

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

Implementation Issues Under the Public
Utility Regulatory Policies Act of 1978

Docket No. AD16-16

**SUPPLEMENTAL COMMENTS
OF THE SOLAR ENERGY INDUSTRIES ASSOCIATION**

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I. INTRODUCTION

The Solar Energy Industries Association (“SEIA”) thanks the Commission for engaging on a number of emerging issues in the electric industry, including potential changes to the implementation of the Public Utility Regulatory Policies Act of 1978 (“PURPA”).¹ SEIA represents solar companies that develop, own and operate a wide variety of projects throughout the country, including solar installations at the transmission and distribution levels, as well as behind-the-meter installations at commercial, industrial, and residential host-sites.² Qualifying cogeneration and small power production facilities (“Qualifying Facilities” or “QFs”) further PURPA’s important statutory goals of fuel diversity and national security, contribute to the resilience of the system, and simultaneously place downward pressure on the utility’s incremental cost to serve.³ SEIA has actively participated in this proceeding since the Commission opened this docket in 2016, including filing multiple sets of comments, participating as a panelist during the June 2016 Technical Conference, and presenting testimony in U.S. Congressional hearings.⁴ As SEIA has consistently

¹ 16 U.S.C. § 2601, *et seq.* (2012).

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

⁴ *See* Comments on behalf of the Solar Energy Industries Association, Docket No. AD16-16 (June 7, 2016) (“SEIA Technical Conference Testimony”); *see also* Solar Energy Industries Association (SEIA) Post Technical Conference Comments, AD16-16 (Nov. 7, 2016) (“SEIA Post-Technical Conference Comments”); Testimony of Todd G. Glass on behalf of the Solar Energy Industries Association before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Energy, *Powering America: Reevaluating PURPA’s Objectives and its Effects on Today’s Consumers* (Sept. 6, 2017) (“SEIA House Testimony”), available at <https://docs.house.gov/meetings/IF/IF03/20170906/106362/HHRG-115-IF03-Bio-GlassT-20170906.pdf>.

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, which is essential to reduce costs and drive innovation for the benefit of ratepayers.

In this docket, PURPA critics have called for a greater reliance by electric utilities on competitive solicitation programs as an alternative to PURPA's "must purchase" obligation. To assist the Commission in its decisionmaking and the administration of the statutory requirements, SEIA proposes a bidding program that would relieve utilities of the obligation to pay QFs for avoided capacity costs when the utility satisfies all of its needs through a fair and open competitive solicitation. SEIA is open to modifications to PURPA implementation through increased use of competitive solicitations, but such solicitations must include sufficient protections and SEIA opposes a finding that utility-run competitive solicitations could, as some including the National Association of Regulatory Utility Commissioners ("NARUC") suggest, satisfy the statutory criteria for an exemption from the "must purchase" obligation under Section 210(m)(1)(C) of PURPA. Any competitive solicitation program adopted by the Commission must prevent self-dealing and affiliate abuse and ensure the QF contracts function in their intended way by furthering competitive outcomes. SEIA respectfully requests that the Commission impose the important safeguards set forth below to ensure fair and transparent competition in any bidding programs conducted in accordance with PURPA. As SEIA explains below, any rulemaking to reform implementation should also aim to reduce the widespread non-compliance with PURPA by many state commissions and utilities and strengthen transparency, accountability, and enforcement.

II. EXECUTIVE SUMMARY

As SEIA has previously explained, while there are certainly ways in which PURPA implementation can be improved to address the legitimate concerns of multiple stakeholders,⁵ and given the passage of time and continued development of market access challenges, SEIA believes an additional technical conference is warranted to develop the rules for competitive bidding programs and ensure sufficient protections are in place to prevent discrimination against QFs. PURPA opponents have grossly overstated the severity of problems, have disingenuously failed to acknowledge the problems inherent in the vertically-integrated utility model that PURPA seeks to redress, and have totally failed to admit that Qualifying Facilities routinely and consistently face discrimination from state commissions and utilities in much of the country today. The Commission opened this docket more than three years ago,⁶ 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.⁷

These Supplemental Comments respond to the specific reform proposal put forth through the Supplemental Comments of NARUC and the accompanying whitepaper (“NARUC Supplemental Comments”),⁸ in which NARUC proposes that FERC establish a “yardstick” against which state

⁵ See, e.g., SEIA Post Technical Conference Comments at 4-27.

⁶ See Notice of Technical Conference, Docket No. AD16-16 (Feb. 9, 2016).

⁷ See, e.g., *NV Energy to double renewable capacity — if voters reject retail choice*, UTILITYDIVE (June 1, 2018), available at <https://www.utilitydive.com/news/nv-energy-to-double-renewable-capacity-if-voters-reject-retail-choice/524716/>.

⁸ See Supplemental Comments of the National Association of Regulatory Utility Commissioners, Docket No. AD16-16 (Oct. 17, 2018) (“NARUC Supplemental Comments”) (providing a proposal to FERC as Attachment A) (“NARUC Proposal”).

competitive solicitation programs can be evaluated for the purpose of exempting utilities from PURPA, pursuant to Section 210(m)(1)(C).⁹ As SEIA explains below, Congress enacted PURPA with the goal of diversifying the supply of electric generation resources away from resources built, owned, and rate-based by vertically-integrated monopoly electric utilities which incurred frequent cost overruns that were passed on to ratepayers.¹⁰ SEIA has proposed a competitive bidding program that will further these important statutory goals. Congress re-affirmed its goal to encourage QF development in the Energy Policy Act of 2005 (“EPAct 2005”), in which Section 210(m) was added to PURPA, acknowledging changing electricity market dynamics, but also maintaining utilities’ obligations to purchase energy and capacity at the avoided cost rate where competitive markets are not sufficiently developed. Through testimony and written submissions in this docket, SEIA (among others) has explained that purchasing utilities, and the state commissions that regulate them, have engaged in patterns and practices that are inconsistent with these statutory directives.’¹¹ Consistent with the continued Congressional directive, and the goal of promoting competition by allowing independent power producers to place additional downward pressure on incumbent utilities’ cost-of-service rates, SEIA now proposes a bidding program that would further the statutory

⁹ Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005. *See* Pub. L. 109-58, 1253, 119 Stat. 594, 967 (2005) (“EPAct 2005”).

¹⁰ *See, e.g., FERC v. Mississippi*, 456 U.S. 742, 756 (1982) (recounting PURPA’s statutory directives); H.R. Rep. No. 95-1750 at 9 (1978) (Conf. Rep.) (documenting the legislative history and development of PURPA). *See also*, Richard Munson, *From Edison to Enron: The Business of Power and What it Means for the Future of Electricity*, 103-107 (2005) (recounting that Senator John Durkin was a proponent of competition in the electric industry and supported by manufacturers that were interested in installing their own generation as a means to “avoid the high costs of utilities’ over-budget reactors”).

¹¹ *See, e.g.*, SEIA Technical Conference Testimony at 4-5; SEIA Post-Technical Conference Comments at 7-15; Supplemental Comments of the Solar Energy Industries Association at 24-30, Docket No. AD16-16 (Oct. 26, 2018) (“SEIA 2018 Supplemental Comments”).

goals of competitive markets while providing sufficient protections to prevent discrimination against independent generators. SEIA also requests that, as part of the PURPA modernization efforts, the Commission strengthen its role in the oversight and enforcement of PURPA. These Supplemental Comments also address the positions set forth in the comments submitted by certain utilities¹² and the Edison Electric Institute¹³ (collectively “Incumbent Utilities”).

As discussed in Section III, NARUC’s “yardstick” proposal does not satisfy the requirements for an exemption under Section 210(m)(1)(C). If, however, the Commission wishes to consider designing a “yardstick” for waiver of the mandatory purchase obligation under Section 210(m)(1)(C), SEIA suggests that the Commission encourage utilities to join an existing ISO/RTO, form a new ISO/RTO that provides markets of the type described in Section 210(m)(1)(A) or (B), or institute direct access for all commercial and industrial off-takers within the applicable service territory. In other words, if QFs have a non-discriminatory and meaningful ability to compete to sell directly to buyers other than the host utility, whether through an ISO/RTO market or through a commercial and industrial direct access market, a utility should be eligible for an exemption from its mandatory purchase obligations under Section 210(m).¹⁴ These opportunities, however, do not currently exist outside of organized wholesale and deregulated retail markets.

¹² Comment of Portland General Electric Co., Docket No. AD16-16 (Mar. 26, 2019); Answer of the American Public Power Association and National Rural Electric Cooperative Association, Docket No. AD16-16 (Feb. 19, 2019); Comment of the Global Energy Institute of the U.S. Chamber of Commerce on Implementation Issues Under PURPA, Docket No. AD16-16 (Dec. 7, 2018).

¹³ Supplemental Comments of the Edison Electric Institute, Docket No. AD16-16 (June 25, 2018).

¹⁴ See, e.g., *Corporate Renewables Procurement Accounted for Nearly a Quarter of All Deals in 2018*, GREENTECH MEDIA (Feb. 5, 2019) (explaining that between 2017 and 2018 corporate procurements grew 109% percent across the United States and that growth is expected to continue in

Multiple discussions with SEIA’s membership revealed that the majority of QF developers are unable to gain meaningful market access in most of the 35 states with vertical-integration, including the 15 states where vertically-integrated utilities are members of an ISO/RTO. SEIA’s members are ready, willing, and able to compete to provide low-cost solar energy and capacity in all markets in the U.S. While SEIA opposes NARUC’s proposal, SEIA’s members believe that there is merit to the idea of FERC engaging in a rulemaking proceeding to define a competitive process that utilities outside of ISO/RTO markets may deploy under PURPA. SEIA proposes that modernization to PURPA feature both competitive procurements for new generation resources and QF contracts for energy to compete with the purchasing utility’s existing portfolio.

To this end, in Section IV, SEIA proposes that where a state has created a well-structured, fairly administered, and completely non-discriminatory process for procuring all new generation resources, then a utility with an approved competitive procurement process should be relieved of its obligation set forth in 18 C.F.R. § 292.303(a) to pay QFs not prevailing in a competitive solicitation for avoided capacity costs (unless the solicitation fails to procure its identified capacity target). This competitive procurement process must provide substantial safeguards against discrimination and self-dealing. Specifically, determinations of capacity need must be linked to a utility’s integrated resource plan, the solicitation must be conducted in accordance with the *Allegheny* factors, and purchasing utilities must offer non-discriminatory access to transmission and interconnection services.¹⁵ Under SEIA’s proposal a purchasing utility retains its statutory obligation to compensate

2019 due to factors such as increasingly favorable contract terms and sustainability goals),
availability at: .

¹⁵ The question as to whether a competitive bidding program is consistent with PURPA’s mandate is not a new issue. *See Notice of Technical Conference, Regulation of Independent Power Producers*, 52 Fed. Reg. 36,998 (1987); *Notice of Public Conferences and Request for Comments*,

QFs that do not participate in the solicitation, or are not winning bidders, for energy when the QF can provide energy at the incremental cost of electric energy that such utility would otherwise generate itself – the avoided cost.¹⁶ This is a critical part of SEIA’s proposal and reflects the reality that although competitive procurement for new generation will provide for some competition with a monopoly utility, such utilities often rely on their existing portfolio of (potentially uneconomic) generating assets to serve their load.¹⁷

Finally, Section IV.B discusses the need to strengthen the Commission’s focus on enforcement, accountability, and transparency. Where utilities have not received a waiver of their obligation to purchase QF energy and/or capacity, the Commission must ensure that Qualifying Facilities receive the full protections of PURPA in order to encourage QF development and promote competition with monopoly utilities. This includes (i) requiring contract lengths that are sufficient to support capital market financing, (ii) establishing minimum standards for LEO formation and promoting standardized contracts, and (iii) requiring transparency in avoided cost data. As SEIA has

Cogeneration; Small Power Production, 52 Fed. Reg. 2552 (1987). A full recounting of the history of the Commission’s proceedings in which it considered whether competitive bidding programs would be compliant with PURPA is provided in the 1988 edition of the Energy Law Journal. See Griggs, John Wyeth, *Competitive Bidding and Independent Power Producers: Is Deregulation Coming to the Electric Utility Industry*, 29 ENERGY LAW JOURNAL 415, 431-441 (1988), available at [https://www.eba-net.org/assets/1/6/29_9EnergyLJ415\(1988\).pdf](https://www.eba-net.org/assets/1/6/29_9EnergyLJ415(1988).pdf).

