

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Qualifying Facilities Rates and  
Requirements

Implementation Issues under the Public  
Utilities Regulatory Policy Act of 1978

Docket Nos. RM19-15-000  
and AD16-16-000

**COMMENTS OF THE  
ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON),  
AMERICAN CHEMISTRY COUNCIL (ACC)  
AND  
AMERICAN FOREST & PAPER ASSOCIATION (AF&PA)**

The Electricity Consumers Resource Council (ELCON), the American Chemistry Council (ACC) and the American Forest & Paper Association (AF&PA) (together U.S. Manufacturers) respectfully submit these comments regarding the Commission's notice of proposed rulemaking (NOPR) to revise its regulations implementing Sections 201 and 210 of the Public Utilities Regulatory Policy Act of 1978 (PURPA). PURPA, implemented in the fashion that Congress conceived, is critically important to the economic viability of our members. Over the decades, ELCON, ACC and AF&PA have actively participated in PURPA matters before the Commission, including in the proceedings leading up to Order 688 and more recently in the administrative docket leading up to the present NOPR, including a presentation at the 2016 technical

conference and follow up written comments.

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members own and operate hundreds of major facilities and are consumers of electricity in the footprints of all organized markets and other regions throughout the United States. Reliable electricity supply at just and reasonable rates is essential to our members' operations. ELCON members are among the largest owners and operators of cogeneration facilities that are used in oil refining, petrochemicals, organic and inorganic chemicals, food processing, and motor vehicles. As such, ELCON supports PURPA in general and its emphasis on fair and nondiscriminatory treatment to manufacturers. PURPA, when implemented correctly, promotes competition and through its inherent efficiency, provides a cost-effective safety net for both non-utility and utility energy and capacity costs, which benefits all consumers.

ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®; common sense advocacy designed to address major public policy issues; and health and environmental research and product testing. The business of chemistry is a \$526 billion enterprise and a key element of the nation's economy. It is among the largest exporters in the nation, accounting for ten percent of all U.S. goods exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure. Cogeneration is a prevalent source of both electric and steam energy for ACC members.

AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and

marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - *Better Practices, Better Planet 2020*. The forest products industry accounts for approximately 4% of the total U.S. manufacturing GDP, manufactures nearly \$300 billion in products annually, and employs approximately 950,000 men and women. The industry meets a payroll of approximately \$55 billion annually and is among the top 10 manufacturing sector employers in 45 states.

The forest products industry produces and uses renewable energy for manufacturing operations and is a significant contributor to our country's existing base of renewable energy. On average, approximately 66 percent of the energy used at AF&PA member pulp and paper mills is generated from carbon-neutral biomass. The industry is a leader in the use of combined heat and power (CHP) technology, which is extremely efficient because it uses the same fuel to produce both thermal energy used in the manufacturing process and electricity, some used on-site and some sold to the grid. In 2016, 98.5 percent of electricity generated in the U.S. forest products industry was produced using CHP.

Most of the CHP processes used in the pulp and paper industry are highly integrated into the manufacturing process. The biomass residuals from the manufacturing process - *e.g.*, bark, spent pulping liquor, sawdust, shavings, and paper residuals that cannot be used for products - are used as the primary fuel to power the mills and to provide electricity for the grid. Many of these facilities can choose to certify Qualifying Facilities (QFs) under PURPA either as Small Power Producers (SPPs) or cogeneration facilities, and many have chosen the former. Nonetheless, those facilities are no different than cogeneration facilities in terms of their power generation or need for the protection offered by PURPA.

All three organizations have members that own and operate facilities that consume significant amounts of power in their manufacturing process in addition to owning and operating QFs under PURPA. Because they operate in a highly

competitive global market and face fierce international competition, they cannot automatically pass on higher raw material and energy costs to their customers and still remain competitive. Further, many of their members' facilities are located in rural areas and provide high-paying jobs for the communities in which they are located. Those jobs are a critical driver of the overall economic health of those oftentimes vulnerable communities. Reliable and affordable electricity is critical to their competitiveness and the jobs they create and maintain.

Finally, all three organizations' members are investigating opportunities for adding or increasing renewable power or other alternative forms of Behind the Meter (BTM) energy (e.g., solar arrays), as costs for that energy decrease or to meet company sustainability commitments. The Commission should ensure that any regulations it adopts encourage the development of that energy and do not create barriers to their use.

Our comments below, therefore, are offered from both perspectives – those of QF owners that already self-supply some energy and are actively investigating future BTM opportunities, and those of consumers, who seek to ensure electricity rates are just and reasonable.

I. ALTHOUGH CERTAIN SURGICAL IMPROVEMENTS TO PURPA IMPLEMENTATION MAY BE APPROPRIATE, WATERING-DOWN THE STATUTE WOULD REDUCE COMPETITION

A. The NOPR Proposes Fundamental Changes to Implementation of PURPA

In the NOPR, the Commission proposes eight changes that together would constitute a substantial rewriting of how Sections 201 and 210 of PURPA are implemented.

*First*, the Commission proposes to grant states the flexibility to require that energy rates (but not capacity rates) in QF power sales contracts and other legally enforceable obligations (LEO) vary in accordance with changes in the purchasing electric utility's as-available avoided costs at the time the energy is delivered.

*Second*, the Commission proposes to grant states additional flexibility to allow QFs to have a fixed energy rate, but to provide that such state-authorized fixed energy rate can be based on projected energy prices during the term of a QF's contract based on the anticipated dates of delivery.

*Third*, the Commission proposes to grant states the flexibility to set "as-available" QF energy rates: (1) for QFs selling to electric utilities located in organized electric markets at the locational marginal price (LMP); and (2) for QFs selling to electric utilities located outside of organized electric markets, at competitive prices from liquid market hubs or calculated from a formula based on natural gas price indices and specified heat rates.

*Fourth*, the Commission proposes to provide that an electric utility's obligation to purchase from QFs may be reduced to the extent the purchasing electric utility's supply obligation has been reduced by a state retail choice program.

*Fifth*, the Commission proposes to modify its current "one-mile rule" for determining whether generation facilities should be considered to be part of a single facility for purposes of determining qualification as a qualifying small power production facility and to allow a showing that facilities between one and ten miles apart (i.e., more than one mile apart and less than ten miles apart) actually are a single facility (with distances one mile or less still irrebuttably a single facility, and distances ten miles or more irrebuttably separate and different facilities).

*Sixth*, the Commission proposes to revise its regulations implementing PURPA section 210(m), which provide for the termination of an electric utility's obligation to purchase from a QF with nondiscriminatory access to certain markets by reducing the rebuttable presumption for small power production facilities (but not cogeneration facilities) from 20 MW to 1 MW .

*Seventh*, the Commission proposes to clarify that a QF must demonstrate commercial viability and financial commitment to construct its facility pursuant to objective and reasonable state-determined criteria before the QF is entitled to a contract or LEO.

*Eighth*, the Commission proposes to allow a party to protest a self-certification or self-recertification of a facility without being required to file a separate petition for declaratory order and to pay the associated filing fee.

B. FERC Must Uphold the Fundamental Purposes of PURPA

As discussed in these comments, narrowly crafted improvements to the PURPA regulations, focused on those isolated instances where they have been abused or implemented in unforeseen and problematic ways, are appropriate. However, PURPA continues to have an essential role in promoting competition and benefitting consumers, notwithstanding changes in technologies and in the energy markets. In fact, under today's conditions, robust implementation of PURPA is of heightened importance. The NOPR does not establish that its proposed wholesale regulatory changes, which in many cases would water down PURPA, are either necessary or appropriate in the absence of Congressional action to amend that statute.

The NOPR overstates the case for modifications to PURPA regulations by referring to the changes in the energy industry since initial enactment of PURPA in 1978 and the Commission's issuance of its initial PURPA regulations in 1980. Congress substantially amended PURPA by the Energy Policy Act of 2005 (EPA 2005), and thereafter the Commission responded by enacting substantial revisions to its regulations in Order Nos. 688 and 688-A. The changes in the energy industry in recent years, including those very changes on which the NOPR relies - increased availability of natural gas, the rise of the wholesale markets, and incentives for alternative sources (*see* NOPR at ¶3) - in fact were evident when Congress revisited PURPA in 2005. Since then Congress has on numerous occasions considered whether new or changing market conditions warranted further amendment of PURPA, and it has not done so. The statutory provisions under which PURPA was created have codified the purposes of PURPA and, as such, the Commission must recognize and support these provisions.

The Commission and U.S. Manufacturers are in agreement that PURPA was

enacted “to encourage the development of alternative generation resources . . . and cogeneration facilities that make more efficient use of the heat produced from the fossil fuels that were then commonly used in the production of electricity.” NOPR at ¶2. PURPA’s enactment in 1978 marked the first Congressional step toward electricity competition and away from the natural monopoly model for power generation. The statute was the birthplace of competitive power and “opened the door for independent power generation.”<sup>1</sup> PURPA paved the way for subsequent Congressional and FERC reforms at the federal level to enable wholesale competition, and it motivated many states to restructure power generation to provide for competition in investment and asset management. Industrial consumers pushed for PURPA and subsequent state and federal reforms to ensure that competitively-priced energy was available to support their need for efficient energy sources with more cost predictability than what regulated utilities were able to provide. ELCON, in particular, was founded in 1976 in anticipation of federal legislation such as PURPA to help facilitate the transition to a more competitive generation paradigm and enable industrial self-supply.

