming-the-carolinas-power-markets-producing-a-panacea-or-a-pandoras-box/#4be24757c5ea>)

⁴⁰ *Id.*

⁴¹ NOPR at P 4.

⁴² NOPR at P 32.

Giving flexibility to those who flout PURPA is inconsistent with the statutory direction to not discriminate against QFs.

Where states have fostered – or will commit to fostering – competition between incumbent electric utilities and independent power producers, SEIA agrees that flexibility and relief from traditional PURPA implementation may be appropriate. Where states have refused to promulgate a PURPA program that ensures QFs’ rights consistent with statutory intent and Commission’s implementing regulations and orders (including declaratory orders⁴³), however, SEIA strongly disagrees that further “flexibility” should be afforded. SEIA renews its request that the Commission devote resources to ensuring that PURPA is enforced and that states, and the monopoly utilities they regulate, are not able to use predatory administrative litigation and/or tariff processes to foreclose competition.

Following EPC Act 2005, the Commission reviewed the competitive status of the regions and the need to maintain the QF mandatory purchase obligation. The competitive landscape has remained largely static since the Commission made its determination in Order No. 688. In almost twenty states with fully-regulated monopoly utilities and no organized wholesale markets, PURPA provides the only path to market access for IPPs. In another fifteen states where fully regulated monopolies operate within organized wholesale markets, IPPs seeking to construct and operate facilities rely on PURPA for market access. Qualifying Facilities that are able to sell at the

⁴³ See Complaint at P 3-8, *FERC v. Idaho Public Utilities Commission*, No. 1:13-cv-141 (2013) (“Notwithstanding FERC’s four declaratory orders issued over the course of more than one year, the Idaho Commission has not taken voluntary corrective measures”). The referenced declaratory orders are *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011); *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012); *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012); *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187). *But see, In the Matter of the Complaint by Consolidated Edison Development*, NorthWestern Energy’s Post-Hearing Response Brief, South Dakota Docket EL16-021 (June 7, 2017) (taking the position that “FERC’s orders resolving PURPA disputes are hortatory, not mandatory”); *Portland General Electric Co. v. FERC*, 854 F.3d 692, 701-702 (D.C. Cir. 2017) (“Although FERC’s order in that case contained some language that appeared mandatory . . . we nonetheless treated the order as declaratory.”).

vertically-integrated utility's avoided cost are supporting PURPA's important statutory goals of fuel diversity and national security and contributing to the overall resilience of the system, while simultaneously placing downward competitive pressure on the utility's incremental cost to serve.⁴⁴ Allowing additional flexibility where discriminatory treatment has been tacitly permitted would be a blank check for further discrimination and entrenchment of utility monopoly power. Such further flexibility would be akin to a de-facto waiver of the must purchase obligation in certain regions where PURPA non-compliance has been tacitly endorsed. State flexibility cannot and should not equate to effective waiver of PURPA's statutory mandates. In lieu of offering non-compliant states flexibility, the Commission should adopt SEIA's August 28, 2019 Counterproposal that would allow states to replace QF "put" rights at administratively determined avoided cost rates with an all-source competitive solicitation regime (in which utilities and their affiliates could participate alongside QFs and other market participants so long as adequate safeguards are in place).⁴⁵

1. Qualifying Facilities Face Discriminatory Treatment in Non-Compliant States

There have been too many instances to enumerate of utility bad actors, and too many instances where state utility commissions have either failed to successfully regulate utilities engaging in discriminatory practices or have actively promoted such discrimination. The Commission's proposed rule fails to acknowledge that any noncompliance with PURPA has occurred. By broadening state authority and providing access to tools that may be used to discriminate against QFs or discourage QF development, the Commission will make it difficult to impossible for QFs to obtain any relief from this unlawful misconduct. What we will see instead is

⁴⁴ See Comments of the Solar Energy Industries Association, Docket No. AD18-7 (May 9, 2018).