¹⁶ See 18 C.F.R. § 292.303(a); 304(d).

¹⁷ For an example of the potentially uneconomic nature of a vertically-integrated utility’s existing portfolio of assets, the Montana Environmental Information Center recently presented testimony in NorthWestern’s rate case that the true value of the utility’s share in Colstrip is closer to \$100 million, not the \$300 million that NorthWestern claims. See, e.g., *Value, future of Colstrip a flashpoint in NorthWestern’s \$35 million electric rate-hike request* (Mar. 13, 2019) (noting that the MEIC wants “to make sure that customers are protected from a monopoly utility wanting to gouge them and put more money into a failing resource, when in fact there are cheaper ways to generate electricity”), available at <https://www.kbzk.com/news/politics/2019/03/13/value-future-of-colstrip-a-flashpoint-in-northwesterns-35-million-electric-rate-hike-request/>.

previously explained, the Commission should maintain a bright-line one-mile rule, maintain the presumption that QFs that are 20 MW and under do not have nondiscriminatory access to competitive organized wholesale markets, and maintain the existing self-certification process.¹⁸

III. NARUC’S “YARDSTICK” PROPOSAL DOES NOT MEET THE STANDARD IN SECTION 210(M)(1)(C) AND SHOULD BE REJECTED

NARUC has asked that FERC establish a “yardstick” against which state competitive solicitation programs can be evaluated for the purpose of exempting utilities from PURPA’s mandatory purchase obligation.¹⁹ As the Supreme Court explained many years ago, the “basic purpose of section 210 of PURPA is to provide a market for the electricity generated by small power producers and cogenerators”²⁰ given that “utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities.”²¹ NARUC’s proposal does not address or fulfill the statutory mandates of Section 210, and should be rejected by this Commission.

In general, NARUC’s recounting of changes in energy markets, especially in states not participating in an ISO/RTO, is overstated and inaccurate.²² Congress passed Section 210(m) into law to provide a FERC a toolbox by which it could waive a purchasing utility’s mandatory purchase

¹⁸ See, e.g., SEIA 2018 Supplemental Comments at 24-30.

¹⁹ See NARUC Proposal at 6 (discussing the whitepaper’s proposal that “FERC should support expanding competitive practices under PURPA”).

²⁰ *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 410 (1983) (quoting 45 Fed. Reg. 12221 (1980)).

²¹ *FERC v. Mississippi*, 456 U.S. at 750.

²² Compare *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688 at PP 54, 139, FERC Stats. & Regs. ¶ 31,233 (2006) (“Order No. 688”); *on reh’g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *aff’d sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008) (addressing the issues and arguments presented in the NARUC proposal regarding the standard set forth in Section 210(m)(1)(A)-(C)).

obligation where “a QF has nondiscriminatory access to potential purchasers other than the host utility, sufficient to justify terminating the purchase requirement.”²³ As explained in Order No. 688, the competitive element of Section 210(m) is concerned with “whether the wholesale market provides a meaningful opportunity for a QF to sell its capacity and energy *to a buyer other than the utility to which the QF is interconnected.*”²⁴ As the Commission concluded in Order No. 688 when determining whether organized procurement processes could satisfy the statutory standards for waiver: “[r]eflecting on parties’ comments and the Commission’s own experience with utilities’ procurement processes leads us to conclude that the processes are complex and not uniform we cannot find that simply requiring an organized procurement process without elaboration would meet the requirements of the statute.”²⁵

PURPA’s statutory requirements have not changed since EPAct 2005 and Order Nos. 688 and 688-A. In order to meet the standard for waiver of the mandatory purchase obligation set forth in FPA Section 210(m)(1)(C), a QF must have “(1) nondiscriminatory access to transmission and interconnection services, and (2) competitive short-term and long-term markets that provide a meaningful opportunity to sell to buyers other than the utility to which the QF is interconnected.”²⁶ These conditions do not remotely exist in any state outside of an ISO/RTO and are not likely to develop at any time in the near future.²⁷

²³ Order 688-A at P 25.

²⁴ Order No. 688 at P 140 (emphasis added).

²⁵ *Id.* at P 138.

²⁶ *Id.* at P 34.

²⁷ As discussed *infra*, reserve sharing arrangements between balancing authorities, such as the Energy Imbalance Market (“EIM”) administered by the California Independent System Operator Inc. (“CAISO”) do not provide market access for QFs.

If the Commission wishes to consider a “yardstick” for waiver of the mandatory purchase obligation under Section 210(m)(1)(C), SEIA suggests that the Commission encourage utilities that wish to seek a waiver of PURPA’s purchase obligation to join an existing ISO/RTO, form a new ISO/RTO that provides markets of the type described in Section 210(m)(1)(A) or (B), or institute direct access for all commercial and industrial off-takers within the applicable service territory.²⁸ If QFs are able to meaningfully compete to sell directly to buyers other than the host utility, whether through an ISO/RTO market or through a commercial and industrial direct access market, a utility should be able to gain exemption from its mandatory purchase obligation in accordance with EPAct 2005. NARUC’s proposal, however, does not satisfy the statutory standard set forth in Section 210(m)(1)(C).

A. NARUC’s Proposal Does Not Provide a Meaningful Opportunity to Sell to Buyers Other Than the Interconnected Utility

As the Commission explained in Order Nos. 688 and 688-A, the statutory language of Section 210(m) requires that a Qualifying Facility “have a meaningful opportunity to sell capacity and energy to buyers other than the interconnected utility” and explained that the term “meaningful opportunity” means an “actual, and not just theoretical, opportunity.”²⁹ NARUC proposes that the Section 210 purchase obligation be waived where the purchasing utility allows QFs to participate in a competitive solicitation conducted to fill “additional energy and capacity needs” identified in the purchasing utility’s integrated resource plan.³⁰ For short-term energy and capacity sale

²⁸ See, e.g., Order No. 688 at P 43 (explaining that the structure of Section 210(m)(1) reflects Congressional intent to impose a particular set of tests for each category and to not conflate these into a single standard).

²⁹ Order No. 688-A at P 38.

³⁰ NARUC Proposal at 7.

opportunities, NARUC proposes that a showing that the QF has access to a trading hub where load-serving entities routinely engage in “off-system” transactions is sufficient to satisfy the statutory standard. The NARUC proposal fails to take into account whether the “yardstick” provides QFs with a meaningful opportunity to sell short and long-term energy and capacity – the crux of the statutory standard for waiver.

The reality is that the markets the NARUC authors suggest QFs rely on are markets of excess energy traded among load-serving entities. The two most active trading points in the West are Mid-Columbia (“Mid-C”) in the Northwest and Palo Verde in the Southwest, but the NARUC authors fail to demonstrate the liquidity of these markets, particularly given the limited amount of energy-pricing data available for transactions that occur at these points. The fact that “transactions routinely occur at one or more liquid trading hubs”³¹ tells us nothing about what fraction of a utility’s energy procurement occurs in this manner or the extent to which these opportunities are open to all types and sizes of firms (including Qualifying Facilities or other non-utility generators using conventional or advanced technologies).³² In contrast to ERCOT and other ISO/RTO regions, the utilities transacting at the trading hubs identified in NARUC’s proposal retain a native load preference and may tie up transmission capacity and impede power flow schedules of competing generators. Further, utilities at these hubs have the market power and incentive to favor themselves and their affiliates in the posting of Available Transmission Capability and use discretionary dispatch to create constraints that block a QF’s scheduled power flows. As Balancing Authorities, these purchasing

³¹ *See id.*

³² Transactions that occur at these hubs are based upon the marginal operating and shortage costs (which may be the “spot market” price). These costs are naturally variable with seasonal demand, the fuel in use, and the utilities operating resources.

utilities could also deploy a preferential administration of energy balancing provisions to gain advantage over competitors. In addition, these non-coordinated transmission regions do not employ market-based congestion management systems and Qualifying Facilities cannot hedge their risk by buying financial transmission rights on commercially significant flowgates. These trading hubs simply do not provide the price transparency, liquidity, or volume of opportunity and that would give rise to the type of certainty that would provide a real market alternative for independent power producers like QFs.

Even if a QF were able to contract for delivery to one of these trading points outside of an organized market, the NARUC Proposal fails to address the substantial challenges inherent in wheeling across multiple systems outside of an ISO/RTO. Under NARUC's proposal a QF can offer to sell short-term energy at Mid-C in accordance with the products offered by the Western Systems Power Pool ("WSPP"), but the proposal's authors fail to specify whether the interconnecting utility must provide transmission service sufficient to enable the sale of such a product. These concerns are not theoretical. In *PáTu Wind*, the developer explained to FERC how it entered into a contract for sale with Portland General in 2010 and then arranged point-to-point transmission service to deliver the output of the project first through point-to-point transmission service with Wasco Electric Cooperative's system and then through the Bonneville Power Administration ("BPA") system to ultimately deliver to Portland General's Troutdale substation.³³ The developer recounted how it made repeated attempts to dynamically schedule its output with Portland General, but Portland General consistently "refused to discuss or participate in implementing dynamic scheduling."³⁴

³³ See *PáTu Wind Farm, LLC*, 150 FERC ¶ 61,032 at PP 4-16 (2015) (recounting the developer's request for dynamic scheduling and Portland General's consistent refusal to provide such service).

³⁴ *Id.* at 8 (citing *PáTu Complaint* at 8).

Likewise, Portland General refused to allow the generator to use 15-minute scheduling.³⁵ As *PáTu Wind* demonstrates, QFs operating outside of ISO/RTO markets still face problems with discrimination in the form of transmission foreclosure, including denial of access to transmission services, pancaked rates, contract path limitations, and lack of regional dispatch among others. NARUC does not address, or even acknowledge, these structural limitations that prevent QFs outside of ISO/RTO regions from obtaining meaningful access to buyers other than the interconnected utility.

1. The EIM is Not Sufficiently Developed to Meet the Statutory Standard of Section 210(m)

As SEIA previously explained, the developing Energy Imbalance Market (“EIM”) operated by the CAISO does not satisfy the Section 210(m) standards.³⁶ The facts and circumstances that the Commission relied on in the issuance of Order No. 688 and its progeny – in which this Commission offered waivers to utilities that are operating within all ISO/RTO regions including PJM, MISO, ISO-NE, NYISO, SPP, CAISO, and ERCOT – have not materially changed. While some of the vertically-integrated utilities in the West that have not otherwise joined an organized wholesale energy or capacity market have offered to participate in the EIM. The EIM is a platform provided by the CAISO to allow BAs to leverage the benefits of real-time balancing while also maintaining all of their existing authority, the EIM does not provide meaningful market access to QFs.

In the EIM, BAs remain responsible for procurement or self-provision of reserves and other ancillary services. Qualifying Facilities, as well as other IPPs, do not have a mechanism to directly participate in the EIM. Under NARUC’s proposal, Qualifying Facility would be required to

³⁵ *Id.* at P 30 (citing *PáTu Complaint* at 13).

³⁶ *See* SEIA Technical Conference Testimony at 6.

“sleeve” their proposed transaction in the EIM through the purchasing utility, and the utility would then compensate the QF for the value of the EIM’s BA-BA transaction. Such sleeving maintains the monopoly power of the vertically-integrated utility. Unlike in an ISO/RTO region, the BAs participating in the EIM preserve their autonomy and “retain authority over transmission planning, day-ahead marketing, and transmission system and balancing authority operation.”³⁷ The EIM market does not currently allow QFs to participate directly nor does the market allow QFs to enter into sales arrangements that are for a term longer than five minutes. While the EIM is a progressive market design that aims to efficiently balance supply and transfers between participating BAs, it is not a market of the type described in Section 210(m)(1)(A)-(C).

2. There is Insufficient Evidence of Opportunity to Sell Long-Term Energy and Capacity Outside of an ISO/RTO

NARUC and the Incumbent Utilities likewise present no concrete evidence that Qualifying Facilities have a meaningful opportunity to sell long-term energy and capacity outside of the ISO/RTO regions. While an occasional transaction has occurred under these conditions, the “opportunities” presented by the NARUC proposal are theoretical, and they do not justify waiving the mandatory purchase obligation for utilities that have maintained vertical-integration and have elected to remain outside of organized markets for the past twenty years. “There is insufficient evidence in the record in this proceeding to conclude that NARUC’s proposal provides a Qualifying Facility an actual opportunity to sell long-term energy and capacity products, and, therefore, it must be rejected.