Via PURPA, industrial consumers sought to create a mechanism to address utilities’ reluctance to purchase or sell power to non-utility generators. Specifically, PURPA Title II enabled the ability of co-generators to sell power on to the grid at a utility’s “avoided cost,” or what it would have cost the utility to contract or self-supply that energy and capacity. It also requires utilities to purchase power from all QFs and to provide non-discriminatory backup power to these facilities. The 2005 amendments to PURPA established a process by which utilities could seek relief from PURPA’s mandatory purchase obligation where competitive markets exist and a framework exists for QFs and utilities to negotiate future contracts.

Since then, competitive conditions developed in some regions, but elsewhere competition continues to flounder. Even today, under current PURPA provisions, neither competitive power nor industrial self-supply thrive in cost-of-service states.

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<sup>1</sup> S. Cicala, National Bureau of Economic Research, “Imperfect Markets Versus Imperfect Regulation in U.S. Electricity Generation,” (Jan. 2017) at p. 3 (available at <https://www.nber.org/papers/w23053.pdf>).

Small industrial self-supply faces barriers to participation even within RTO/ISOs, because even with PURPA's support, energy markets retain characteristics that thwart the ability of consumers to cost-effectively provide for themselves.<sup>2</sup> Generally, conditions are more competitive within RTO/ISO systems, especially for energy and balancing services. In regulated states within RTO/ISO regions, however, structures for energy and balancing service pricing are not a full substitute for PURPA, as investment is driven by integrated utilities, not in response to market signals, and economic merchant and industrial self-supply facilities either never develop or retire prematurely.<sup>3</sup>

As such, PURPA remains very relevant to this day, especially in states that retain the natural monopoly cost-of-service model for power generation. Going forward, the benchmark for PURPA should be more focused on an assessment of competitive conditions rather than the market penetration of fuels and technologies covered under PURPA.

### C. PURPA "Reform" May Reduce, Rather than Enhance, Competition

Calls for broad PURPA reform are coming from utilities, not consumers, often as a means to restrict competition and industrial self-supply. Especially over the past year, the strategy of many major integrated utilities has shifted to rapid expansion of the renewables component of their rate bases and insulating themselves from competition, including the competitive alternatives that are developed pursuant to PURPA.

Integrated utilities are suddenly attracted to renewables-heavy integrated resource

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<sup>2</sup> *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 405 (1983), see also *Sithe Energies, Inc.*, 105 FERC ¶ 61,240 at P 2 (2003) ("In passing PURPA, Congress identified two major obstacles that had served in the past to stifle non-utility power plant development: (1) the reluctance of traditional electric utilities to purchase power from and sell power to non-traditional utilities; and (2) the substantial burdens of pervasive federal and state regulation. Congress in PURPA sought to remove these obstacles.").

<sup>3</sup> On the merchant side, this is evidenced by the sale of NRG's MISO fleet and planned departure of some of Calpine's efficient natural gas-fired generators in CAISO. On the industrial side, some barriers to partial self-supply within the SPP footprint are harming CHP retention and development.



plans (IRPs), given they would add to rate base, instead of pass-through power purchase agreements. Merchants historically dominated market share for renewables,<sup>4</sup> but changes in tax rules and other conditions have recently enabled utilities to rate base renewables at mass scale. This is much more supportive of their goals to build their balance sheets and ROE returns than buying energy and capacity from third parties, including QFs. Regulatory action to soften competitive mechanisms under PURPA would risk exacerbating this utility-driven cost-additive outlook.<sup>5</sup>

Regulated utilities are circumnavigating least-cost planning principles in the name of lowering emissions to justify renewables rate base expansion. This is particularly evident in prominent announcements by integrated utilities like Xcel<sup>6</sup> and Duke Energy<sup>7</sup> to procure 100% clean energy by 2050. Industrial consumers flag these utility pronouncements as a major cost concern. Rate-based assets have an empirical record of low capital productivity as evidenced by the applied history of the Averch-Johnson effect.<sup>8</sup> These concerns are exacerbated by the complexity of renewable asset deployment -- renewables are heterogeneous resources whose investment prudence and capital productivity depend on a series of micro-decisions, such as wind curtailment probability analysis and solar-plus-storage configurations tailored to expected real-time conditions, which meshes poorly with the capital management incentives of cost-of-service regulation.

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<sup>4</sup> B. Murphy, "Renewable energy ownership: A game plan for utilities," *Utility Dive* (May 22, 2019) (available at <https://www.utilitydive.com/news/renewable-energy-ownership-a-game-plan-for-utilities/555268/>).

<sup>5</sup> At least seven state industrial groups in regulated states mentioned this to ELCON in 2019 as a particularly alarming trend for cost impacts.

<sup>6</sup> L. Gheorghiu, "Xcel CEO pushes nuclear to hit utility's 100% clean energy by 2050 goal," *Utility Dive* (Mar. 26, 2019) (available at <https://www.utilitydive.com/news/xcel-ceo-pushes-nuclear-to-hit-utility-100-clean-energy-by-2050-goal/551314/>).

<sup>7</sup> C. Morehouse, "Duke Energy commits to 100% carbon-free power by 2050," *Utility Dive* (Sept. 18, 2019) (available at <https://www.utilitydive.com/news/lng-natural-gas-critical-for-duke-energy-utility-aims-renewables-100-carbon-free-power/563128/>).

<sup>8</sup> A quality explanation of the deleterious effects of cost-of-service regulation incentives, in contrast to the benefits of competitive markets to drive efficient resource entry and exit, can be found in the PJM paper "Resource Investment in Competitive Markets" available at: <https://www.pjm.com/~media/library/reports-notice/special-reports/20160505-resource-investment-in-competitive-markets-paper.ashx>

The sharp cost declines and performance improvements in renewables over the past decade were heavily driven by competitive suppliers pushing incremental innovation. These and other dynamic efficiencies have primarily occurred under competitive conditions, as evidenced by nuclear operating efficiency improvements<sup>9</sup> and fossil plant heat rate improvements and lower fuel prices<sup>10</sup> unique to merchant facilities. Limiting competitive participation in renewables development via restrictive provisions constructed in the guise of PURPA reform, would likely result in a sharp decline in capital productivity – and induce associated upward rate pressure – as well as stunted innovation.

Our members often see merchant solar generation at cost points far below the incumbent utility. For example, integrated utilities in Florida are pushing to rate base solar developments at cost caps 40% higher than the current market set by merchant solar developers.<sup>11</sup>

Contrary to the arguments provided by those proponents most supportive of the changes proposed in the NOPR, the current state of the electricity markets evidence the need for continued robust PURPA implementation as an essential tool to discipline utility self-builds that sometimes come in above their own QF avoided cost rates.

D. Robust Implementation of PURPA Actually Is of Heightened Importance to Industrial Consumers As They Explore Additional Self-Supply Options

U.S. Manufacturers look at PURPA as a greater opportunity to mitigate barriers to self-supply, particularly respecting Combined Heat and Power (CHP) or cogeneration technology, which is extremely efficient because it uses the same fuel to produce both thermal energy used in the manufacturing process and electricity. The

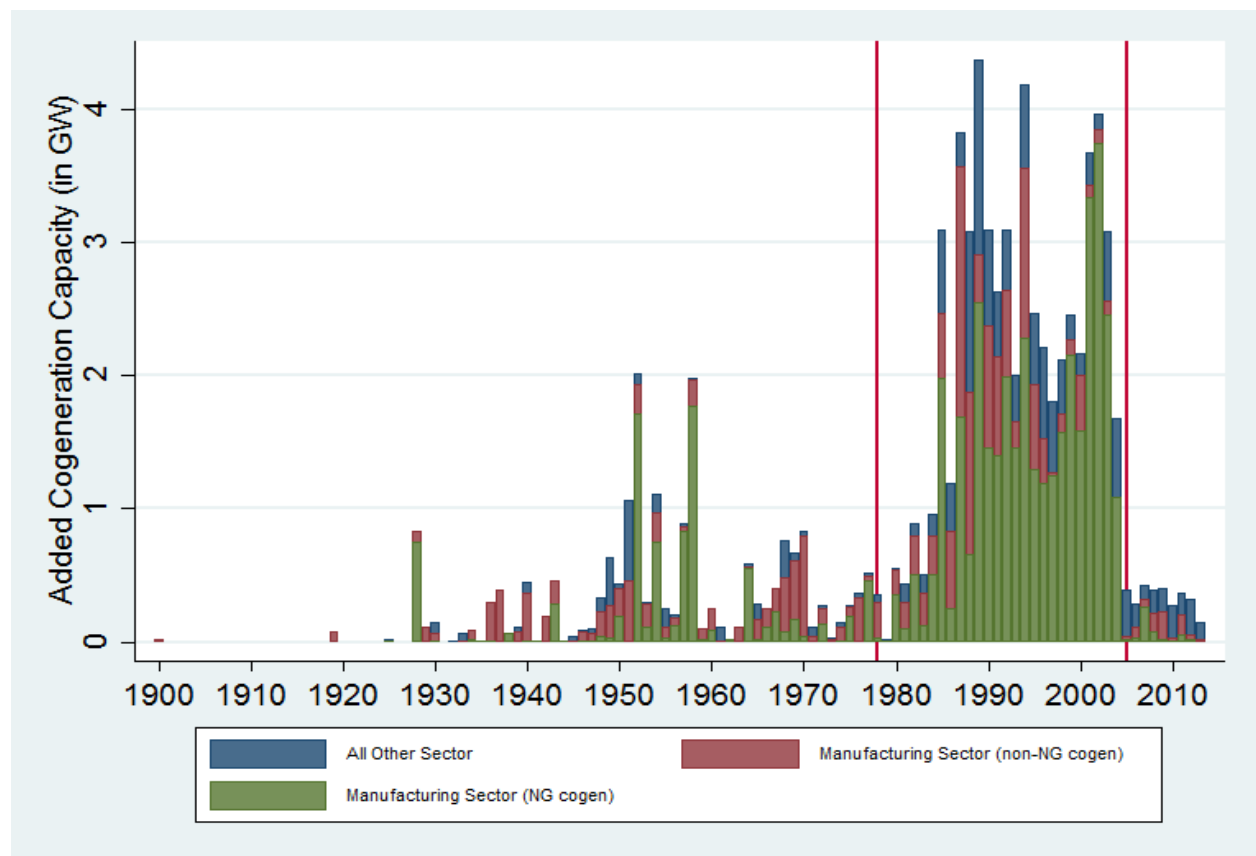
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<sup>9</sup> Davis & Wolfram, National Bureau of Economic Research, “Deregulation, Consolidation, and Efficiency: Evidence from U.S. Nuclear Power,” (Aug. 2011) (available at <https://www.nber.org/papers/w17341.pdf>.)