⁴⁵ See SEIA Counterproposal, Docket No. AD16-16 (Aug. 28, 2019). See also All Source Whitepaper; William Driscoll, *Solar Beats Gas When Utilities Use All-Source Procurement*, PV MAGAZINE, Apr. 29, 2020, <https://pv-magazine-usa.com/2020/04/28/solar-beats-gas-when-utilities-use-all-source-procurements/>.

increased discriminatory treatment in certain states, strengthening of utilities' monopoly power, reduced diversity of options available to customers, and less competition – all of which run counter to PURPA's mandates and the Commission's broader goals for competitive energy markets.

In multiple prior submissions in this proceeding, SEIA has highlighted examples of utility discriminatory treatment against QFs, which state commissions have either supported directly or failed to stop. To refresh the record:

- PURPA requires that a QF developer be able to create its own legally enforceable obligation with avoided cost calculated at the time the QF incurs the obligation. Certain states, however, have implemented policies regarding contract terms – and specifically length – to discriminate against QF development. Commission precedent requires that QFs are entitled to contracts “long enough to allow QFs reasonable opportunities to attract capital from potential investors.”⁴⁶
 - In 2017 in Montana, a Public Service Commissioner was unknowingly recorded acknowledging that policies he supported to reduce PURPA rates and contract lengths were likely sufficient to halt development of QF projects.⁴⁷ **A judge later ruled in Montana that the PSC intentionally set PURPA policies to stop solar project development.**⁴⁸
 - The Idaho Commission also limited contract length for solar and wind QFs between 100 kW and 10 annual average megawatts to two years. As pointed out by a group of Public Interest organizations in their comments in this proceeding, at the same time, the Commission allows for longer contract terms for other QFs, such as hydro and cogeneration.⁴⁹ **To SEIA's knowledge, no PURPA contracts have been executed**

⁴⁶ *Windham Solar LLC*, 157 FERC ¶ 61,134, at P 8 (Nov. 22, 2016).

⁴⁷ Tom Lutey, *Hot Mic Records Troubling Conversation about Solar Regulations*, BILLINGS GAZETTE, June 27, 2017, https://billingsgazette.com/news/state-and-regional/govt-and-politics/hot-mic-records-troubling-conversation-about-solar-regulations/article_8499a49d-e281-5dd7-aae7-aeccca0394e.html

⁴⁸ Catherine Morehouse, *Montana Judge rules PSC intentionally set PURPA rates to kill solar projects*, UTILITY DIVE, April 8, 2019, <https://www.utilitydive.com/news/montana-judge-rules-pscintentionally-set-purpa-rates-to-kill-solar-project/552236/>

⁴⁹ See Comments of the Environmental Law and Policy Center, Natural Resources Defense Council, Sierra Club, Southern Environmental Law Center, Sustainable FERC Project, Vote solar, North Carolina Sustainable Energy Association, and Montana Environmental Information Center in Opposition to the Commission's Notice of Proposed Rulemaking Under PURPA, Docket No RM19-15, 50-21 & fn. 142 (“*Compare Idaho Public Utility Commission, Order No. 33357, Case No. IPC-E-15-01, In re Idaho Power Co's Pet. To Modify Terms and Conditions of PURPA Purchase Agreements, (Aug. 20, 2015) (2 year maximum contract term for QFs) with Idaho Public Utilities Commission, Order No. 34479, Case No. IPC-E-19-14, In re Application of Idaho Power for Approval of Power Purchase Agreement with Jackpot Holdings (Nov. 7, 2019) (seeking comment on application of Idaho Power to enter 20 year fixed-price contract with non QF generator), available at https://puc.idaho.gov/fileroom/cases/elec/IPC/IPCE1914/ordnotc/20191107NOTICE_OF_COMMENT_DEADLINES_ORDER_NO_34479.PDF)*

since this commercially unreasonable contract length was adopted, and states like Arizona have expressly rejected such draconian measures in favor of longer term (e.g., 18 year) contracts.⁵⁰