³⁷ See, e.g., Bonneville Power Administration Energy Imbalance Initiative, Report on EIM, available at: <https://www.bpa.gov/Projects/Initiatives/EIM/Pages/Energy-Imbalance-Market.aspx>.

B. NARUC’s Proposal Does Not Remedy Discriminatory Transmission and Interconnection Practices

NARUC’s proposal, like Order No. 688, points to FERC’s Open Access Transmission Tariff (“OATT”) principles to support its claim that QFs have non-discriminatory access to transmission and interconnection services.³⁸ Outside of RTO/ISOs, however, most QF interconnections involve sales to the interconnecting utility. As FERC held in Order No. 2006, state commissions, rather than FERC, have supervisory authority over the QF interconnection process when sales are made to the host utility.³⁹ In other words, in most states, QFs cannot avail themselves of OATT processes and protections because state rules, not FERC-regulated OATT rules, govern the interconnection of QFs. State commissions vary widely with respect to their ability or inclination to supervise the conduct of interconnecting utilities in a meaningful way.⁴⁰ Despite efforts to avoid collusion between a utility’s interconnection and generation teams, corporate culture, shared legal and executive teams, and shared incentives mean that the interconnection teams that implement the interconnection procedures are rarely indifferent to the impact of their decisions on the financial viability of IPPs that are seeking to compete with the utility.⁴¹ In addition, interconnection studies are conducted by the utility using black-box methodologies that rely on proprietary software and data that cannot be easily

³⁸ NARUC Proposal at 4.

³⁹ *See, e.g., Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, 111 FERC ¶ 61,220, P 516 (2005).

⁴⁰ *See, e.g.,* Petition for Enforcement of FLS Energy, Docket No. EL17-5 (Oct. 17, 2016) (explaining that Northwestern was withholding interconnection agreements from small solar QF developers and that the Montana Public Service Commission had not taken any action to remedy this discriminatory practice).

⁴¹ *See, e.g.,* Formal Complaint of PáTu Wind Farm LLC, Docket No. EL15-6 (Oct. 10, 2014) (alleging improper interference by Portland General’s merchant function in the operations of Portland General’s transmission function in violation of the Commission’s Standards of Conduct requirements).

be replicated, challenged or corrected by the QF customer. In many states, debilitating queue study delays can leave project developers waiting years to receive the results of their required interconnection studies.⁴² In other states, purchasing utilities routinely attempt to foist non-reimbursable network upgrade charges on QFs, under the guise of “integration” or “deliverability” charges, despite the fact that such incremental charges are inconsistent with the Commission’s transmission rules.⁴³ Finally, as seen in the Carolinas, by using non-standard tests, utilities can employ a wide array of questionable interconnection technical screens to delay and block development of independent generation that is in competition with the utility’s own resources.⁴⁴

The practical reality is that OATT principles are inapplicable to most QF interconnections and are not sufficient to provide QFs selling to utilities outside of ISO/RTO markets with non-discriminatory access to interconnection and transmission services.

C. Potential Alternative Pathways for a Section 210(m)(1)(C) Waiver

As mentioned above, if utilities seek to obtain a waiver of their mandatory purchase obligation under Section 210(m)(1), the most direct route under the current statutory framework is to

⁴² See, e.g., Complaint of Florida Municipal Power Agency, Docket No. EL19-40 (Jan. 30, 2019) (explaining that the QF facility was waiting upwards of a year for the first round of interconnection studies to be completed).

⁴³ See, e.g., *Public Serv. Co. of Colorado*, 167 FERC ¶ 61,141 (2019) (explaining that non-reimbursable network upgrades are inconsistent with the Commission’s rules on transmission and rate recovery).

⁴⁴ See, e.g., *North Carolina’s Largest Solar Company Takes on Duke Energy Over New Test for Connecting Projects to Grid*, CHARLOTTE BUSINESS JOURNAL (Oct. 3, 2016) (detailing the “stiffness test” that Duke Energy unilaterally imposed on developers of solar projects), available at: <https://www.bizjournals.com/charlotte/news/2016/10/03/north-carolina-s-largest-solar-company-takes-on.html>. See also SEIA Post-Technical Conference Comments at 24-25 (explaining that Duke stated it would remove all projects with proposed distribution interconnections from the queue and did not propose to include a time value refund of the interconnection deposits it solicited and has held in reserve for the past few years.).

join an existing ISO/RTO or form a new ISO/RTO that provides markets of the type described in Section 210(m)(1)(A) or (B). If QFs have a non-discriminatory and meaningful ability to compete to sell directly to buyers other than the host utility, whether through an ISO/RTO market or through a commercial and industrial direct access market, a utility should be able to gain exemption from its avoided cost mandatory purchase obligations. NARUC's proposal, however, does not satisfy the statutory standard set forth in Section 210(m)(1)(C).

SEIA's members are seeking meaningful market access and an opportunity to compete, on equal footing, with entrenched monopoly utilities that have dominated the electricity sector since long before PURPA's original enactment in 1978. If a vertically-integrated utility provided Qualifying Facilities direct access to the commercial and industrial customers within the utility's service territory, this would provide QFs meaningful access to buyers other than the utility to which the QF is interconnected and it could potentially result in substantial cost savings for these customers. However, such direct market access would require changes to the regulatory framework in these traditionally regulated states which, to SEIA's knowledge, has not meaningfully occurred. Providing the end-users, retail customers, greater choice in the source of electricity they consume in their homes and businesses would improve efficiencies, increase innovation, and reduce costs of electricity generation that are ultimately borne by retail customers. SEIA supports, and the Commission should implement, a Section 210(m)(1)(C) waiver if direct access for all commercial and industrial customers is implemented within the purchasing utility's service territory.

IV. SEIA'S PROPOSAL: DEVELOPING A COMPETITIVE SOLICITATION FRAMEWORK FOR NEW GENERATION, PROMOTING COMPETITION WITH EXISTING GENERATION, AND STRENGTHENING PURPA IMPLEMENTATION

Well-functioning competitive markets benefit customers by providing customers with new options and flexibility for meeting demand, as well as allocating scarce resources and incentivizing

efficient production by highlighting scarcity through price signals. When there is a robust competitive market, regulators may rely upon market-based prices in lieu of cost-of-service regulation to assure a just and reasonable result.⁴⁵ As discussed *supra*, NARUC's proposal does not provide QFs with a meaningful opportunity to sell energy and capacity over a short and long basis, as the statute requires. Understanding that the Commission, however, wishes to consider whether competitive bidding programs could satisfy the statutory directive, SEIA presents a proposal that would relieve the purchasing utility of its obligation to compensate QFs for avoided capacity value if a utility adopts a fair, transparent, and non-discriminatory competitive procurement process for all new generation using a robust state-approved integrated resource planning process.

High levels of concentration in generation ownership and sales are an indicator of the potential to exert market power in a region. If the Commission wishes to deploy a competitive solicitation framework in lieu of the existing administratively-determined avoided cost framework, the Commission must ensure that purchasing utilities are not allowed to manipulate competitive solicitation programs through the exercise of market power. Proposals from NARUC and the Incumbent Utilities lack such protections, but SEIA has incorporated such protections as detailed below. Under SEIA's proposal, QFs not competing in or winning the competitive solicitations for new generation would still have the opportunity to sell energy to the utility under the existing PURPA framework to ensure QFs can continue to compete against the utility's reliance on its existing (potentially uneconomic) generating assets.

⁴⁵ *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993).

A. Proposed Framework to Establish Competitive Solicitations for New Generation Needs

While SEIA's members are concerned about the potential for the purchasing utility to discriminate against QFs, SEIA's members believe that there is merit to the idea of FERC engaging in a rulemaking proceeding or technical conference to a competitive solicitation compliance pathway by which a utility that does not qualify for a Section 210(m) waiver could comply with PURPA. SEIA's members will compete vigorously wherever there is a fair and open process that provides a meaningful and non-discriminatory opportunity to sell. SEIA encourages the Commission to initiate a technical conference to develop proposed regulations to implement open and fair competitive solicitations under PURPA that also prevent discrimination, self-dealing, and affiliate abuse in the administration of any such program.

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, the utility must retain the obligation to pay QFs for energy and capacity in accordance with 18 C.F.R. § 292.303(a), but 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.

Under SEIA’s proposed framework, the need to conduct an administrative calculation of avoided capacity costs is eliminated, but consistent with the Commission’s direction in Order No. 688-A, any utility seeking to deploy competitive solicitations in lieu of administratively-determined avoided capacity costs must provide participants with complete and transparent information regarding transmission constraints, levels of congestion, and interconnections to prevent discrimination against Qualifying Facilities.⁴⁶

1. Conducting Competitive Solicitations for New Capacity Additions in Close Coordination with an Integrated Resource Planning Process

The Commission should be aware that many of PURPA’s most vocal opponents, who claim that they do not need or want the power offered to them by independently-owned QF resources, are simultaneously proposing to develop renewable resources that they will own and include in their ratebases upon which they earn a return.⁴⁷ Idaho Power, which has pushed through a two-year contract limitation for QFs, announced in March 2019 that it “has set a goal to provide 100-percent clean energy by 2045” and explained that “Idaho Power plans additional investments in wind, solar and other clean sources.”⁴⁸ Idaho power cites the low cost of solar electricity as the tipping point for this move. In Colorado, where Xcel has recently announced its plans to be carbon free, it has been reported that Xcel’s ambitious clean energy goals “will help Xcel get permission from regulators to depreciate lots of uneconomic old fossil-fuel assets (which activists have been hassling it about

⁴⁶ See Order No. 688-A at P 67.

⁴⁷ See, e.g., Roberts, David, *A Major US Utility is Moving Toward 100% Clean Energy Faster Than Expected*, VOX MEDIA (May 29, 2019) (explaining the reasons and rationale for Xcel to ratebase new renewables), available at <https://www.vox.com/energy-and-environment/2018/12/5/18126920/xcel-energy-100-percent-clean-carbon-free>.

⁴⁸ See Idaho Power sets goal for 100-percent Clean Energy by 2045, available at <https://www.idahopower.com/news/idaho-power-sets-goal-for-100-percent-clean-energy-by-2045/>.

anyway) and build, build, build a bunch of new stuff. In short, Xcel stands to profit handsomely, and benefit politically, by giving its customers the clean energy they want.”⁴⁹ While Xcel received some of the lowest offer prices in the nation for the renewable resources, the utility’s solicitation set ownership targets of 50% for renewables, meaning that independent developers seeking to finance, own, and operate their projects were disfavored when compared to utility-owned resources. If the Commission moves forward with a competitive solicitation framework in lieu of PURPA’s mandate to pay QFs for capacity, the Commission must institute a non-discriminatory framework by ensuring that non-utility generators, like QFs, are able to compete on a level playing field to serve these incremental needs.

As the Commission is aware, third-party contracts provide a known price, while rate-based resources require extensive assumptions to develop an assumed price, and this is an area where major errors can be, and have been, made to the detriment of ratepayers. Given this dynamic, SEIA is concerned that the utility may not correctly evaluate the actual costs for comparison purposes between a long-term obligation placed in ratebase (30-plus years) and the shorter-term contracts that would result from third-party purchases (15-20 years). To protect competition, the Commission must require that solicitation programs include clear details regarding the manner in which the bids will be scored and clearly specify price and non-price criteria under which bids are evaluated, including (a) acceptable delivery points and any scoring deductions for delivery to other points, (b) credit evaluation criteria and development security requirements, (c) and performance requirements.⁵⁰ Selection of an initial shortlist of bids must be based on these enumerated price and

⁴⁹ *Id.*

⁵⁰ Under the “cooperative federalism” scheme of PURPA, the specific programmatic requirements are left to the purview of the purchasing utility’s applicable regulatory body, but the

non-price factors, with any price scores for utility-owned generation presented in a transparent manner. To protect the integrity of the competitive solicitation and the Commission's statutory responsibilities, the Commission should ensure that any competitive solicitation processes be fair and equitable, transparent, consistent, comprehensive and unbiased to all bidders to prevent discrimination in favor of the utility's resources on which it earns a return.

The accurate linkage of PURPA implementation to the purchasing utility's integrated resource planning ("IRP") process is critically important. SEIA's members have seen utilities reduce avoided costs based on the claim that no future capacity is needed in one year, and then after receiving approval for low avoided cost rates, file IRPs projecting the need for new renewable capacity the following cycle. A critical element of SEIA's proposal is that any utility seeking to deploy a competitive solicitation in lieu of its PURPA obligation to pay QFs for capacity be required to procure all new resources, as identified in a state commission-approved IRP through the competitive solicitation process, and not artificially segment the market by limiting the solicitation to a fraction of identified capacity needs or limit the solicitation to a single technology, a single program, or a single build type.