<sup>10</sup> Bushnell, Mansur & Novan, “Review of the Economics Literature on US Electricity Restructuring,” (Draft Feb. 23, 2017) (available at [https://arefiles.ucdavis.edu/uploads/filer\\_public/e0/ee/e0eefda6-9fe2-4f88-8ca6-a00f25379754/restructuring\\_review.pdf](https://arefiles.ucdavis.edu/uploads/filer_public/e0/ee/e0eefda6-9fe2-4f88-8ca6-a00f25379754/restructuring_review.pdf)).

<sup>11</sup> IHS Markit. “The Energy Daily.” 15 July 2019. ED Vol 47, No. 134.

United States has an installed capacity of over 82 gigawatts of CHP at more than 4,100 industrial and commercial facilities, but there remains the technical potential for an additional 149 gigawatts of CHP. Full implementation of PURPA is essential to the continuing development of CHP, which enhances our energy security by reducing our national energy requirements, improves U.S. manufacturers' international competitiveness by increasing energy efficiency and reducing costs, diversifies energy supplies by enabling further integration of domestically produced and renewable fuels, advances societal goals by reducing CO<sub>2</sub> and criteria pollutants, improves grid reliability, and creates jobs. Unfortunately, the potential to add substantial quantities of new cogeneration is not being realized. Since 2005, when PURPA was last amended to make it easier for utilities to avoid PURPA requirements, the U.S. has experienced an extreme drop-off in new CHP. As evident from the chart below, new additions of CHP during and after 2005 are generally lower even than the CHP additions that occurred prior to PURPA's original enactment.



Although installed CHP capacity is very small compared to solar and wind, by comparison QF status is of critical importance to CHP. Energy Information Administration (EIA) data analyzed by AF&PA for the 2008-2017 period show that for every year other than 2017, at least 57% of CHP capacity additions have been QFs; in 2015, 97% of incremental CHP capacity was QFs.

In addition, our members are presently seeking additional self-supply that includes and goes beyond conventional CHP. Our members already self-supply with biomass and other energy sources that are qualified as SPPs. They now are seeking additional self-supply options, such as biomass, renewable-CHP hybrid systems, microgrids, fuel cells, non-emitting hydrogen fuel sources, and on-site wind and solar. This is the result of cost considerations, the ability to generate steam and electricity with fuel requirements significantly less than for dedicated facilities, a physical hedge to address bulk reliability problems,<sup>12</sup> and a growing objective of industrial consumers to achieve corporate sustainability and clean energy goals. Removing barriers to industrial self-supply, including robust PURPA implementation, is critical to improving the competitiveness of U.S. manufacturing and enhancing grid resilience, as was discussed in ELCON's comments to the Energy Department's request for information on enhancing grid resilience:

Industrial consumers have long faced systematic discrimination from incumbent utilities for cogeneration, such as excessive transmission charges and flawed or absent rates for supplemental and standby power. Industrial consumers see the same emerging for other forms of self-supply, especially as the diversity of partial-requirements customers exceeds the regulated paradigm's customer class designations. This is most evident in regulated monopoly states, where cost-of-service utilities have a strong disincentive to let consumers provide for themselves. . . . Granting industrial consumers increased procurement autonomy is the

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<sup>12</sup> For example, some industrial consumers in California are looking to increase their share of on-site self-supply given the increased likelihood of firm load curtailments to industrial customers as part of wildfire prevention protocols.

surest path to drive innovation in self-sufficiency and, by connection, weather-related resilience. DOE could assist in enhancing the visibility of federal and state barriers to industrial self-supply and highlight why PURPA remains critical in today's context to achieve this end.<sup>13</sup>

Any Final Rule should recognize and sustain the PURPA protections that are necessary for U.S. manufacturers to develop QF self-supply options, both cogeneration facilities and small power production facilities.

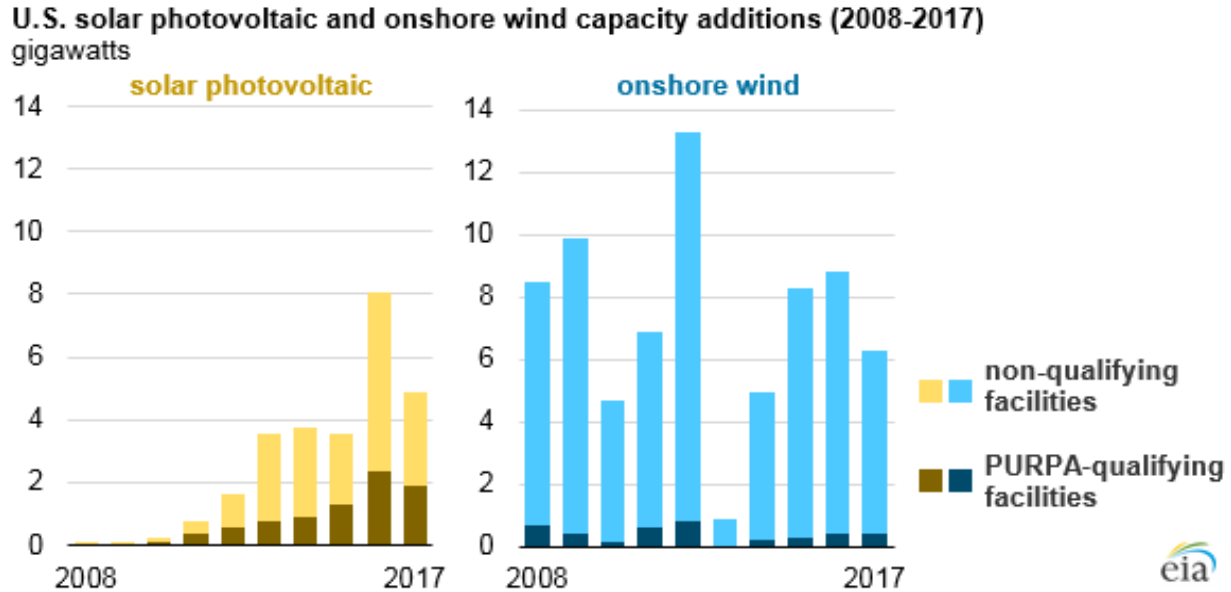
E. Limited, Targeted Improvements to PURPA  
Would Preserve and Enhance Its Essential Role

Industrial consumers are net consumers – many do not have *any* QFs – and thus have financial interest to flag any systemic PURPA problems. Even so, U.S. Manufacturers see no evidence of systemic “bad QFs”, such as pervasive overpriced contracts that put upward pressure on rates. Rather, isolated instances of poor PURPA implementation give rise to targeted areas to improve PURPA implementation. Many commenters have pointed to an unprecedented buildout of solar photovoltaic and onshore wind resources as indicative of a problem with PURPA. Comments have claimed that PURPA needs to be “modernized” because a few states have been encumbered by this rapid buildout and have reached a saturation point. The reality is that federally mandated incentives in the form of Production Tax Credits (PTCs) or Investment Tax Credits (ITCs), state renewable energy mandates, technological innovation, and dramatic reductions in the capacity cost of such technologies have stimulated the unprecedented buildout of solar photovoltaic and onshore wind resources. Most of this new solar and wind capacity is *not* PURPA QF capacity. The vast majority of this new capacity is *not* relying on PURPA to support project financing and interconnection. The graph below, prepared by the EIA, highlights the fact that

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<sup>13</sup> ELCON, “Comments on the Department of Energy Notice of Request for Information on Codes, Standards, Specifications, and Other Guidance for Enhancing the Resilience of Electric Infrastructure Systems against Severe Weather Events,” (Aug. 23, 2019), at pp. 6-7 (available at <https://elcon.org/comments-of-elcon-on-doe-request-for-information-on-enhancing-the-resilience-of-electric-infrastructure-systems-against-weather-events/>).