- Despite being required to forecast avoided costs rates, utilities in Indiana for example, only offer short-term rates of one year or less, and the Indiana Utility Regulatory Commission has not remedied this despite it being brought to the Commission's attention and brought up in these proceedings.⁵¹
- Other states have obscured information and limited transparency, making it difficult to obtain an accurate picture of their PURPA decision-making.
 - In certain vertically-integrated states, the utilities' avoided cost information submitted to the PUC is not made publicly available as required by law or is not reported in a useable format.⁵² **In certain states, including Minnesota for example, the Commission allows utility avoided cost rates to be treated as confidential trade secrets.⁵³** In the absence of transparency, even state commissions may not be able to effectively review utility avoided cost calculations, particularly to the extent that private fuel-price inputs affect the avoided cost calculation.

States that are unwilling to provide a competitive pathway for QF development under existing PURPA rules should certainly not be given “flexibility” to implement PURPA in a manner that strays even further from the Congressional directive to regulators to “encourage” QFs. The Commission's offer of “flexibility” in an effort to modernize PURPA cannot and should not enable states and utilities to kill QF development.

⁵⁰ See, e.g., Billy Lutz, *Arizona Commission Extends PURPA Contract Terms to 18 Years*, SOLAR POWER WORLD, Dec. 12, 2019, <https://www.solarpowerworldonline.com/2019/12/arizona-commission-extends-purpa-solar-contract-terms-to-18-years/>.

⁵¹ See Supplemental Comments of the Southern Environmental Law Center at 6-7, Docket No. AD16-16 (Oct. 17, 2018) (explaining that “on May 2, 2018, the IRUC declined to act on the objections, leaving utilities in Indiana free to continue offering only non-financeable short-term PURPA contracts with a forecasted rate option no longer than one year).

⁵² See SEIA August 2019 Counterproposal at 52.

⁵³ See Frank Jossi, *Clean Energy Groups say Minnesota utilities hid public data as trade secrets*, ENERGY NEWS, Feb. 25, 2019, <https://energynews.us/2019/02/25/midwest/clean-energy-groups-say-minnesota-utilities-hide-public-data-as-trade-secrets/>; see also Supplemental Comments of the Southern Environmental Law Center at footnote 24, Docket No. AD16-16 (Oct. 17, 2018) (“For example, all three of the investor-owned utilities in Minnesota annually file avoided cost information with the Minnesota Public Utilities Commission as required by 18 C.F.R. § 292.302(b), but each utility uses trade-secret protections to shield from public view the information required by 18 C.F.R. §§ 292.302(b)(1)-(3). See, e.g., Schedule A attached to Xcel Energy's 2018 Cogeneration and Small Power Production Report and Petition, Docket No. E999/PR-18-9 (Minn. Pub. Util. Comm'n Jan. 2, 2018). Additionally, in response to a Freedom of Information Act request from the Southern Environmental Law Center, TVA first stated that it did not maintain the data at all, then argued that some of the data was exempt from FOIA as confidential business information.”)

2. The Commission Should Give States Flexibility to Adopt SEIA's Proposal for All Source Competitive Solicitations

SEIA highlights the proposal it put forth as part of the record in August 2019 to establish a competitive bidding program that would relieve utilities of the obligation to pay QFs for avoided capacity costs when the utility satisfies all its needs through a fair and open competitive solicitation, while still providing adequate protections against discrimination.⁵⁴ Additionally, SEIA calls the Commission's attention to a recent whitepaper published by Energy Innovation Policy and Technology explaining that "As sole buyers, [vertically-integrated utilities] have control over inputs to and methods for conducting resource planning, as well as methods and assumptions used to evaluate bids received in competitive procurement processes."⁵⁵ As the authors explain:

With the acquiescence of their regulators, vertically-integrated utilities can:

- Control information and impose biases on procurement processes, which can discourage or disfavor otherwise competitive procurement opportunities.
- Exercise arbitrary or unfair decision making, which may result in competitive projects being rejected or saddled with unreasonable costs or delays.
- Impose terms and conditions that may result in sellers having to accept below-market prices or onerous contract requirements in order to remain active in the market.⁵⁶

The whitepaper's authors evaluated four cases of resource procurement by vertically-integrated utilities including Public Service Company of Colorado, Public service Company of New Mexico, Georgia Power and Minnesota Power. As SEIA previously explained, both PacifiCorp and NorthWestern have engaged in unfair solicitation processes to prevent competitive independent projects from being developed.⁵⁷

⁵⁴ See SEIA August 2019 Counterproposal at 17-58.