2. Imposing Prohibitions on Self-Dealing and Affiliate Preference

To approximate a competitive market, the bidding program must be operated free of perceived conflict, bias, or opportunity for self-dealing, particularly where purchasing utilities are allowed to compete in the solicitation. It is critical that any bidding programs be administered by an independent third-party administrator, and the administrator must also be deeply involved with the bid evaluation methodology, scoring, and the final selection of winning bids to ensure the process

Commission is responsible for issuing a framework for PURPA implementation that will guide these local regulatory bodies on their application of PURPA within individual territories.

remains technology-agnostic. Further, potential participants must have a process by which they can raise potential self-dealing concerns in advance of, and during, the solicitation process. Many states have not yet evolved to a point that lessens the import of the Commission’s long-held observation that “[a]ffiliates may have the incentive to engage in preferential transactions because they share common corporate goals – profits for stockholders that own both entities.”⁵¹

The Commission has long recognized that self-dealing may arise in transactions where the utility’s own assets compete in competitive solicitations alongside independent power producers. While there is nothing *per se* discriminatory or preferential about a utility-owned asset, or a utility affiliate, participating in a competitive solicitation, “the indication of the presence of market power with no effort at mitigation alerts the Commission to the potential for preferential pricing.”⁵² Rates that result from competitive solicitations in which there is a potential for self-dealing or preferential pricing may be unjust, unreasonable, and unduly discriminatory.⁵³ For the Commission to find that the rates produced by a competitive solicitation are just and reasonable, the Commission must conclude that the concerns about self-dealing and/or reciprocal dealing have been adequately addressed and resolved.”⁵⁴

⁵¹ See, e.g., *Portland Gen. Elec.*, 51 FERC ¶ 61,108, 61,245 (1990); *Midwest Gas Users Ass’n v. FERC*, 833 F.2d 341, 354 (D.C. Cir. 1987) (coincidental economic interests may prevent arm’s length bargaining).

⁵² *Portland General*, 51 FERC at 61,245.

⁵³ *TECO Power Services Corp.*, 53 FERC ¶ 61,202, 61,809-10 (1990).

⁵⁴ *Id.*

i. Utility-Designed Solicitations May Produce Results Inconsistent with a Competitive Market

In enacting PURPA, Congress recognized that the rising costs and decreasing efficiencies of utility-owned generating facilities were increasing rates and harming the economy as a whole.⁵⁵ As the inroads of competition have developed in the electric power industry, the Commission has consistently recognized that market-based rates are consistent with the public interest so long as market power is mitigated.⁵⁶ The major concern of the Commission has been whether a market participant “could limit competition and thereby drive up prices,”⁵⁷ and SEIA is concerned that a purchasing utility’s market power could foreclose QFs from competing to serve the identified energy and capacity needs. As the Commission has long-recognized, “lack of market power is the key prerequisite for allowing market-oriented pricing.”⁵⁸ The Commission has consistently imposed mitigation requirements when a seller possesses market power, but an illustrative case study of PacifiCorp’s RFP – which the authors of the NARUC proposal hold out as an exemplar – demonstrates how market power can influence a solicitation and result in discrimination against QFs. Unfortunately these concerns are not isolated to a single utility or a single program, and market power influences have discouraged competition in other documented instances by discriminating against non-utility owned resources. NorthWestern’s conduct in Montana demonstrates how a utility

⁵⁵ See Order No. 888, 75 FERC ¶ 61,080 (1996) (citing *FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982)).

⁵⁶ See, e.g., *Ocean State Power*, 44 FERC ¶ 61,261 (1988); *Commonwealth Atlantic Limited Partnership*, 51 FERC ¶ 61,368 (1990); *Citizens Power & Light Company*, 48 FERC ¶ 61,210 (1989).

⁵⁷ *Id.* See also *PJM Interconnection, LLC*, 117 FERC ¶ 61,331, P 34 (2006) (approving the minimum offer price rule for sellers that were net buyers because such entities “may have incentives to depress market clearing prices below competitive levels”).

⁵⁸ *Ocean State Power*, 44 FERC at 61,979.

can unfairly control a competitive bidding process by imposing unrealistic demands on potential suppliers, and Duke's conduct in North Carolina shows how solicitation criteria can result in discrimination against independently-owned resources. The Commission must address these concerns about self-dealing and/or reciprocal dealing before finding that a competitive procurement program is consistent with PURPA.

1) PacifiCorp

PacifiCorp's recent competitive solicitation in Oregon shows how a utility can, inadvertently or not, design an RFP that prioritizes the construction of the generation and transmission assets it includes in its ratebase and on which it earns a rate of return. The NARUC authors provide the background, explaining:

In late 2017/early 2018, PacifiCorp issued RFPs for wind and solar resources that would add more than 1,100 MW of wind to their system, as well as repower 1,000 MW of existing wind. Since that time, at least three developers have sought QF pricing for potential wind and solar projects that also competed in, but did not win, these most recent PacifiCorp RFPs.⁵⁹

What the NARUC authors do not highlight, but which the Commission should be aware, is that throughout the process, QFs and other participants raised concerns that the RFP was designed in a way that unfairly prioritized utility-owned assets in Wyoming that are necessary to support the construction of a segment of the Energy Gateway transmission project for which PacifiCorp is authorized to receive a 200 basis point incentive ROE.⁶⁰ Both independent evaluators participating

⁵⁹ NARUC Proposal at 4.

⁶⁰ *See, e.g.*, Comments of the Division of Public Utilities at 6, Utah Docket No. 17-035-23, *available at*: <https://pscdocs.utah.gov/electric/17docs/1703523/295751RedacCommDPU8-4-2017.pdf>. (acknowledging that “the eastern Wyoming location is prime territory for wind resources,” but arguing against the solicitation structure because “it may be possible for a bidder/developer to be competitive with a project location outside of Wyoming. Granted that the chance for the selection of

in the solicitation expressed concern that the RFP results did not lead to the acquisition and delivery of electricity at the lowest reasonable cost to the retail customers, and the Oregon PUC declined to acknowledge the results of the RFP.⁶¹

In 2017, PacifiCorp announced that (1) the utility would begin constructing Segment D of Energy Gateway – beginning with a single 500 kV line connecting Aeolus to Bridger; and (2) its RFP would only accept bids for wind resources that would utilize Segment D. Additional details were provided when PacifiCorp announced to the Utah Commission that it would begin the process of acquiring “up to 1,270 MW of wind resources capable of interconnecting to, and/or delivering energy and capacity across, PacifiCorp’s transmission system in Wyoming” to “ensure that winning bids are selected with sufficient time to support development of the new 500 kV transmission line in Wyoming.”⁶² PacifiCorp simultaneously moved to close avoided cost proceedings in all jurisdictions, explaining that there would not be a need to purchase from Qualifying Facilities because “[t]he new wind and transmission associated with this [RFP] provides all-in economic benefits to PacifiCorp customers in all jurisdictions.”⁶³ As recounted by Bates White, only after a

significant amounts of wind generation in this RFP outside of Wyoming may impact the viability of the D2 transmission segment, that situation might enhance ratepayer benefits.”).

⁶¹ *In the Matter of PacifiCorp*, Oregon Public Service Commission Docket No. UM1845 (May 23, 2018), available at <https://apps.puc.state.or.us/orders/2018ords/18-178.pdf>.

⁶² *See, e.g.*, Final Report of Merrimack Energy Group Inc. to Utah Public Service Commission at 13-15, Utah Docket No. 17-035-23 and 17-035-040 (Feb. 2018) (providing an independent evaluation of the process and expressing concern that “under the current structure of the RFP it is not certain if the solicitation process will lead to the acquisition and delivery of electricity at the lowest reasonable cost to the retail customers) (“Utah IE Report”), available at <https://pscdocs.utah.gov/electric/17docs/1703523/300421RedacFinRep2-27-2018.pdf>.

⁶³ *See* PacifiCorp’s Reply Comments, Oregon Docket No. UM 1794, available at <https://edocs.puc.state.or.us/efdocs/HAC/um1794hac163419.pdf>.

last-minute modification to the RFP did PacifiCorp even allow non-Wyoming resources to participate in the solicitation at all.⁶⁴

The independent evaluators and stakeholders in both Oregon and Utah raised concerns that PacifiCorp's solicitation would not "lead to the acquisition and delivery of electricity at the lowest reasonable cost to retail customers."⁶⁵ Both evaluators expressed significant reservations throughout their reports on a number of issues, but as the Utah evaluator explained, the inclusion of PacifiCorp's self-build resources presented "the most important and complex issue in the design of a competitive bidding process."⁶⁶ Of note, the "benefits" that PacifiCorp calculated for Segment D of Energy Gateway were not subject to examination or vetting, but were inserted into the RFP as a fixed assumption, and PacifiCorp did not attribute the cost of Segment D to the Wyoming wind resources but did attribute the cost to all non-Wyoming wind resources. As the independent team explained "it is important for the RFP evaluation process to consider the cost of the transmission project in comparing bids."⁶⁷

As recounted in the IE reports, PacifiCorp received bids for 18 projects, covering 13 different sites, and a total of 59 different bid options. In evaluating the RFP bids, PacifiCorp determined that it would not be possible to construct Gateway South by December 31, 2020 and disqualified all projects with interconnection queue positions higher than 712. In addition, PacifiCorp disqualified

⁶⁴ See Bates White Final Report on PacifiCorp's 2017R Request for Proposals to the Oregon Public Utility Commission ("Oregon IE Report"), available at https://www.utc.wa.gov/_layouts/15/CasesPublicWebsite/GetDocument.ashx?docID=848&year=2016&docketNumber=160353.

⁶⁵ See Utah IE Report at 15.

⁶⁶ Report of the Utah Independent Evaluator Regarding PacifiCorp's Draft Renewable Request for Proposals at 31 (August 11, 2017), available at <https://pscdocs.utah.gov/electric/17docs/1703523/296625Ex1.2OliverTest9-13-2017.pdf>

⁶⁷ Oregon IE Report at 16.

two wind projects, finding that the proposal to include energy storage rendered the bids non-compliant because PacifiCorp did not request proposals that included energy storage assets. Few eligible projects remained, but from that pool, PacifiCorp selected three winning projects: two of its own self-build plants totaling 750 MW, and a 400 MW project, where 200 MW are sold as a build transfer, and 200 MW are offered through a power purchase agreement.⁶⁸ While PacifiCorp allowed resources as small as 10 MW to submit bids into the RFP, PacifiCorp's RFP did not shortlist any QFs, nor any projects under 80 MW. PacifiCorp is not moving forward with any projects that do not depend on construction of Segment D of Energy Gateway for which it is already receiving an incentive ROE adder. As the Oregon PUC stated when it declined to acknowledge PacifiCorp's 2017 IRP, "We simply cannot conclude at this time that the narrow shortlist from PacifiCorp's RFP—a packaged bundle of mostly company-owned Wyoming wind resources connected to a single transmission line—clearly represents the renewable resource portfolio offering the best combination of cost and risk for PacifiCorp customers."⁶⁹ Nonetheless, PacifiCorp is proceeding with its self-titled "EnergyVision2020" and broke ground on June 5, 2019.

2) NorthWestern

Under a program established by the Montana legislature in 2012, NorthWestern is required to purchase a certain amount of energy from community renewable energy projects ("CREP") – projects no greater than 25 MW and where local owners have a controlling interest. Beginning in 2015, NorthWestern sought waiver from its obligation to purchase from CREPs based on the claim that it had taken "all reasonable steps" to complete such purchases but was unable to contract with

⁶⁸ As part of an agreement before the Wyoming Public Service Commission, PacifiCorp agreed to eliminate the 161 MW build transfer from its procurement plan and did not complete contracting with the fourth resource initially-designated in the solicitation.