PURPA QF capacity accounts for a very small percentage of the solar and onshore wind capacity additions from 2008 until 2017.<sup>14</sup>

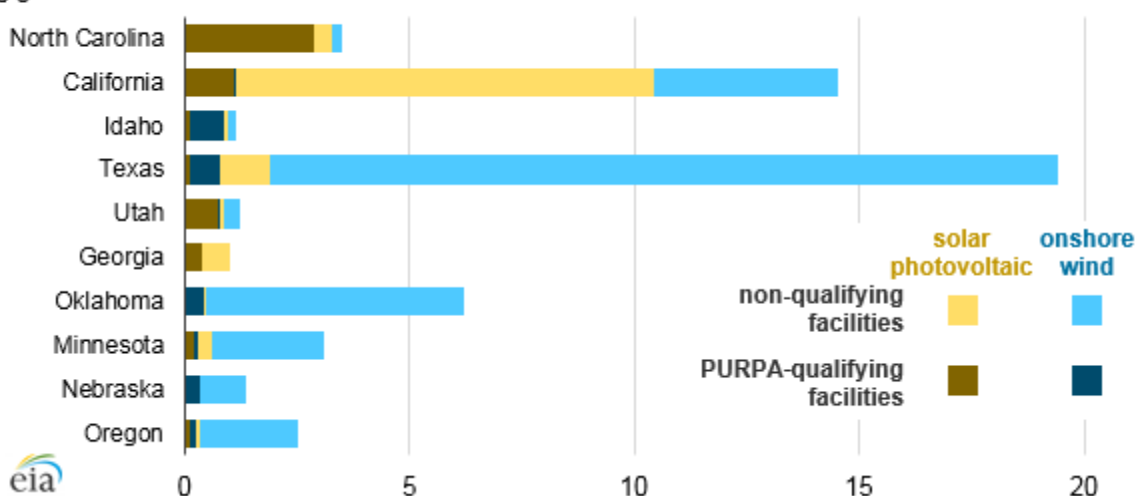


Also, as described in the graph below (also prepared by EIA), only the outcomes in three states (North Carolina, Idaho, and Utah) suggest that PURPA has substantially influenced solar and onshore wind buildouts. Elsewhere, the PURPA influence is miniscule.<sup>15</sup>

<sup>14</sup> U.S. Energy Information Admin., *PURPA-Qualifying Capacity Increases, but It's Still a Small Portion of Added Renewables* (Aug. 16, 2018), (available at <https://www.eia.gov/todayinenergy/detail.php?id=36912&src=email>).

<sup>15</sup> These data were originally supplied in comments by AF&PA and ELCON in Docket No. AD16-16 and are resubmitted here for convenient reference.

**Top ten states with PURPA-qualifying facility generating capacity additions (2008-2017)  
gigawatts**



It is noteworthy that the limited, legitimate PURPA implementation problems that have occurred are state-specific and limited to only a handful of states.<sup>16</sup> ELCON has engaged state consumer advocates on the matter, who often responded by noting that states generally have the tools they need to avoid any chronic problems with PURPA implementation.<sup>17</sup> To the extent these few states have experienced PURPA implementation problems, it suggests that more limited solutions, such as using the existing tools available to set more reasonable avoided cost rates, is the correct approach. The broad modifications being proposed in the NOPR, based on problems that have surfaced in only three to four states, suggest that the proverbial tail is wagging the proverbial dog.

Moreover, criticisms of PURPA implementation have largely focused on solar merchant developers, who have constituted the vast majority of new QF development

<sup>16</sup> U.S. Energy Information Administration, “PURPA-qualifying capacity increases, but it’s still a small portion of added renewables,” *Today in Energy* (Aug. 16, 2018), (available at <https://www.eia.gov/todayinenergy/detail.php?id=36912>).

<sup>17</sup> A common response was that states have considerable autonomy to set avoided costs very low, even zero in many cases.

during the past decade.<sup>18</sup> The EIA has observed that the “capital costs of solar PV have dropped to less than the utilities’ avoided cost, making the technology cost competitive.”<sup>19</sup> Generally, this is a positive economic indicator as competitive forces drove technology costs down. However, incumbent utilities are thwarting these competitive forces by transitioning to higher cost solar procurement consistent with the financial incentive of cost-of-service regulation and seeking to re-establish barriers to QF development that PURPA has charged this Commission with eliminating.

Under these circumstances, any changes to PURPA implementation should enhance competitive outcomes while carefully avoiding unintended consequences such as restricting industrial self-supply and, in the worst case, causing potentially devastating collateral damage to manufacturing facilities that could ultimately result in the closing of the facility with the loss of all of the attendant jobs. Ultimately, states have the ability to adopt open, competitive markets that create a healthy competitive environment. However, most states have not done so, and thus the Commission must protect and pursue PURPA implementation for states that remain committed to cost-of-service regulation. The NOPR contains some elements that may improve PURPA implementation but other parts that would harm it.

## II. ANY MODIFICATIONS TO THE COMMISSION’S PURPA REGULATIONS MUST BE SURGICAL IN NATURE, AND SEEK TO PROMOTE, NOT IMPEDE, PURPA’S OBJECTIVES

### A. Summary of U.S. Manufacturers’ Specific Comments on the NOPR’s Proposals

U.S. Manufacturers urge the Commission to pursue a surgical approach to PURPA reform to enhance competitive outcomes, while carefully avoiding unintended

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<sup>18</sup> U.S. Energy Information Administration, “PURPA-qualifying capacity increases, but it’s still a small portion of added renewables,” *Today in Energy* (Aug. 16, 2018), (available at <https://www.eia.gov/todayinenergy/detail.php?id=36912>).

<sup>19</sup> U.S. Energy Information Administration, “PURPA-qualifying capacity increases, but it’s still a small portion of added renewables,” *Today in Energy* (Aug. 16, 2018), (available at <https://www.eia.gov/todayinenergy/detail.php?id=36912>).



consequences like restricting industrial self-supply and the ability to obtain financing for needed self-supply energy projects. As discussed in these comments, U.S. Manufacturers recognize opportunities to improve PURPA implementation, including minimizing gaming of the one-mile rule and clarifying the requirements for establishment of a legally enforceable obligation.

The following principles should guide the Commission's PURPA reforms:

- (1) PURPA was designed as, and remains, a valuable tool to promote efficient competitive outcomes, and any regulatory changes should support truly competitive markets;
- (2) other PURPA statutory objectives and obligations remain unchanged;
- (3) any changes to FERC's PURPA regulations should promote, not discourage, competition between QFs and utility self-builds;
- (4) any changes to FERC's PURPA regulations should eliminate or reduce, not erect, barriers to sales of energy that is not consumed behind the meter and ensure non-discriminatory access to electricity markets; and
- (5) any changes to FERC's PURPA regulations should be supported by substantial evidence in the record; currently, many of the NOPR's proposals are not sufficiently supported or are not supported at all.

As discussed below, U.S. Manufacturers oppose changes to FERC's PURPA regulations that are inconsistent with these principles, but where possible we are proposing workable alternatives. U.S. Manufacturers:

- (1) propose certain prerequisites and conditions to any changes to avoided cost calculations;
- (2) propose a self-supply carve-out for any changes to the rebuttable presumption that applies to elimination of the mandatory purchase obligation;
- (3) support changes to clarify the establishment of a legally enforceable obligation;
- (4) support narrow changes to address any gaming of PURPA regulations; and
- (5) subject to adoption of an additional safeguard and an important clarification, do not oppose changes to the procedural process for QF certification and self-

certification.

For example, the NOPR's reduction in the rebuttable presumption threshold to 1 MW for QFs other than cogeneration facilities, in the overly broad manner in which it is proposed, would inflict considerable "collateral damage" on industrial consumers. U.S. Manufacturers with QFs under 20 MW simply do not have the resources required to participate in wholesale electricity markets. U.S. Manufacturers would support, however, alternative means to achieve the valid objectives of the NOPR without imposing harm on industrial facilities. Thus, the PURPA regulations could be revised to recognize that merchant developers in RTO/ISOs under 20 MW may have non-discriminatory access to the transmission system, but industrial consumers seeking to self-supply, with the ability to import and export power as necessary to complement the self-supply arrangement, do not. Retaining the 20 MW threshold for only cogeneration facilities, however, would preclude other forms of industrial self-supply, such as microgrids and on-site renewables, including biomass, that provide unique reliability and resilience value and assist in maintaining competitiveness and meeting corporate sustainability goals that purchases from the bulk system cannot provide. Accordingly, the 20 MW threshold should be retained for all consumer self-supply applications that are QFs. This would be consistent with the stated rationale for the exemption, which is based on characteristics of the market participant and not fuels or technologies, and would improve the legal robustness of the proposed change by eliminating an indefensible distinction between cogeneration and SPPs.