⁵⁵ See All Source Whitepaper at 2.

⁵⁶ *Id.*

Under SEIA's Counterproposal, where a state has created a well-structured, fairly administered, independently-monitored, and completely non-discriminatory process for procuring energy and capacity from new generation resources, (i) a utility complying with that process should be relieved of its obligation set forth in 18 C.F.R. § 292.303(a) to pay Qualifying Facilities not prevailing in a competitive solicitation for capacity when the utility has satisfied its capacity needs through a competitive solicitation; and (ii) Qualifying Facilities should not be provided with a pathway for circumventing and disrupting that process. Where a utility's competitive solicitation fails to secure all of the energy and capacity needs identified in the solicitation, any Qualifying Facilities that satisfy the shortfall will be paid an avoided cost rate for energy and capacity that equals the clearing price resulting from the competitive solicitation (and for the same contract term), in compliance with 18 C.F.R. § 293.304. The utility must retain the obligation to pay QFs for energy in accordance with 18 C.F.R. § 292.303(a), but SEIA is open to energy pricing established through market mechanisms rather than administrative proceedings and to shorter contract terms for these energy-only contracts, provided that such QFs are eligible to bid into future competitive solicitations for energy and capacity.

As noted, under SEIA's proposed framework, the need to conduct an administrative calculation of avoided capacity costs is eliminated. This program would require close coordination with state Integrated Resource Planning, and require that solicitation programs include clear details regarding the manner in which bids will be scored to avoid discriminatory scoring by utilities, or scorings that don't accurately compare long-term rate based obligations with short term third party purchases.⁵⁸ This program would also need to impose prohibitions on self-dealing and affiliate preference by utilities, and be designed and administered by a third-party to clearly establish a fair,

⁵⁸ See SEIA August 2019 Counterproposal at 20-22 (presenting further detail on these points).

and independent scoring process.⁵⁹ Solicitations should also be conducted in accordance with Allegheny competitive bidding principles.⁶⁰ In administering any bidding program, the utility must be responsible for properly coordinating the interconnection and bidding process to ensure that transmission market power is not abused.⁶¹

⁵⁹ *Id.* at 22 (presenting further detail on these points).

⁶⁰ The Allegheny principles are: (1) transparency, a requirement that the solicitation process be open and fair; (2) definition, a requirement that the product, or products, sought through the competitive solicitation be precisely defined; (3) evaluation, a requirement that the evaluation criteria be standardized and applied equally to all bids and bidders; and (4) oversight, a requirement that an independent third party design the solicitation, administer bidding, and evaluate bids prior to selection. *See Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082, at P 18 (2004).

⁶¹ *See* SEIA August 2019 Counterproposal at 34-37 (presenting further detail on these points).

II. CONCLUSION

As discussed herein, SEIA encourages the Commission to (1) revise its proposed Ten Mile Rule and instead maintain a bright-line rule for determining when a QF is located at the “same site;” (2) conclude that QFs connected to a utility distribution system, where the utility does not manage interconnection and transmission service under an OATT, do not have non-discriminatory access to ISO/RTO wholesale markets; (3) recognize the role of PURPA in the modern energy landscape as the means to drive vertically-integrated regions toward competition; and (4) adopt SEIA’s proposal for all-source competitive solicitations in lieu of providing non-compliant states additional flexibility.

Respectfully submitted,

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May 4, 2020

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this pleading has been served this day upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 4th day of May, 2020 in Washington, D.C.

/s/ Stephanie Phillips