⁶⁹ *In the Matter of PacifiCorp*, Order 18-178, Oregon Docket No. UM1845 (May 23, 2018).

eligible resources. The Montana Commission granted the waiver, and the decision was challenged. As Judge Manley in Montana’s Eighth Judicial District explained in his recent Order finding that both Northwestern and the Montana Commission failed to comply with the state’s law, Northwestern had deployed an unfair solicitation process as a means to prevent such projects from being constructed.⁷⁰ As Judge Manley explained, “record evidence shows that NorthWestern failed to accommodate realistic CREP-development timeframes.” The court went on to detail how “NorthWestern instead required projects to become operational less than 18 months after submitting bids, even though NorthWestern previously conceded that ‘moving from competitive resource solicitation to production requires at least 24 months . . .’⁷¹ As Judge Manley concluded after analyzing a number of other criteria NorthWestern used to unfairly eliminate potential projects, both the utility and the state commission violated the law by using an unfair solicitation process to ensure that no CREP projects were built.⁷²

3) Duke

North Carolina’s Competitive Procurement of Renewable Energy (“CPRE”) program, developed as part of the state’s 2017 comprehensive renewable energy law which also imposed reforms to North Carolina’s PURPA mandatory-purchase framework for the state’s vertically-

⁷⁰ See *Montana Environmental Information Center v. Montana Pub. Serv. Comm’n*, Cause No. DDV-18-0640 (Aug. 1, 2019) (explaining that the Montana Commissioners who voted to grant the waivers asserted that their reason for doing so was their personal opinions that the CREP law itself was unreasonable), available at: <https://meic.org/wp-content/uploads/2019/08/19-08-01-ORDER-Reversing-MT-PSC-Final-Order-7578B.pdf>.

⁷¹ *Id.*

⁷² *Id.*

integrated utilities,⁷³ illustrates that problems can arise when the utility itself is allowed to participate in its own competitive solicitation process. The law stipulated that regulated monopoly Duke Energy, as well as its unregulated renewables developer arm, could compete to build generation in the utility’s home territory against independent power producers. As part of the solicitation process, it was determined that all projects owned by the utility would be exempt from the requirement to post bid security, whereas all third-party owned projects were required to post substantial security to “discourage 11th hour withdrawals and encourage applications for ‘shovel-ready’ projects.”⁷⁴ Each proposal submitted by a “third-party market participant” was required to post security equal to \$20/kW based on the facility’s inverter nameplate capacity within seven business days of notification that the party’s proposal was designated as part of the “primary competitive tier.”⁷⁵ More than sixty percent of third-party proposals withdrew after being designated because they could not, or did not, provide security after being selected.⁷⁶ All projects owned, developed, or positioned

⁷³ See N.C. Gen. Stat. § 62-110.8 (codifying HB589), *available at*: https://www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_62/GS_62-110.8.pdf (reducing the threshold for standard contracts, limiting QF contracts to five year terms, and relieving utility of obligation to compensate QF for capacity where utility’s capacity needs are satisfied through other procurements).

⁷⁴ See *Duke Drops Largest Solar Project in North Carolina Procurement – Its Own*, GREENTECH MEDIA (Aug. 6, 2019) (quoting the report of the RFP administrator, Accion), *available at*: https://www.greentechmedia.com/articles/read/duke-drops-largest-solar-project-in-north-carolina-procurement-its-own?utm_campaign=GTMsocial&utm_medium=social&utm_source=twitter&utm_content=1565192006#gs.uqbuje.

⁷⁵ See Report of the Independent Administrator: Conclusion of Step 2 Evaluation and Selection of Proposals at 1-2; 5-6 (April 9, 2019), *available at*: <https://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=d2a72630-6104-4359-96ff-ab6229e7b1e0>.

⁷⁶ *Id.*

to be purchased by Duke Energy were exempt from any security posting requirements, and 100% of its designated projects proceeded.⁷⁷

In announcing the winners of the solicitation and designating Duke-owned projects to fill approximately half of the solicitation's, Duke claimed that the projects selected "represent the most competitive of the 78 that were submitted when bidding opened last July."⁷⁸ Duke failed to explain that by not having to post a bid bond Duke had "6-7 months longer than other bidders to further develop, de-risk, and diligence the site to determine whether or not it was actually financeable."⁷⁹ After the winners of the solicitation were announced, two winning proposals were withdrawn; one project from an independent power producer and one from the Duke Energy portfolio.⁸⁰ The independent power producer is subject to an approximate \$1 million withdrawal fee, but the Duke Energy project is able to withdraw without such liability.

The independent auditor has recommended that "[p]roposal security or some functional equivalent should be required in the case of both Duke self-developed projects and Asset Acquisition projects that the DEP/DEC team."⁸¹ As the auditor explained, exempting Duke-owned projects from the security requirement gave these projects a "free option to withdraw at any time, which the IA

⁷⁷ *Id.*

⁷⁸ See News Release (Apr. 17, 2019), available at: <https://news.duke-energy.com/releases/competitive-process-yields-carolinas-biggest-one-day-collection-of-solar-projects-ever-significant-savings-for-duke-energy-customers>.

⁷⁹ See *North Carolina Utilities Approve 551 MW of Solar Power at 3.8¢/kWh*, PV MAGAZINE (July 22, 2019), available at: <https://pv-magazine-usa.com/2019/07/22/north-carolina-utilities-approve-551-mw-of-solar-power-at-3-8%C2%A2-kwh/>.

⁸⁰ See *Duke Drops Largest Solar Project in North Carolina Procurement – Its Own*, GREENTECH MEDIA (Aug. 6, 2019).

⁸¹ See Final Report of the Independent Administrator at 6 (July 18, 2019), available at: <https://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=310d32ad-4c50-4a6b-b428-3bb89f6302cd>.

believes was an unanticipated result.”⁸² While the rule around the posting of developmental security is expected to be changed before the next round of bidding, “allowing a monopoly utility to compete for the chance to sell power to itself can turn routine contracting matters into awkward situations.”⁸³

ii. The Commission Should Require Solicitations to be Conducted in Accordance with the *Allegheny* Factors

These examples illustrate how a utility can design a “competitive” solicitation that has the end result of foreclosing market access for independent power producers in favor of the utility’s own resources. To protect against self-dealing, SEIA encourages the Commission to apply the *Allegheny* competitive bidding principles⁸⁴ to any PURPA competitive solicitation program. 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.⁸⁵ As the independent evaluators observed when evaluating PacifiCorp’s RFP, to maintain integrity in the process, all contract and resource types must include provisions/conditions that allow for the same or very similar risk allocation to allow for a level playing field. In imposing its *Allegheny* factors, the Commission must ensure that the utility will conduct a fair and transparent process in which all bidders are treated the same.

⁸² *Id.*

⁸³ See *Duke Drops Largest Solar Project in North Carolina Procurement – Its Own*, GREENTECH MEDIA (Aug. 6, 2019).

⁸⁴ See *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082, at P 18 (2004) (“*Allegheny*”).

⁸⁵ *Id.*

The Commission has a long history of detecting the potential for affiliate preference and has designed and implemented the *Allegheny* factors to protect captive customers from affiliate abuse.⁸⁶ The Commission is well-versed in these guidelines and is the appropriate regulatory body to ensure that multi-state utilities are employing consistent solicitation programs throughout their operating companies.⁸⁷ SEIA suggests that one cooperative federalism path forward would have the Commission require a purchasing utility, prior to instituting a competitive solicitation program that will be used to define a utility's PURPA obligations with respect to capacity procurement, submit an attestation to its applicable regulatory authority committing to adhere to the *Allegheny* principles and demonstrating that it has taken steps to ensure that neither it, nor its affiliate, will receive undue preference during any stage of the process.⁸⁸ The applicable regulatory authority will retain its jurisdiction to review the specific RFP scoring and evaluation criteria and should be required to approve the design of the purchasing utility's competitive solicitation program. Potential solicitation participants, as well as other interested stakeholders, must be provided a process to comment on the purchasing utility's draft and final RFPs to protect fairness and assure that the process will produce prudent investment. To ensure rates remain just and reasonable, the Commission should encourage the applicable regulatory authority to cap the costs included in rates for utility-owned generation that a utility may build as a result of such solicitation to the costs included in the bid used in the

⁸⁶ See, e.g., *Electric Power Supply Ass'n*, 155 FERC ¶ 61,102, P 55 (2016) (rescinding waivers permitting affiliate transactions due to the potential for affiliate abuse amongst AEP Generation Resources and Ohio Power Company).

⁸⁷ SEIA invites the Commission to consider reassessing and strengthening the *Allegheny* factors when used in this context, as the Commission has gained substantial experience and insight into the practices that can be deployed by a purchasing utility that have the effect of foreclosing competitors from the market.

⁸⁸ See *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382, at 62,167-69 (1991) (*Edgar*);

comparative analysis for the RFP when a state permits a utility to compete in its own RFP. To ensure the process does not discriminate against non-utility generators, the Commission should require the purchasing utility to provide the state commission, and make available for public inspection, a post-solicitation report that (1) identifies the winning bidders; (2) includes a copy of any reports issued by the independent evaluator; and (3) demonstrates that the solicitation program was implemented without undue preference for the interests of the purchasing utility or its affiliates.⁸⁹ This report should also be distributed to all parties that participated in the purchasing utility's bidding program.

When a purchasing utility and its affiliates choose to forego participation in the RFP, the Commission could establish a rebuttable presumption that the competitive solicitation program is consistent with the *Allegheny* factors. Parties seeking to challenge such a presumption would retain the right to petition for enforcement pursuant to the procedures set forth in Section 210(h) of PURPA.

3. Requiring Non-Discriminatory Transmission and Distribution Service

As discussed above, PacifiCorp Transmission's last-minute interconnection study disrupted the competitive process in Oregon and resulted in the elimination of many projects at a late stage in the process. In administering any bidding program, the utility must be responsible for properly coordinating the interconnection and bidding processes to ensure that transmission market power is not abused. Utilities should not be permitted to implement last-minute and disruptive interconnection studies during the administration of the bidding program, and should be required to ensure that the bidding program process is coordinated with the interconnection process so that

⁸⁹ See, e.g., *id.*; *Allegheny* at P 22.

participants are provided with interconnection and transmission information that may inform their project development and bid pricing.

In addition, when a utility or its affiliates will participate in the bidding program, there must be adequate safeguards to protect against the conveyance of transmission and interconnection information that would provide an unfair advantage to the utility and/or its affiliates. When a utility or its affiliates are participating in the solicitation, the teams already benefit from an institutional knowledge of the transmission system, including areas most likely to experience congestion or require network upgrades. While institutional knowledge cannot be unlearned, the Commission must require a barrier to “wall off” the team members developing bids for the solicitation, including the associated legal and management team members, to ensure that these team members are not provided access to transmission or interconnection data that is not otherwise made available to the participants in the solicitation. In the competitive bidding program, all participants must be provided with equal access to data and information relevant to transmission and interconnection. The existing Standards of Conduct are too narrow in scope to prevent such discrimination, as the “no conduit” and “independent functioning” rules are directed at real-time operations and only prevent the sharing of day-to-day operational information.⁹⁰

The Commission should also require that, prior to a utility being relieved of the obligation to pay QFs for avoided capacity based on a competitive solicitation program, the purchasing utility must offer transmission and distribution service to QFs on the same rates, terms, and conditions as provided to the purchasing utility’s merchant function or the purchasing utility’s affiliates. The

⁹⁰ See e.g., *Standards of Conduct for Transmission Providers*, Order No. 717, 125 FERC ¶ 61,064, P 40 (2008), *order on reh’g*, 129 FERC ¶ 61,043 (2009), *order on reh’g*, 129 FERC ¶ 61,123 (2009), *order on reh’g*, 131 FERC ¶ 61,045 (2010), *order on reh’g*, 135 FERC ¶ 61,017 (2011).

treatment of transmission and “integration” or “deliverability” costs can be a significant barrier to entry for competitive market entrants, particularly when such costs are non-reimbursable. Another way in which a utility can bias the results of an RFP is to allow its own generation special access to transmission resources, impose unnecessarily burdensome requirements on third-party contracts that make transmission infeasible for the project,⁹¹ or withhold available firm transmission or other flexible transmission products (e.g. dynamic scheduling).⁹²

As explained above, in Order No. 2006 the Commission held that a QF is only entitled to OATT interconnection service when there is “some manifestation of a QF’s ‘plan to sell’ output to third parties.”⁹³ In a competitive solicitation environment, the QF will be selling to the host utility and would not otherwise be protected by the Commission’s OATT principles and practices. As the D.C. Circuit held in *PáTu Wind*, a QF is not a transmission customer of the host utility when selling under PURPA and is not guaranteed the protections of the OATT or the Standards of Conduct.⁹⁴ Thus, under the current regime, a Qualifying Facility that would participate in an RFP would not be protected by the Commission *pro forma* generator process that was recently updated in Order No. 845 and also would not be protected from discrimination in the provision of delivery service and charges for other ancillary services. As a result, a Qualifying Facility participating in a PURPA competitive solicitation program as outlined here will face a significant risk of discrimination.⁹⁵

⁹¹ See, e.g., Petition for Enforcement of Blue Marmot, Docket No. EL19-13 (Nov. 7, 2018) (explaining the circumstances that led to Portland General’s determination that the QF should construct a 300-mile transmission line directly to PGE’s system, at its own non-reimbursable expense, for a 16 MW capacity shortfall on Portland’s system).