Respecting the NOPR's proposals on avoided costs, U.S. Manufacturers support improvements to the determination of avoided costs but stress that some aspects of the NOPR's approach would open the door to undermining competition. In particular, any change to allow states to implement variable rates for energy avoided costs must be premised on equivalent treatment for incumbent utilities to avoid an investment risk asymmetry that uneconomically skews renewables investment toward utility self-builds. U.S. Manufacturers foresee opportunities to improve avoided energy cost methodologies, and proposals in the NOPR have different pros and cons.

U.S. Manufacturers also stress that, while they are proponents of legitimate competitive procurement that exempts industrial self-supply, no state has implemented such a program sufficient for avoided capacity costs, let alone a more ambitious application like the NARUC proposal. The history of competitive procurement outside the organized markets is not favorable -- such processes are usually competitive in name only -- and those states that have facilitated a degree of competition have only done so for a subset of procurement that largely insulates the incumbent utility from the forces of dynamic competition. U.S. Manufacturers stress that if the Commission seeks to explore competitive procurement further, it should do so only with additional dedicated comment periods and an adjoining technical conference or workshop.

U.S. Manufacturers support the NOPR's proposals that would improve and strengthen PURPA implementation and that are also legally defensible. The NOPR contains thoughtful approaches to address any potential under the current regulations for gaming and sham transactions, such as reforming the one-mile rule and demonstration of commercial viability to be eligible for the legally enforceable obligation. Some of the proposed elements in the NOPR, however, such as a 10-mile rule proposal to replace the one-mile rule, appear to lack sufficient supporting evidence to justify selection of the specified solution. U.S. Manufacturers are committed to working with the Commission and other parties to ensure the robustness and defensibility of the reforms, which will minimize unnecessary litigation and the likelihood of subsequent efforts to reform PURPA.

U.S. Manufacturers agree that the NOPR accurately identifies other areas for improvement, but some elements of the NOPR require modification to avoid unintended consequences. For example, industrial consumers conditionally support the reduction in obligation to purchase based on a state retail choice program, but only subject to development of clear and enforceable criteria that exclude mandatory purchase obligation relief for default supply obligations that utilities meet with their own generation. Similarly, the NOPR's approach to allow a protest rather than a declaratory order proceeding to challenge QF self-certification must appropriately

recognize that QFs need protection against frivolous challenges. Accordingly, U.S. Manufacturers propose that the challenger retain the full burden of establishing that a QF certification is invalid and that all protests must be supported by an affidavit from a corporate officer, and that costs for certification and challenges to certification are symmetrical. Any termination of a QF on this basis must be accompanied by unequivocal proof that the QF does not meet the statutory requirements for QF status.

B. All Changes Should be Prospective Only; Existing Power Purchase Agreements Should Not be Affected

As a threshold matter, any Final Rule should make clear that any and all changes to the Commission's PURPA regulations are prospective only, and are not intended to, and do not, affect any existing power purchase agreements (PPA) during their currently effective term. The NOPR observes that certain changes are prospective only. For example, in ¶ 92, the NOPR states, with respect to the retail choice exception to the mandatory purchase obligation that "The Commission intends that this proposal would apply prospectively from the effective date of the final rule and would not disturb contracts in effect at the time the utility's supply obligation is reduced." Likewise, in ¶ 100, the NOPR states, with respect to changes to the one-mile rule, that "The Commission proposes that this change would be effective as of the date of a final rule, which means that such challenges could only be made to QF certifications and recertifications that are submitted after the effective date of the final rule in this proceeding." However, the NOPR does not provide an absolute and clear pronouncement that changes to the regulations will not impact existing PPAs. U.S. Manufacturers place great value on contract certainty, and oppose efforts to abrogate valid, freely negotiated agreements. The Final Rule should be clear that no changes to the PURPA regulations will affect existing PPAs.

C. The Fixed Price Option for the Avoided Cost Energy Rate Should Be Retained Unless States Demonstrate Symmetric Treatment for Utility Self-Builds and QFs

The NOPR proposes to eliminate the requirement that a utility must afford a QF the option to enter a contract at an avoided cost energy rate that is fixed or known for the duration of the contract. NOPR at ¶¶61-81. U.S. Manufacturers oppose this aspect of the NOPR as it is currently proposed. As an alternative, U.S. Manufacturers would support improvements to avoided cost methods that accurately reflect utility avoided costs, which currently insulate utilities from energy market changes, and therefore would drive investment in projects on an equal footing with utility-self builds, ultimately promoting competition. Elimination of the contract option as proposed in the NOPR, however, would have the opposite effect.

The contract option has encouraged development of QFs, and more generally has encouraged competition, for two reasons.

First, the contract option has provided QFs with a stable alternative that promotes their ability to obtain financing. Achieving certainty around the revenue stream for a project decreases its financial risk and lowers its financing costs. The fixed price approach for avoided cost energy pricing puts QFs on more equal footing with utility self-builds, which attract lower-cost financing because state regulatory pre-approval processes provide nearly guaranteed cost recovery with a rate of return over the lifetime of a project.

Second, the contract option has played a key role in promoting just and reasonable and non-discriminatory rates for QFs, particularly in cost of service jurisdictions as required under Sections 210(b)(1) and 210(b)(2) of PURPA. More variable avoided cost rates will result in unintended consequences that result in less competitive conditions and may leave consumers worse off, as utility self-builds do not face the same market risk exposure. Pushing more market risk to QFs while utility assets remain insulated from markets creates an investment risk asymmetry. This puts QFs at a competitive disadvantage and shifts the consumer burden to more utility

builds, which have generally been higher cost than merchants. U.S. Manufacturers have long supported procurement that shifts investment risk to suppliers, but doing so for one subset of suppliers will discriminatorily undermine what competition PURPA implementation can provide.

The aforementioned context is critical to evaluate the consumer impact of avoided cost rates. Failure to do so often gives the impression that consumers are overpaying for QF rates systemically by selecting the wrong benchmark comparison. For example, a recent study funded by the Edison Electric Institute (“EEI Study”) compared QF contract rates against competitive power purchase agreement (PPA) benchmarks.<sup>20</sup> The EEI Study concluded that avoided cost rates for QF contracts “generally exceeded rates that are realized in competitive markets” and that “solar QF contracts did not reflect underlying cost trends because solar installation costs decline far faster than the administratively determined QF rates.”<sup>21</sup> This is accurate in many cases and makes a convincing argument for why power generation should be procured competitively. However, the relevant comparison for avoided costs is what utilities otherwise procure in the absence of the QF, which is rarely competitive and shifting away from PPAs towards self-builds that sometimes exceed their own avoided cost rate.

An accurate comparison of avoided costs should be pegged to actual utility procurement, which is often not reflective of competitive PPA conditions. Criticism of QFs “locking-in” consumers to rates that do not reflect cost declines over time must acknowledge that utility procurement does exactly the same via the pre-approval process, sometimes for a longer duration than QF contracts. QFs can only benefit consumers by competing on a level playing field with comparable terms and conditions.

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<sup>20</sup> E. Nicholson & M. Kagan, Concentric Energy Advisors, “An Empirical Analysis of Avoided Cost Rates for Solar and Wind QFs under PURPA,” (Nov. 2019) (prepared for Edison Electric Institute) (available at <https://ceadvisors.com/wp-content/uploads/2019/11/An-Empirical-Analysis-of-Avoided-Cost-Rates-for-Solar-and-Wind-QFs-Under-PURPA.pdf>).

<sup>21</sup> *Id.* at p. 20.

Avoided costs flow from utility resource planning, and a staple of IRP is treating all resources on a “consistent and comparable” basis. In theory, this could provide a basis for exploring how to shift investment risk in the energy market, but it would also require fundamental rethinking of the “used and useful” test and the terms of the regulatory compact, such as conditions of project pre-approval, to disallow cost recovery on stranded assets. This has not been accomplished anywhere. The former head of NARUC even noted that expenditure disallowance “seldom occurs” and that the “legal presumption that governs the arcane, trial-like proceedings of utility commissions is that all utility spending is prudent.”<sup>22</sup> In fact, cost-of-service states have generally migrated towards shifting additional investment risk onto ratepayers and off of utilities, such as through the proliferation of construction work in progress, as opposed to increasing utility risk exposure to market changes like more robust application of the “used and useful” test. Without this, the objective of PURPA to ensure a level playing field between QFs and utility-self builds cannot stand, as QFs would bear energy market risk and incumbent utilities would not.

D. Alternative Metrics For Calculating Avoided Cost  
Require Careful Assessment

The NOPR proposes to determine that a locational marginal price (LMP) is a *per se* reasonable measure of an as-available avoided cost for energy and to preliminarily advance several other metrics of “competitive prices” that would also be sufficient for calculation of avoided energy costs. NOPR at ¶¶43-60. These changes would allow states to choose to ignore the long-standing factors established by FERC regulation in determining the avoided cost rates, including: availability of capacity or energy from a QF during the system daily and seasonal peak periods; dispatchability and reliability; the relationship of the availability of energy or capacity from the QF to the ability of the

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<sup>22</sup>T. Kavulla, “There Is No Free Market for Electricity: Can There Ever Be?,” *American Affairs* (Summer 2017) (available at <https://americanaffairsjournal.org/2017/05/no-free-market-electricity-can-ever/>).

utility to avoid costs; costs or savings from variations in line losses; and application of technology-specific avoided cost rates.

The access to information that utilities have and the special knowledge of and experience with the state commissions already give the utilities considerable advantages in navigating the process and obtaining favorable avoided cost determinations. These advantages would be compounded by any non-disclosure provisions enacted by state commissions in these proceedings. U.S. Manufacturers have substantial concerns that these aspects of the NOPR would unfairly tilt the balance toward utilities even more, and we urge the Commission to proceed, if at all, cautiously and thoughtfully.

Although under the NOPR the change would apply nationwide, competitive conditions do not exist for energy, balancing services, or capacity products outside of RTO/ISOs. The existence of somewhat liquid market hubs for spot transactions is not equivalent to competitive markets with non-discriminatory access, as utility self-builds typically will receive expedited approval through IRPs and guaranteed cost recovery. As such, the Commission must very carefully assess any action that would permit the pegging of avoided costs to alternative metrics that presume that competitive conditions exist.

The NOPR seeks comment on alternative metrics for avoided energy costs, including CAISO's Energy Imbalance Market (EIM), bilateral hubs, heat rate and natural gas price proxies, and more. U.S. Manufacturers note that EIM merely covers imbalance conditions, so it does not capture the vast majority of unit commitment and dispatch scheduling cost parameters. In fully-integrated RTO/ISOs with day ahead markets, the real time market often covers roughly 10% of the market volume, whereas roughly 90% of total market activity occurs in the day ahead market. Further, a regular spread exists between day ahead and real time markets, and if the day ahead market were removed the prices in the real time market would change. As such, CAISO's EIM is not a complete measure of energy avoided costs.

In order for bilateral markets to form a proxy for avoided cost pricing, those



markets must be robust, liquid, and open with long-term price signals. Outside RTO/ISOs, bilateral markets rarely drive investment decisions. U.S. Manufacturers' experience has been that bilateral-only areas are often limited in liquidity, particularly when there are small players with limited sales options. These companies regularly experience prices to sell power at a material discount to the bilateral hub and a material premium if they seek to buy power.

A liquid regional hub does not necessarily imply liquidity at a more granular level. The lack of nodal pricing makes this difficult to detect outside RTO/ISOs. The basis spread resulting from transmission congestion is often very material between zonal and nodal levels in RTO/ISOs, and thus why nodal pricing exists in the first place. The implied spread outside of RTO/ISOs is often opaque in real time and poorly documented in hindsight. Sometimes QFs will be curtailed based on transmission elements despite appearing economic based on the regional hub price. This often reflects the opacity of transmission system operations, which Commission staff flagged as a potential area of concern outside RTO/ISOs already in a staff paper and technical conference on transmission line ratings.<sup>23</sup> In particular, staff sought to explore how to improve transparency in available transmission capacity determinations and other elements that limit true open access in bilateral-only regions. U.S. Manufacturers strongly support such efforts and flag that this is a clear indication that discriminatory treatment and barriers to the bulk transmission system persist under current conditions outside of RTO/ISOs.

For these and other reasons, bilateral markets alone are insufficient to serve as complete avoided costs measures. Congress broadly recognized the shortcomings of bilateral-only areas, and thus lifted the PURPA must-purchase obligation under EPAct 2005 only for RTO/ISO regions. Since then, nothing has transpired to change this fact.

U.S. Manufacturers recognize, however, that the states can improve their

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<sup>23</sup> See FERC Staff Paper, "Managing Transmission Line Ratings," Docket No. AD19-15-000 (Aug. 2019) (available at [https://www.ferc.gov/CalendarFiles/20190823124451-Managing%20Transmission%20Line%20Ratings\\_Staff%20Paper.pdf](https://www.ferc.gov/CalendarFiles/20190823124451-Managing%20Transmission%20Line%20Ratings_Staff%20Paper.pdf)).

avoided cost calculations, which are not always consistent or transparent. PURPA and the FERC regulations already prohibit states from using avoided costs as a policy tool to discourage economically viable resources (with rates that are below avoided costs) or to encourage or subsidize uneconomic resources (with rates that exceed avoided costs). We do not believe that there is one best method, and granting states more flexibility in determining avoided costs may have benefits, but the Commission must remain committed to oversight that ensures a sound basis for unconventional approaches to avoided costs calculations. For example, departing from administrative price forecasts pegged to a peaking plant may make sense for some off-peak segments, but peakers are the marginal unit on other times of the year as well, and increasingly so in sub-peak load periods when the availability of renewables declines and/or outage rates for conventional generators are higher. Using heat rates and natural gas prices as a proxy is complicated by the fact that natural gas units are not always marginal, especially in export-constrained subregions when renewables output is high. This practice also contains extensive forecasting error. Comparing this error to other forms of administrative price forecasting has merit, as these are standard practice in many areas. Generally, further research on dynamic, granular system lambdas outside RTO/ISOs would be fruitful. FERC must carefully assess the pros and cons of each methodology, best practices, and options for addressing the pricing anomalies that exist in wholesale markets created by federal subsidies.

U.S. Manufacturers do not see a single current state competitive procurement process in place today that is fit for calculating a capacity avoided cost proxy, let alone a substitute for the must-purchase obligation as in the NARUC proposal. At the state level, proponents of competitive procurement have generally been very disappointed with the quality of its implementation, which often results in a process that is competitive in name only. This is particularly evident in regulated states that in the late 2000s and early 2010s revamped their IRP and utility procurement rules, often with a

strong bent toward introducing competitive mechanisms.<sup>24</sup> Staff and commissioners at public utility commissions (PUCs) often shared resources during this time.

Independent experts advising PUCs regularly held up Oregon as a gold standard for utility planning and competitive procurement, given its “long history of solid planning going back to 1989.”<sup>25</sup> The same utility procurement experts now recognize that “Oregon has been criticized for its competitive procurement process, in which the utility has won the bid 95% of the time.”<sup>26</sup>

Likewise, many merchant generators pushed “market tests” and other competitive mechanisms in regulated utility procurement because they possessed economical assets earlier this decade.<sup>27</sup> This largely failed, and many merchants have since sold off their fleets or retired economic assets.<sup>28</sup> This forced consumers to pay for uneconomic incumbent utility self-builds. Merchant generators often no longer commit resources in an attempt to pursue competitive state reforms because the probability of success is very low.

U.S. Manufacturers continue to see shortcomings in “competitive” procurement practices across regions, ranging from PacifiCorp to Georgia Power. A current example is Dominion Energy Virginia’s 2019 RFP, which limits competition in a manner that “all but guarantees that a Dominion self-build option will prevail.” The process restricts participation to new resources only and does not permit an independent third party to evaluate bids, instead allowing the incumbent utility non-publicly to review bids to determine whether its own bid or that of a competitor is preferable.<sup>29</sup>

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<sup>24</sup> For example, look at various materials produced by the Regulatory Assistance Project over this period.

<sup>25</sup> J. Migden-Ostrander, The Regulatory Assistance Project, “Decoupling and Integrated Resource Planning,” (Mar. 16, 2018), at p. 55 (presentation to Montana Energy and Telecommunications Interim Committee) (available at [https://www.raonline.org/wp-content/uploads/2018/03/rap\\_migden\\_mt\\_senate\\_decoupling\\_irp\\_2018\\_mar\\_16.pdf](https://www.raonline.org/wp-content/uploads/2018/03/rap_migden_mt_senate_decoupling_irp_2018_mar_16.pdf)).

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., K. Spees, *et al.*, The Brattle Group, “Enhancing the Efficiency of Resource Adequacy Planning and Procurements in the Midcontinent ISO Footprint – Options for MISO, Utilities, and States,” (Nov. 015) (prepared for NRG) (available at [http://files.brattle.com/files/5886\\_enhancing\\_the\\_efficiency\\_of\\_resource\\_adequacy\\_planning\\_and\\_procurements\\_in\\_the\\_miso\\_footprint\\_newell\\_spees\\_1115.pdf](http://files.brattle.com/files/5886_enhancing_the_efficiency_of_resource_adequacy_planning_and_procurements_in_the_miso_footprint_newell_spees_1115.pdf)).

<sup>28</sup> NRG’s former MISO fleet provides a valuable case study.

<sup>29</sup> See “Doswell Letter . . . Urges Suspension of Uncompetitive Solicitation Process for New Power

A worthwhile case study is Entergy Louisiana, which has stifled competition in its competitive procurement process. The Louisiana Public Service Commission (LPSC) recently approved a new Entergy Louisiana gas plant despite opposition from the Louisiana Energy Users Group (LEUG), who represents industrial consumers. The LPSC noted that the basis for LEUG's opposition was that the request for proposal (RFP) was "improperly designed to limit resource options to new construction comparable to the self-build proposal."<sup>30</sup> Calpine opposed the project as well because it was "not supported by a valid, robust market test".<sup>31</sup> Importantly, the last paragraph of the Commission Order confirmed that approval of the St. Charles CCGT "does not mean that the findings or recommendations in this proceeding shall apply one way or the other, to any future utility applications for approval of new generation resources" so that it would not set any precedent going forward for future RFPs.<sup>32</sup> A pending rulemaking before the LPSC seeks to address procedural aspects of future RFPs as pertains to the timing requirements to raise and resolve questions and criticisms during an RFP process; however, the rulemaking does not address the underlying issue of utility efforts to stifle competition. The takeaway from this and many other "competitive" utility procurement processes is that such cases delineate many of the nuances that determine whether an RFP is workably competitive. These include transparent and independent oversight and evaluation of alternatives, plus safeguards against affiliate abuse involving transaction between franchised utilities and their market-based affiliates. Competitive RFPs also require well-defined technical parameters, such as ensuring broad size, timing, operating parameters, and other specifications of resource needs in the utility planning process to facilitate competition

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Peaking Resources," CISION PR Newswire (Nov. 21, 2019) (available at <https://www.prnewswire.com/news-releases/doswell-letter-to-virginia-state-public-utility-commission-and-attorney-general-urges-suspension-of-uncompetitive-solicitation-process-for-new-power-generation-peaking-resources-300963053.html>).