⁹² See, e.g., *PáTu Wind*, 150 FERC at PP 7-13.

⁹³ Order No. 2006 at 516.

⁹⁴ See *PáTu Wind Farm, LLC v. FERC*, No. 15-1237 (D.C. Cir. Slip Op. April 25, 2017).

⁹⁵ *Id.*

Accordingly, as a condition of implementing a PURPA competitive solicitation program in which QFs compete the purchasing utility must (1) provide all Qualifying Facilities non-discriminatory interconnection service of comparable quality to FERC's *pro forma* interconnection procedures and on the same rates, terms, and conditions as provided to the utility's merchant function, and (2) publish a code of conduct to separate the procurement function employees from interconnection and delivery function employees. Further, the Commission should clarify that, consistent with Order No. 888 and the open access principles set forth in individual OATTs and reciprocity tariffs, a utility cannot use its control of transmission assets to preference its own resources, or those of its affiliates, in the evaluation and selection of winning bids.

4. Retaining Existing PURPA Framework for Purchases of Energy

As discussed above, establishing a competitive procurement process for new capacity additions may pave the way to address fundamental barriers to competition over the long-term, but it does not allow QFs to compete directly against the utility's existing asset portfolio. As the Commission has recognized, and as discussed above, bilateral contracting markets where competitors compete for limited new generation based on long-run marginal cost projections are separate and distinct from short-term electricity and ancillary service markets for both new and especially existing generation.⁹⁶ In the experience of SEIA's members, the vast majority of a vertically-integrated utility's load is served not by newly procured generation resources, but by the operation of its existing fleet of rate-based resources on which it has been earning a return for many decades. SEIA's members were unable to identify any utility operating outside of the ISO/RTO markets that relies on third-party owned resources to fulfill any meaningful portion of its energy

⁹⁶ See Order No. 688 at P 120.

needs. Many of the Incumbent Utilities that oppose PURPA continue to rely on their own fleet of rate-based generating units for the vast majority of their energy and capacity needs, with some such utilities seeking to build and rate-base substantial amounts of new renewable generation to replace aging thermal generation at a cost that exceeds the calculated avoided cost. These vertically-integrated utilities control access to consumers and severely limit opportunities for IPPs to enter the market and compete.

In many jurisdictions, direct competition with existing utility generation could result in certain utility-owned generators being operated significantly less or being retired early. The reality is that many traditionally regulated cost-of-service monopoly utilities around the country currently own and operate generation resources that, if they participated in an open market, would be uneconomical and likely retired based purely on market forces.⁹⁷ While some states are developing innovative tools to accelerate the depreciation of uneconomic assets or otherwise address stranded assets in the integrated resource planning process,⁹⁸ PURPA's requirement that Qualifying Facilities be allowed to displace the operation of existing resources where they can do so at avoided energy

⁹⁷ See, e.g., *The Coal Cost Crossover: Economic Viability of Existing Coal Compared to New Local Wind and Solar Resource* (March, 24, 2019) (Research Report by Energy Innovation Policy & Technology, LLC), available at: <https://energyinnovation.org/publication/the-coal-cost-crossover/>; *Half of All U.S. Coal Plants Would Lose Money Without Regulation*, BLOOMBERG (March 26, 2018), available at: <https://www.bloomberg.com/news/articles/2018-03-26/half-of-all-u-s-coal-plants-would-lose-money-without-regulation>.

⁹⁸ See, e.g., *Colorado May Have a Winning Formula for Managing Early Coal Plant Retirements*, GREENTECH MEDIA (March 25, 2019) (explaining the use of securitization to retire aging power plants and fund transition assistance), available at <https://www.greentechmedia.com/articles/read/colorado-may-have-a-winning-formula-for-managing-early-coal-plant-retirement#gs.tm7loo>

costs remains the law of the land and sound public policy, and is a minimum placeholder to the greater competition with existing generation that SEIA believes would be beneficial.⁹⁹

In other words, in the absence of the competitive markets described in Section 210(m)(1), QFs must still have the opportunity to sell energy to the utility at the administratively-determined avoided energy rate even when the purchasing utility administers a competitive solicitation to procure capacity. SEIA believes that this proposal strikes an appropriate balance of encouraging competition for new and existing generation while avoiding unnecessarily stranding utility assets. SEIA's members believe the explicit requirement in the existing regulations that Qualifying Facilities have the right to sell energy to the host utility at the utility's avoided cost unless such facilities have non-discriminatory access to a wholesale market for long-term and short-term energy remains sound public policy.¹⁰⁰ As the Commission correctly noted, "At any given time, an economically dispatched utility can avoid operating its highest cost units as a result of making a purchase from a qualifying facility."¹⁰¹ As the cost to install solar facilities continues to decline, SEIA expects that many Qualifying Facilities will be able to provide energy to the purchasing utility at a rate that is less than the cost to operate its legacy generating units. Therefore, the mandatory energy purchase obligation set forth in 18 C.F.R. § 292.303(a) must be maintained to allow QFs to compete against the utility's existing generating assets.

⁹⁹ See, e.g., Fox-Penner, Peter, *Efficiency and the Public Interest: QF Transmission and the Energy Policy Act of 1992* ENERGY LAW JOURNAL 14:51, 14:55 n.25 (1993).

¹⁰⁰ 18 C.F.R. § 292.303(a), 292.304(d), 292.309.

¹⁰¹ Order No. 69 at 12221.

B. Strengthening Enforcement, Accountability and Transparency in the Implementation of PURPA

PURPA modernization cannot and should not be a one-way street. While FERC allows the states “flexibility for experimentation and accommodation of special circumstance,” pursuant to Section 210(f) of PURPA, state regulatory authorities and nonregulated electric utilities must be required to implement the Commission’s rules.¹⁰² The Commission should strengthen implementation of the statute as described below to ensure that QFs have meaningful access to a market in which it may compete with incumbent utilities.

1. Enforcement: Strengthening Efforts Where Utilities Retain the Mandatory Purchase Obligation

A significant reason that PURPA accounts for only a modest portion of total renewables deployment is that PURPA has not been appropriately implemented in many states. From SEIA’s perspective, the uneven growth in Qualifying Facilities among states is not evidence of PURPA’s modern-day irrelevance, but rather is evidence of the inconsistency and inadequacy of PURPA’s implementation in many states. Qualifying Facilities that are able to sell at the 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 pressure on the utility’s incremental cost to serve.¹⁰³ It should be the goal of this Commission, consistent with the statutory direction of PURPA, to encourage the development of Qualifying Facilities. Strengthening enforcement and oversight is key to fulfilling this responsibility.

¹⁰² Policy Statement, 23 FERC ¶ 61,304, 61,664 (1983).

¹⁰³ See Comments of the Solar Energy Industries Association, Docket No. AD18-7 (May 9, 2018).

i. Contract Length Must be Sufficient to Give the QF a Reasonable Opportunity to Attract Capital

In their requests for PURPA modernization, proponents do not focus on the different methodologies that could be employed by states and utilities to better approximate avoided cost,¹⁰⁴ but instead assert that long-term contracts with QFs (at any price) are unjust and unreasonable.¹⁰⁵ As the Commission has long recognized, “Long-term contracts are an important tool to achieve and maintain a strong power infrastructure, particularly for new entrants into the generation sector and especially for many renewable energy developers.”¹⁰⁶ Any evaluation of potential downside risk of fixed long-term contracts must be coupled with consideration of the benefits to ratepayers of QF development, including competition-driven cost reduction and the elimination of risks of ratepayers bearing the cost of a utility’s failed capacity additions and expansions.¹⁰⁷

As SEIA has previously explained, independent power producers rely on capital market financing for their projects which, at the most basic level, requires that an independent developer obtain a contract that includes (1) a set price for the sale of the product (energy, capacity, and other services) and (2) a financeable term, similar to a utility depreciation or amortization schedule.¹⁰⁸

¹⁰⁴ *Compare Supplemental Notice of Technical Conference*, Docket No. AD16-16 (June 27, 2016) (seeking input on avoided cost methodologies).

¹⁰⁵ *See, e.g.*, Speaker Materials of Commissioner Kristine Raper, Idaho Public Utilities Commission, Docket No. AD16-16 (June 30, 2016); EEI Supplemental Comments, Attachment A at 1-4.

¹⁰⁶ *See, e.g.*, *Advance Notice of Proposed Rulemaking re: Wholesale Competition in Regions with Organized Electric Markets*, Docket No. RM07-19 (June 22, 2007).

¹⁰⁷ SEIA Technical Conference Testimony at 4-5; SEIA Post-Technical Conference Comments at 7-15; SEIA 2018 Supplemental Comments at 24-30. *See also PJM Interconnection LLC*, 168 FERC ¶ 61,121 (2019) (finding that incumbent and non-incumbent transmission owners must be treated on a comparable basis).

¹⁰⁸ *See, e.g.*, Supplemental Comments of the Solar Energy Industries Association at 23-24, Docket No. AD16-16 (Oct. 26, 2018).

This is true to different degrees whether one is operating in a vertically-integrated territory or a territory within an ISO/RTO market (where additional financial products may be available).

Through administrative proceedings, individual contracting actions, and legal maneuvers around the concept of a “legally enforceable obligation,” QFs have experienced purchasing utilities and state commissions that are actively seeking to quell QF development by ensuring that the term of the contract is insufficient to support financing in the capital markets. Yet, in each of these same states, the purchasing utilities are provided with long-term cost recovery for the useful life of installed generating assets, which often spans 30-50 years.

In some states, this practice of providing reduced contract terms to prevent development of third-party resources has been long-established. For example, Alabama Power offers a contract to QFs that only has a one-year term in which payments are based on the avoided cost calculated at the time the obligation is incurred and for which it charges the developer a \$1,000 monthly “administration charge.”¹⁰⁹ In Idaho, the state commission sought to foreclose QF developers from the state, and found an effective tactic in reducing the contract term to two years and effectively barred entry for any third-party financed resource. Seeing the “success” of the Idaho approach, other purchasing utilities are seeking to employ this discriminatory tactic. In Arizona, despite the fact that the three incumbent utilities have executed less than ten PURPA contracts in total over the past decade, all have sought to reduce contract terms for QFs to two years. Duke Energy Florida (“DEF”) recently attempted to seek authorization to limit QF contracts to two-year terms, explaining to its state commission that this practice was consistent with Alabama, Tennessee, Mississippi,

¹⁰⁹ See Alabama Power, Rate CPE – Contract for Purchased Energy, *available at* <https://www.alabamapower.com/content/dam/alabamapower/Rates/CPE.pdf>.

Idaho, and Georgia.¹¹⁰ SEIA, and others, opposed DEF's request and argued that two-year terms were inconsistent with PURPA and discriminated against QFs.¹¹¹ DEF withdrew its request shortly before action was expected from the state commission.¹¹²

This tactic of discouraging QF development by preventing developers from obtaining contracts of a sufficient term to support capital market financing is a clear violation of PURPA and results in discrimination against QFs that already lack meaningful market access. In *Windham Solar* the Commission held that Qualifying Facilities are entitled to contracts of a term that is "long enough to allow QFs reasonable opportunities to attract capital from potential investors."¹¹³ That ruling has done nothing to change the unreasonable, anti-QF behavior of state commissions and utilities. SEIA requests that this Commission remedy these practices by adopting a rebuttable presumption that contract terms of twenty (20) years are needed to give Qualifying Facilities a reasonable opportunity to attract capital.¹¹⁴ A twenty-year term is consistent with the term specified in many utility RFPs for new generation resources, including recently issued or approved RFP's by PacifiCorp, Dominion, and Duke. The Commission should adopt a rebuttable presumption that a QF is entitled to a contract term of twenty years to prevent discrimination by ensuring that QFs, many of

¹¹⁰ See Duke Energy Florida, LLC's Petition for Declaratory Statement Regarding PURPA Solar Qualifying Facility Power Purchase Agreements, Florida Docket No. 20180169 (Sept. 7, 2018).