<sup>30</sup> *Entergy Louisiana, LLC, et al.*, Louisiana Public Service Commission Order No. U-33770, Nov. 17, 2016, at p. 5.

<sup>31</sup> *Id.* at p. 6.

<sup>32</sup> *Id.* at p. 54.

rather than narrowly define parameters, which is a common practice utilities use to preclude competition.

These experiences do not diminish the case for legitimate competitive procurement, but rather provide evidence of the implementation challenges of achieving a workably competitive process. A few cursory criteria for a utility to qualify a competitive procurement process as a capacity avoided cost proxy or substitute for the MPO (*i.e.*, the NARUC proposal) would leave states in a *less* competitive situation. As noted by the National Renewable Energy Laboratory, “Auctions must meet a complex set of conditions in order to function properly. Markets must be sufficiently deep and liquid to lead to accurate prices, and there has to be homogeneity of product and of project completion risk to ensure that the process is fair.”<sup>33</sup> If the Commission wishes to pursue this further, U.S. Manufacturers urge that the Commission set a high bar with enforcement ability to verify that a process is sufficiently competitive.

Even effective competitive procurement, however, is only applicable to central-plant procurement: industrial consumers’ self-supply must retain PURPA protections. Competitive procurement relies on a uniform definition of a product or set of products in order to facilitate “apples-to-apples” competition.<sup>34</sup> This is sufficient to cover most consumers’ needs, who procure uniform service from the central system. A homogenous central product does not possess the features that industrial self-supply provides (*e.g.*, integrated with load, see elsewhere in comments here), and thus cannot compete on a level playing field with central plant products or services. Industrial consumers also are not in the business of selling power (as noted elsewhere in these comments). Thus, self-supply resources serve a different purpose than central plant procurement and industrials are neither staffed nor have interest in acting as a merchant to meet centralized utility procurement. Industrial self-supply also is sized to

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<sup>33</sup> C. Kreycik, et al., National Renewable Energy Technical Report, “Procurement Options for New Renewable Electricity Supply,” (Dec. 2011) at p. VI (available at <https://www.nrel.gov/docs/fy12osti/52983.pdf>).

<sup>34</sup> For *e.g.*, see 108 FERC ¶ 61,082 (2004) (“*Allegheny*”). See also *Boston Edison Co. re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991).

load, so power exports are not readily predictable and cannot be measured on an equivalency test with central plant procurement.

The NOPR's criteria for qualifying competitive solicitation process is incomplete, including dealing with practical implementation deficiencies that results in procurement that is competitive in name only but nominally checks the standard boxes. The Commission should also only consider a robust version of competitive procurement that exempts QF self-supply. To be clear, strengthening competitive solicitation processes would be a welcome outcome, but will require a far more in-depth record than what this round of comments provides. This would require a full performance assessment of state competitive solicitation processes and extensive expert input on the establishment of solicitation process criteria as well as a Commission verification process. If the Commission wishes to use competitive procurement for either avoided cost purposes or especially for an MPO substitute, it is imperative the Commission seek an additional comment period and perhaps hold a technical conference.

Lastly, the Commission should keep in mind that PURPA in its current form has already motivated states to pursue more competitive forms of procurement. In North Carolina, where PURPA implementation has been hotly disputed, 2017 legislative reform to replace PURPA purchases prompted completion of the first round of renewable energy competitive solicitations. The independent administrator said Duke Energy's ratepayers will save nearly \$400 million compared to the price Duke would pay to generate the power itself.<sup>35</sup> Similarly, critics of PURPA have noted that problems have been "largely avoided in Colorado due to a PURPA regulatory regime grounded in competition".<sup>36</sup> Still, the Colorado process is not a gold standard, as it does not facilitate full resource competition and retains guarantees for the incumbent utility. However, it illustrates value in incremental competition. This speaks more to

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<sup>35</sup> IHS Markit, "Duke dominates North Carolina competition for new solar plants," *The Energy Daily* (April 18, 2019) at p. 4.

<sup>36</sup> <https://www.utilitydive.com/news/purpa-is-undermining-the-clean-energy-transition-colorado-has-a-better-way/567639/>

why the Commission should support robust PURPA implementation to motivate states to use more competitive processes already at their disposal.

If FERC nonetheless implements any changes to its regulations relating to the calculation of avoided cost, they should be made effective prospectively only.

E. The 20 MW Threshold Should Be Retained, Not Just for CHP  
But for all Consumer Self-Supply QF Generation Technologies

The Commission proposes to reduce the threshold for the rebuttable presumption of non-discriminatory access to competitive wholesale markets within RTOs and ISOs from 20 MW to 1 MW for small power producers, while retaining the current 20 MW threshold for cogeneration facilities. NOPR at ¶¶118-130. The NOPR is based on a view that “small power production facilities below 20 MW should be able to participate in such markets under most circumstances.” NOPR at ¶126. In the case of cogeneration facilities, however, “the production and sale of electricity is a byproduct of these [industrial, commercial, residential or institutional] processes, and owners of cogeneration facilities might not be as familiar with energy markets and the technical requirements for such sales.” NOPR at ¶130.

At the outset, U.S. Manufacturers observe that FERC has a burden to meet in justifying any reduction in the current 20 MW threshold. It was just in Order 688-A, issued in 2007, that the Commission confirmed that 20 MW was an appropriate threshold, rejecting utility proposals to set the threshold at 1 or 2 MW. The Commission referenced “Order No. 671, where the Commission retained exemptions for QFs that are 20 MW or smaller from sections 205 and 206 of the FPA, and Order Nos. 2006 and 2006-A, where the Commission recognized that generators 20 MW or smaller should have different standards for interconnection than large generators.” Order 688-A at ¶97. The Commission also observed that “[m]ost QFs larger than 20 MW are interconnected to higher voltage lines, typically considered to be transmission lines, while smaller QFs tend to be interconnected to lower voltage radial lines, frequently considered to be distribution.” Order 688-A at ¶96. The same rationales

have continued validity today.

Accordingly, U.S. Manufacturers propose a more supportable alternative. U.S. Manufacturers recommend that the current 20 MW threshold be retained, not only for cogeneration facilities, but also for other forms of QFs that are used for consumer self-supply. The rationale stated in the NOPR as pertinent to cogeneration facilities is rooted in characteristics of the market participant, not characteristics unique to cogeneration or any specific QF generation technology. The NOPR states incorrectly that small power production facilities are “constructed solely to produce and sell electricity.” NOPR ¶¶ 130. This is true for small power production facilities operated by merchant developers whose intent is to develop resources to sell energy and capacity on the wholesale market, but it is not true for forest products facilities that use biomass to produce energy in their CHP systems. This was recognized by the bill to amend PURPA introduced by Congressman Tim Wahlberg (R-MI) (the primary House proponent of PURPA “modernization”), which exempted both cogenerators and SPPs that use CHP primarily for self-supply purposes from the bill’s provision reducing the threshold from 20 MW to 2.5 MW.<sup>37</sup> It is also true for small power production facilities, which are not necessarily cogeneration facilities, operated by industrial consumers for on-site needs. Industrial consumers have been increasingly diversifying their deployment of distributed energy resources that are small power production QFs at capacity ratings below 20 MWs. Industrial consumers that develop small power production facilities do so for various reasons of critical importance to their operations, including: bolstering reliability to sensitive industrial processes, maintaining competitiveness, utilization of site-generated off gases that would otherwise be flared, meeting corporate sustainability goals, and other objectives that only behind-the-meter generation integrated with complex industrial load can provide. For example, many industrial customers have developed or are developing solar arrays on-site and behind-the-meter, in quantities that are less than 20 MWs. With substantial decreases in the

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<sup>37</sup> H.R. 1502, the [PURPA Modernization Act of 2019](#),



cost of these technologies, manufacturers find it cost-effective to deploy such resources, but still need to rely on the opportunity to make occasional PURPA “puts” to the interconnected utility when QF output exceeds on-site consumption. Industrial consumers cannot receive the same benefits from centralized bulk system procurement as they can with these arrangements, and these same industrial consumers also have no desire or capability to sell power akin to a merchant developer.