¹¹¹ See, e.g., SEIA Response in Opposition to Duke Energy's Petition for Declaratory Statement, Florida Docket No. 20180169 (Oct. 2, 2018).

¹¹² See Duke Energy Withdrawing Petition for Declaratory Statement Regarding PURPA Solar Qualifying Facility Power Purchase Agreements, Florida Docket No. 20180169 (Jan. 18, 2019).

¹¹³ See *Windham Solar*, 157 FERC at P 8.

¹¹⁴ SEIA recognizes that in some circumstances a QF may be able to finance a project with a tenor less than 20 years (depending on multiple other price and non-price terms and conditions); therefore, SEIA has proposed a rebuttable presumption.

which rely on capital market financing, can compete with utility-owned generation assets that are depreciated over 30 or more years.

ii. Preventing Discrimination in Non-Price Terms and Conditions

SEIA's members have experienced discrimination in non-price terms and conditions in numerous states where vertically-integrated utilities remain the dominant generation owners and wholesale markets are less developed and liquid.¹¹⁵ When presented with commercially unreasonable contract terms by utilities, as frequently occurs, developers often are faced with the untenable choice of either abandoning a project to preserve their equity or funding costly litigation or formal arbitration efforts (which may or may not be successful) against the incumbent utilities with the authority to recover all such legal and expert expenses through rates.¹¹⁶ In practice, this allows a utility to drain developers' limited equity resources by forcing them to expend substantial legal and operational fees on gatekeeping issues, which developers do not recover in rates.¹¹⁷

For example, SEIA members have experienced purchasing utilities that demand unreasonable liquidated damages for failure to perform and extremely onerous developer security requirements that appear to be designed to foreclose the QF's ability to obtain financing in the capital markets. Other discriminatory security requirements experienced by SEIA's members include overlapping

¹¹⁵ Compare Order No. 888, 75 FERC ¶ 61,080 (1996) (explaining how utilities with monopoly control can, and will, discriminate against competitive generation) with Hon. Richard D. Cudahy, *PURPA: The Intersection of Competition and Regulatory Policy*, 16.2 FELJ 419, 425-30 (1995) (explaining PURPA's interplay with competition), available at: http://felj.org/sites/default/files/elj/Energy%20Journals/Vol16_No2_1995_PURPA.pdf.

¹¹⁶ See, e.g., *Utah Supreme Court Upholds Ruling Against PacifiCorp for Trade Secret Dispute*, DESERTNEWS (May 20, 2016), available at: <https://www.deseretnews.com/article/865654744/Utah-Supreme-Court-upholds-ruling-against-PacifiCorp-for-trade-secret-dispute.html>.

¹¹⁷ See e.g., SEIA Technical Conference Testimony at 4-5; SEIA Post-Technical Conference Comments at 7-15; SEIA 2018 Supplemental Comments at 24-30.

security requirements (*e.g.*, requiring that developers provide a letter of credit *and* a security interest in the QF assets, etc.) and requirements to grant unreasonable, first priority security interests in project assets (a right typically granted to lenders). SEIA members have experienced discrimination based on resource type. In Montana, the state commission suspended long-term avoided cost rates *only for small solar facilities* for more than a year. In Florida Power & Light’s territory, a QF – which by definition includes variable resources – must be “dispatchable and controllable” in order to be eligible for a contract at the avoided cost. In several other states, QFs are being forced to accept contracts that allow the purchasing utility to require the QF to cease generating for reasons other than a system emergency without compensation or walk away with no contract at all.

These types of provisions, and tactics, are neither consistent with the fundamental intent of PURPA nor financeable. As discussed below, SEIA believes that standard contracts can address and ameliorate many of these challenges, but until such time as such reforms are adopted, SEIA requests that this Commission strengthen its enforcement efforts to prevent discrimination in non-price terms and conditions.

iii. Strengthening Protections for Self-Supply

PURPA’s requirements that all utilities purchase energy or capacity from, and sell necessary power to, QFs supports financing for on-site, behind-the-meter projects that sell to the host load (“Self-Supply Projects”). This includes QFs that are owned by the property owner as well as those that are contracted for through a third-party supplier. PURPA ensures that the independent third-party providers of distributed generation and storage systems who supply those consumers are not subject to unjust and unreasonable rates for supplementary power, back-up power, maintenance power, and interruptible power. PURPA’s mandatory energy purchase obligation is a vital backstop that financing parties require as a necessary condition of their investments in these Self-Supply

Projects. In addition to providing renewable energy on-site to commercial and industrial consumers, Self-Supply projects also support the economic viability and international competitiveness of industrial sectors as agricultural products, building materials, chemicals, food processing, glass, mining, oil & natural gas, paper & forest products, pharmaceuticals, rubber, steel, and textiles.

Although PURPA and FERC's regulations and orders clearly permit a QF to use generation to serve on-site load before selling any excess to the utility, some utilities are attempting to require behind-the-meter QFs to sell all output to the utility at the avoided cost rate rather than allowing the QF to first use any generation to serve on-site load before selling any excess to the utility. To avoid any doubt, the Commission should clarify that a QF has the right to self-supply to serve on-site load before opting to sell any excess output to the utility at the applicable avoided cost rate.

2. Accountability: Establishing a Federal LEO Standard and Enhancing Standard Contracts

Section 210 mandates that the Commission prescribe "such rules as it determines necessary to encourage cogeneration and small power production." The Commission must not reward a purchasing utility for "Rope-a-Dope" tactics that delay and evade QFs to discourage development of independent power production facilities. The resistance to competitive solar QFs is most substantial in states in which vertically-integrated utilities remain the dominant generation owners and wholesale markets are less developed, illiquid, or non-existent. To prevent utilities from exerting unfair bargaining power over QFs, the Commission should (1) establish a federal test for the formation of a legally enforceable obligation and (2) enhance the standard contract mechanism by requiring utilities to offer standard rate schedules and contracts to all QFs up to 80 MW, not just small projects.

i. Establishing a Federal Test for the Legally Enforceable Obligation

In *Virginia Electric Power Co.*, FERC held that a utility may not avoid the creation of a legally enforceable obligation by refusing to sign a contract,¹¹⁸ and explained that while a utility's PURPA obligations may be effectuated through voluntary contracting, "if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA."¹¹⁹ To date, FERC has provided states with discretion to set the criteria it will evaluate in determining whether a QF has established a LEO, while making clear that it is consistent with PURPA and the implementing regulations to find that a QF establishes a legally enforceable obligation by "committing itself to sell to an electric utility."¹²⁰

In SEIA members' experience, states and utilities have used the LEO concept to discourage QF development. In a recent proceeding before the Commission, QFs brought a Petition explaining that the purchasing utility was refusing to contract and New Mexico's standard for a LEO was insurmountably high, in that it required the QF be fully constructed and ready to interconnect to the utility.¹²¹ As the Petitioners explained, because the QFs are not expected to interconnect and achieve commercial operation until 2020, the effect of the New Mexico Commission's ruling is to "deny the Petitioners the right to the legally enforceable obligation needed to provide the certainty required to

¹¹⁸ *Virginia Elec. Power Co.*, 151 FERC ¶ 61,038, P 25 (2015).

¹¹⁹ *See also* Order No. 688 at P 212.

¹²⁰ *JD Wind 1, LLC*, 130 FERC ¶ 61,127, P 25 (2010).

¹²¹ *See* Petition for Enforcement Pursuant to Section 210(h) of the Public Utility Regulatory Policies Act of 1978 of Great Divide Wind Farm 2 LLC, Docket No. EL19-25 (Dec. 6, 2018) ("Great Divide Petition").

obtain the financing required to construct the Projects so that they are able to interconnect and commence power sales.”¹²² Even though the qualifying facility was ready and willing to sell to El Paso at El Paso’s published avoided cost rates, because the utility refused to contract with the QF and the state commission’s imposed an unreasonably high test for a LEO, ratepayers will be denied access to competitive-priced independent generation. The Commission did not authorize this practice, but it did not expressly reject it.¹²³

In *FLS Energy*, the Commission held in favor of QFs when it struck down Montana’s standard as unlawful due to a requirement to execute an interconnection agreement prior to establishing a LEO.¹²⁴ The state commission, however, has insisted that FERC’s opinion is merely advisory and has engaged in protracted litigation and continued to impose insurmountable barriers for QFs to establish legally enforceable obligations.¹²⁵ Following its state commission, in defending against claims for LEOs in other states, NorthWestern takes the position that “FERC does not have the legal authority to make determinations of what constitutes an LEO. FERC’s orders resolving PURPA disputes are hortatory, not mandatory.”¹²⁶

¹²² See Great Divide Petition at 3.

¹²³ See *Great Divide Wind Farm 2, LLC*, 166 FERC ¶ 61,090 (2019).

¹²⁴ See *FLS Energy Inc.*, 157 FERC at P ¶ 61,211 (2016).

¹²⁵ See, e.g., Order No. 7500c, *In the Matter of NorthWestern Energy’s Application for Interim and Final Approval of Revised Tariff QF-1*, Montana Docket D.2016.5.39 (July 21, 2017) (stating that “FERC’s declaratory order [in *FLS Energy*] is advisory only and is non-binding unless and until it is upheld by a federal district court.”); see also *Bear Gulch Solar, LLC v. Montana Public Serv. Co.*, No. 6:2018cv00006 (D. Mont. 2018) (finding that the court could not adjudicate the reach of FERC’s order because the MPSC had revised its LEO test shortly before the federal district court reached its decision; mooted the case).

¹²⁶ See, e.g., *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).

At one extreme, QFs have been allowed to form LEOs and bind utilities by tendering a non-binding “commitment to sell” form, that essentially gives the QF a free option at a defined price, with few consequences for walking away from its commitment to sell. At the other extreme, states have loaded up LEO tests with a host of project maturity or viability requirements that have nothing to do with whether the QF has committed to sell its output to the utility, and serve little purpose but to make it nearly impossible to establish a LEO and obtain financing to develop and construct a project. There is no policy justification for the wildly divergent LEO tests that have been adopted by states across the country.¹²⁷ All parties – QFs, utilities, ratepayers, state commissions, and FERC – would be well-served if the Commission adopts a nationally applicable LEO test that appropriately balances the interests of QFs and utilities and their ratepayers.

It is entirely reasonable to require that a QF may not enter into a contract with a utility unless and until it has: (i) certified as a QF with FERC, (ii) filed an interconnection request or application, and (iii) secured site control for the duration of the contract term through a land lease, purchase, or binding option to lease or purchase. It is not reasonable, however, for a state to require that the QF obtain all required permits and land use-approvals for constructing its project, secure financing, or be within a defined number of days of placing the project in service. Viability requirements that give the utility control of the contracting timeline or require that the developer undertake actions that are not practical to pursue until later in the construction process are used by utilities to foreclose the

¹²⁷ If a QF contends that a state’s test is unlawful, the enforcement path would require the QF to submit a Petition for Enforcement to FERC, potentially going to federal court to enforce that decision, and must also litigate any factual dispute about whether it took the necessary steps to form a LEO in state court. This protracted enforcement process makes it unreasonably difficult for QFs to pursue their PURPA rights. Even if a QF were successful in obtaining a contract through this process, the contract rate may utilize a stale rate given the several years necessary to receive a remedy for an unlawful LEO test.

development of QFs. It is unjust and unreasonable, and discriminatory, to require a QF that utilizes capital market financing to incur the substantial expense associated with these processes before it has a reasonable degree of certainty as to the price for the output of its project and the term of such purchase commitment.

SEIA renews its request for the Commission to establish a federal standard for a LEO. SEIA believes that a federal standard should be that the purchasing utility has incurred a “legally enforceable obligation” to purchase the output from the QF where the QF has tendered a signed PPA that subjects the QF to liability if it fails to perform. The Commission should make clear that proper implementation of PURPA requires that purchasing utilities not impose “viability” or other commercially-unreasonable prerequisites that would unduly impede a QF’s ability to unequivocally commit to sell its output to the utility.¹²⁸

Where states do not offer a *pro forma* PPA, the developer can submit a unilateral PPA with minimum terms for a financeable PPA, and allow the utility a reasonable time (*e.g.*, 60 days) within which to negotiate with the developer on the remainder of the terms; if no agreement is reached, a LEO is established on the day the developer submits the unilaterally executed PPA to the proper regulatory commission for enforcement.

ii. Enhancing Standard Contracts

Currently, the Commission requires states to establish standard avoided cost rate schedules for QFs up to 100 kW and allow states to create “standard offer” rates and/or contracts for larger QFs. To avoid stale rates, state commissions should instead be required to consider an update to their avoided cost methodology at least every two years and to approve updates to the avoided cost

¹²⁸ SEIA does not oppose requiring that the QF also self-certify to this Commission and submit an interconnection request as part of establishing that a LEO has been incurred.

inputs at least every six months. A standard offer typically includes a state-approved form contract, eliminating the need for protracted negotiations and litigation between the QF and the utility. The standard offer, as we know it today, should be transitioned to a model that resolves concerns about bargaining power for all QFs, and does not incentivize the development of economically inefficient projects. The Commission should require utilities to offer standard rate schedules and contracts to all QFs up to 80 MW, not just small ones.¹²⁹ A six-month update applicable to all QFs strikes a reasonable balance between keeping rates fresh (currently some standard offer rates remain in place for two years or more) and the administrative burden of more frequent refresh proceedings. Numerous states and utilities are already doing this today.

With these elements in place, a QF wishing to contract with a utility would simply request a PPA from the utility at the avoided cost rates and terms and conditions then in effect. The utility would have a defined period of time in which to provide a draft PPA to the QF developer, who would need to fill in project-specific information. The QF would have a defined period of time within which to return the completed PPA and the utility would have a defined period of time within which to review and approve the project-specific information and return an execution version of the PPA to the QF developer. Once again, the developer would have a defined period of time within which to execute and return the final PPA and the utility would likewise have a defined period of time within which to countersign and return the fully executed PPA.¹³⁰

¹²⁹ Negotiated rates would still need to be available for QFs with atypical operating characteristics or generation profiles.

¹³⁰ All of these time frames could be set by the regulatory authority in its oversight of the utility's procurement activities.

3. Transparency: Maintaining and Improving Administratively-Determined Avoided Cost

Where a utility retains its mandatory-purchase obligation for energy or capacity, the Commission should focus its efforts on ensuring transparency in the computation and publication of avoided costs. The failure of utilities to update their avoided costs, or the failure of state regulators to implement a reliable avoided cost methodology, are not problems that can be attributed to QFs or PURPA itself. Critics of administratively-established avoided cost rates raise concerns that the rates resulting from utility commission proceedings necessarily rely on assumptions and modelling that do not perfectly reflect the utility's actual avoided cost.¹³¹ While SEIA acknowledges the reality that administratively-determined avoided cost rates may never perfectly reflect the utility's actual avoided costs,¹³² utilities and state commissions have tools and resources at their disposal to improve avoided costs. Accurate and granular rate designs send the most accurate price signals possible and deploying such rates should be the first step taken to increase transparency.

¹³¹ See, e.g. Testimony of Travis Kavulla before the Senate Committee on Energy and Natural Resources, *available at* https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=0924805D-08D5-4491-89F2-DFBE06FB5B26.

As Mr. Kavulla explained in his prepared written remarks:

I took estimates and projections of nearly a dozen different variables—for example, the price of natural gas, the capital cost of new power plants or the future tax that might be associated with a ton of carbon dioxide emissions—and ran those estimates through a formula, which in turn spit out a number. My colleagues and I then issued a regulatory order, which, with little confidence, was our best estimate of the cost of energy over the next two decades. It is almost needless to say that my projections were almost-always wrong.

¹³² See, e.g., 18 C.F.R. § 292.304(b)(5).

As the Commission has consistently emphasized, forecasted avoided cost rates are critical to a QF's ability to obtain the capital necessary to develop a project.¹³³ Yet, across the country, states have ignored or disregarded this requirement. For example, in Indiana, the utilities do not offer long-term forecasted rates, and instead, only offer short-term rates of one year or less; the Indiana Commission has refused to remedy this practice.¹³⁴ Similarly, Virginia Electric and Power Company offers QFs only short-term market-based rates.¹³⁵ In several states (including Kentucky, Iowa, and Minnesota) the utility's avoided cost information is treated as a confidential trade secret, and utilities like Duke have argued to state commissions that avoided cost data is "proprietary and commercially sensitive" and should be kept confidential.¹³⁶ Treating avoided cost data as a confidential trade secret violates PURPA and results in barriers to entry for QFs.

State commissions and purchasing utilities that do not accurately compute avoided costs, or that deny a QF the ability to verify the utility's avoided cost calculations, are discriminating against QFs and SEIA requests that this Commission remedy these practices by requiring that all utility avoided costs be made public, as currently required by PURPA, and be published on the utility's website or the website of the applicable regulatory authority.

¹³³ See, e.g., Order No. 69 at 12226; *Windham Solar LLC*, 157 FERC ¶ 61,134 (2016).

¹³⁴ 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).

¹³⁵ Va. Elec. & Power Co., Schedule 19.

¹³⁶ See Order No. 2007-70, Docket No. 1980-251-E (S.C. Pub. Serv. Comm'n. Feb 1, 2007).

4. Consistency: Preserving the Existing PURPA Framework for Certification and Classification

Congress passed PURPA with the goal of diversifying the supply of electric generation resources away from those generation resources developed, built and owned by vertically-integrated monopoly electric utilities with frequent cost overruns that were passed on to ratepayers, and toward QFs developed by independent power producers. Given PURPA's important role in stimulating competition and innovation in the electric industry, and at a time in which the established industry is changing rapidly, SEIA strongly encourages the Commission to maintain some elements of its PURPA implementation program in their current form, particularly if the Commission is considering undertaking a substantial change to the regime by allowing competitive solicitations in lieu of capacity payments to Qualifying Facilities, as outlined above. SEIA is open to exploring ways that PURPA implementation can be modified and improved to address certain potential issues that have been identified by PURPA critics, such as the alleged abuse of the "one-mile rule" relating to co-location or artificial bifurcation of QFs. However, the appropriate approach to doing so is as part of a balanced, consensus-oriented effort to update PURPA implementation. As there has been a lack of solid data on these issues presented to date, SEIA recommends keeping these provisions in their current form.

i. Maintain One-Mile Rule as a Bright Line Test

The maximum size of a qualifying small power production facility, as provided for in Section 292.204(a)(1) is 80 MW, including the capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site.¹³⁷ The Commission currently applies a bright-line test for determining what constitutes

¹³⁷ 18 C.F.R. § 292.204(a)(1).

location at the same site: facilities under common ownership and using the same energy resource that are within one mile of each other are deemed to be located a single site for purposes of the 80 MW size limit, but those that are more than a mile apart they are deemed to be at separate sites and thus to be separate facilities.¹³⁸

EEI and others have expressed concern about certain developers locating multiple facilities under 80 MW in size just over a mile from one another, allowing for aggregated generation over the 80 MW cap to qualify for PURPA. These parties have suggested that the current one-mile bright-line test be replaced with a rebuttable presumption that could be overcome based on consideration of a variety of factors, including a common point of interconnection, site control document, financing plan and development/permitting plan. Replacing a bright-line test with a rebuttable presumption is an invitation for extensive and contentious litigation and no party has presented any actual or documented instances of “gaming” of the one-mile rule. SEIA is unaware of any such “gaming” and without a record of any evidence, questions the need to revise a rule that provide stability and certainty to the industry.

SEIA notes that no documentary evidence has since been presented to justify revising the existing one-mile rule since it submitted its Supplemental Comments last year. However, as proposed in SEIA’s Supplemental Comments submitted in November 2018, if the Commission has determined that the record supports a revision to the rule, then SEIA suggests the following compromise.

One-Mile Rule:

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

¹³⁸ See *Northern Laramie Range Alliance*, 138 FERC ¶ 61,171 (2012).

- (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.

Under no scenario should common financing be relevant, as unquestionably distinct facilities are frequently financed as part of a bundled portfolio.¹³⁹

ii. Maintain Self-Certification Program Elements

Citing one example where a few parties allegedly failed to provide adequate information in a self-certification submittal, EEI proposes to eliminate the Commission's long-standing self-certification procedure for QFs.¹⁴⁰ The Commission has rejected previous efforts to revise the process for self-certification, and SEIA's members strongly oppose revisions to this well-established and efficient practice. As ELCON correctly observes in its comments, the complexity, delays, and uncertainties created by a case-by-case qualification procedure would be administratively burdensome for all parties involved and would impose undue burdens on QFs and ratepayers.¹⁴¹ There is no evidence of a significant problem arising from the Commission's current self-

¹³⁹ See SEIA 2018 Supplemental Comments at 9.

¹⁴⁰ EEI Supplemental Comments, Attachment A at 16.

¹⁴¹ See Supplemental Comments of the Electricity Consumers Resource Council, *et al.* at 9, Docket No. AD16-16 (July 13, 2018).

certification program that would justify replacing the program with one that is more complex and burdensome.

iii. Maintain 20 MW Threshold for “Small” QFs

It has been suggested by EEI and others that QFs smaller than 20 MW no longer face difficulties in obtaining non-discriminatory market access in ISO/RTO markets, and that utilities should be relieved of their PURPA must-purchase obligation with respect to all QFs, no matter how small, that are interconnected to utilities in organized wholesale markets. With respect to facilities 20 MW and below, while they may be theoretically able to participate in organized wholesale markets, in many instances they do not have an actual and meaningful ability to do so due to the high administrative costs required for wholesale market participation and the lack of access to potential customers due to the continued challenges of access to non-discriminatory distribution interconnection and delivery service, which varies widely by state.

When the Commission faced this issue approximately a decade ago, the Commission sought comments on how to define “small” renewable energy projects.¹⁴² As the Commission recounted in Order No. 688, “the proposals varied significantly from 1 MW to 80 MWs. However, in general, most of the QF industry supports a 20 MW exemption, utilities generally support no exemption, and some entities are willing to support an exemption for very small QFs (i.e., smaller than 1 MW) in specific territories.”¹⁴³ After reviewing and evaluating the variety of proposals received, the Commission determined that a reasonable and administratively workable definition of “small” is 20 MW.¹⁴⁴

¹⁴² Order No. 688 at P 56.

¹⁴³ *Id.* at P 67.

¹⁴⁴ *Id.* at P 72.

There is no basis for departure from the 20 MW threshold for determination as to “small” QFs and no compelling evidence has been presented in this docket to the contrary. The Commission fully addressed this issue in Order No. 688 in response to the passage of the Energy Policy Act of 2005, and no circumstances have changed that warrant revisiting the Commission’s well-reasoned standard. A 20 MW demarcation strikes a reasonable balance between small and large projects. The Commission used 20 MW in Order No. 671 to exempt QFs that are 20 MW or smaller from Sections 205 and 206 of the FPA, and also used the 20 MW demarcation for eligibility for the interconnection rules contained in Order No. 2006.

The Commission has recently considered whether a utility had rebutted the 20 MW presumption and found that the conditions that the Commission addressed in Order 688 and 688-A regarding limited market access to smaller QFs continued to persist.¹⁴⁵ These conditions included interconnection issues, pancaked rates, operational limitations and administrative cost burdens that prevent nondiscriminatory access. Proponents of lowering or eliminating the 20 MW threshold in organized wholesale markets have not provided sufficient evidence that these conditions no longer exist for smaller QFs in those markets. Indeed, they may still exist for QFs larger than 20 MW as well.

The Commission’s existing rules provide an avenue for utilities to rebut the 20 MW presumption by demonstrating that these small QF have nondiscriminatory market access within these organized wholesale markets. Yet, there has been no evidence in this proceeding that resources of this size have such access or that the barriers to market access have been eliminated.

¹⁴⁵ See, e.g., *PPL Elec. Utilities Corp.*, 145 FERC ¶ 61,053, 61,386 (2013), *reh’g denied*, 148 FERC ¶ 61,207 (2014); *N. States Power Co.*, 151 FERC ¶ 61,110 (2015).

There is insufficient evidence in the record to support reducing the 20 MW threshold, and it should be maintained.

V. CONCLUSION

SEIA appreciates the Commission’s leadership on PURPA and encourages the Commission to focus on the role of PURPA in supporting competition. Despite advances in some parts of the electric power industry, PURPA remains essential to the development of independent renewable energy and cogeneration and an important check against non-competitive pricing behavior by monopoly utilities, particularly those operating outside of ISO/RTO regions. If the Commission wishes to move forward with a competitive solicitation program as part of PURPA, SEIA strongly urges the Commission to hold a technical conference to consider developing implementing regulations that will produce open and fair competitive solicitations while also preventing self-dealing and affiliate abuse in the administration of any such program.

Respectfully submitted,

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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 28th day of August, 2019 in Seattle, WA.

/s/ Heather Curlee