Without PURPA protections in RTO/ISO markets, some industrial consumers seeking to self-supply would have to add full-time equivalent positions and devote additional resources to ascertain legal and technical expertise. The system benefits to RTO/ISO systems would be trivial given the *de minimis* amounts of net exports these facilities create. These additional administrative and financial burdens would deter industrial self-supply and harm the competitiveness of U.S. manufacturing. For example, one AF&PA member was able for many years to sell occasional excess power to its local utility pursuant to a PURPA avoided cost contract with relatively little administrative burden. After the utility was relieved of its PURPA MPO pursuant to FERC rules implementing EAct 2005, the mill encountered extremely burdensome and costly administrative requirements for the same sales. Specifically, in 2017, to sell power valued at less than \$175, the mill was required to become a MISO Market Participant and petition the MISO Independent Market Monitor each year for a waiver from the obligation to offer capacity into the MISO capacity auction. This MISO compliance process consumed staff hours and other resources that dwarfed the minimal revenue that the QF received for its *de minimis* output. This is just one example of the unintended, but significant, consequences of lowering the bar for elimination of the MPO. The current 20 MW threshold should be maintained, at least for QFs that are operating under self-supply arrangements.

Even more sophisticated industrial consumers often have decentralized energy management structures, where industrial power assets are managed by a facility-specific individual or team that is not familiar with RTO/ISO operations nor staffed to participate in them. Power management is not a core business for industrial

consumers, and selling *de minimis* exports is not a business strategy but a necessary capability to have for the development of industrial resources that periodically need to import or export power. This is the case regardless of the self-supply technology that is in use, whether CHP or otherwise. There also are barriers to participation in RTOs/ISOs that are faced by consumers with behind the meter generation but not by utilities.<sup>38</sup>

There is no alternative to the proposed 1 MW threshold that would lower the 20 MW threshold but still maintain PURPA protections for industrial consumers' self-supply. The rationale stated in the NOPR for a 1 MW threshold is very limited, with no assessment of other levels between 1 MW and 20 MW. The bases for the threshold change provided in the NOPR, such as improved market access based on the fast track interconnection process (5 MW threshold) and the RTO/ISO participant threshold (100 kW threshold), do not provide a rationale applicable to industrial consumers seeking to self-supply. There may be some merit to lowering the current threshold for small power producers that have a primary intent to sell power into the wholesale market, but not for consumers who seek to self-supply and are not in the business of selling power.

For these reasons, the current 20 MW threshold should be retained, not just for cogeneration facilities, but for all QFs that are behind-the-meter and for the purpose of enabling self-supply for consumers, who are not in the business of selling power. This would include industrial small power production facilities for self-supply such as those using biomass, waste, or renewable energy. The retention of the 20 MW threshold for SPPs that are used for self-supply would be more consistent with the NOPR's rationale for retaining the 20 MW threshold for cogeneration facilities, as the industrial self-

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<sup>38</sup> See, e.g., Comments of ELCON et al. on the Southwest Power Pool exit fees in Docket No. EL19-11 (Nov. 30, 2018), addressing exit fees as a disproportionate barrier to governance participation in the organized markets for industrial consumers and other similarly situated entities that are not transmission owners or load-serving entities. See also the blog from the Alliance for Industrial Efficiency on the harm to manufacturers from excessive standby rates "[Utility Standby Tariffs Are Standing in the Way of CHP Investments](#)," (June 12, 2017).

supply argument applies equally to CHP and non-CHP applications. Moreover, the original rationales for 20 MW – the LGIA/SGIA line and the threshold for FPA exemptions – continue to apply (NOPR ¶¶ 128-129), and changes would further complicate compliance efforts for this subset of QFs.

These distinct applications would make it straightforward to develop a clear set of criteria to verify that a facility was a self-supply application. Criteria could include whether the QF is sized to load in such a way that only *de minimis* exports occur, a broader application of the fundamental use test,<sup>39</sup> behind-the-meter verification, or load integration demonstration.

F. The One-Mile Rule Should Be Revisited To The Extent Appropriate to Prevent Improper Gaming That Increases Consumer Costs

ELCON has long supported reasonable reform of the one-mile rule, which currently provides an irrebuttable presumption that resources located more than a mile apart are separate QFs for purposes of calculating the 80 MW limit to qualify as an SPP. The current regulations reportedly are susceptible to gaming, as commenters have stated that certain solar and wind developers may act in a manner that is inconsistent with PURPA’s intent by disaggregating large-scale renewable developments into smaller segments to meet PURPA’s size requirements for SPPs.<sup>40</sup> We do not have a specific remedy in mind, however, and would support any well-reasoned approach that is clear and legally defensible, to avoid needing to revisit or litigate this issue extensively.

In this regard, U.S. Manufacturers observe that the NOPR’s proposal (NOPR ¶¶

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<sup>39</sup> 18 C.F.R. § 202.205(d)(2) (requiring that 50% of the total energy output of a facility be used for industrial, commercial, residential or institutional purposes).

<sup>40</sup> See, e.g., G. Bade, “Renewables developers 'gaming' PURPA should force reforms, utilities tell Congress,” Utility Dive (Sept. 17, 2017), (available at <https://www.utilitydive.com/news/renewables-developers-gaming-purpa-should-force-reforms-utilities-tell-c/504436/>), discussing how a wind farm that exceeds the size threshold for qualified SPP status under 18 C.F.R. § 292.204 could disaggregate the project into smaller groupings of turbines and place them greater than one mile apart from one another in order to achieve QF status.

100-107) is not supported by specific evidence supporting the choice of 10 miles, rather than some other distance, as the appropriate threshold. Furthermore, the underlying definition of the location of electric generation equipment in the NOPR (NOPR ¶¶ 108-110) lacks clarity and needs a more defensible basis. Perhaps FERC could consider amending the one-mile regulation to add other factors (*e.g.*, common ownership, interconnection points, operations, financing, etc.) instead of basing QF project distinction solely on distance. U.S. Manufacturers would welcome the opportunity to work with the Commission and other parties to achieve a reform that minimizes gaming, improves legal clarity, and is supported by a robust record.

G. U.S. Manufacturers Support Demonstration of Commercial Viability As a Prerequisite to Securing a Legally Enforceable Obligation

U.S. Manufacturers support the NOPR's proposal to require that QFs demonstrate commercial viability before securing a legally enforceable obligation with the relevant utility. NOPR at ¶¶ 134-142. The objective of the change simply should be that a proposed QF demonstrate that it is not speculative and will likely enter service before a utility incurs an obligation to purchase that QF's output at any particular price. There needs to be a careful balance, however, so that QFs can secure a commitment for purchase early enough in their development cycle so that they can use it to facilitate financing, while addressing sham transactions that merely do enough to trigger the current process to obtain a buy-out. Ensuring projects are sufficiently committed would address this and help legitimate developers have a chance to compete against utility rate-based generation projects.

Sham transactions are certainly possible under PURPA. Instances have occurred where a QF developer takes minimal steps to create a "paper-only" QF, trigger a legally enforceable obligation, enter into a PPA with the host utility, and then immediately negotiate a buy-out of the PPA that reduces what the utility's consumers would otherwise have been required to pay. However, the current record does not sufficiently identify the occurrence of sham transactions that necessitate the change or the NOPR's

proposed general, non-exclusive list of possible criteria. NOPR at ¶¶ 140-142. Therefore, also on this issue, U.S. Manufacturers would welcome the opportunity to work with the Commission and other parties to achieve a reform that minimizes gaming and is supported by a sufficiently robust record.

H. U.S. Manufacturers Support Allowing Protests of Self-Certification of QFs Provided That the Burden of Proof Is Not Improperly Shifted to QFs

Currently, parties wishing to challenge a QF certification must file a petition for a declaratory order, and pay a substantial filing fee. With the important conditions discussed below, U.S. Manufacturers do not oppose the NOPR's proposal to allow entities to file "protests" of certifications of QF status, which do not require a filing fee. NOPR at ¶¶ 143-152. It is critical, however, that any Final Rule recognize that QFs need protection against frivolous challenges. Many QFs have limited legal resources, and QF development may be deterred effectively by the additional transaction cost of litigating frivolous challenges by sophisticated incumbent utilities or other parties.

Accordingly, U.S. Manufacturers propose that, as a mechanism for deterring frivolous challenges, any protests of a QF self-certification must be supported by an affidavit by a corporate officer spelling out and certifying the factual basis for the challenge. This must be supported by unequivocal proof and not based on subjective determinations.

For the same reasons, U.S. Manufacturers object to the burden shifting provision in the NOPR, which states that if the "party submitting a protest . . . specif[ies] facts that make a prima facie demonstration that the facility described in the self-certification or self-recertification does not satisfy the requirements for QF status," that "then the burden would shift to the [QF] to demonstrate that the claims raised in the protest are incorrect and that certification is, in fact, warranted." NOPR at ¶149. The NOPR merely states this position, without providing any support whatsoever for it. The NOPR unjustifiably deviates from the default rule statutorily established in the Administrative Procedure Act, that "[e]xcept as otherwise provided by statute, the

proponent of a rule or order has the burden of proof,” 5 U.S.C. § 556(d).<sup>41</sup>

Instead, as is typical in administrative practice, the challenger should have the full burden of establishing that a QF self-certification is invalid. This would reflect that the “processes and safeguards” that are in place are sufficient and that the Commission has the authority to review a self-certification.<sup>42</sup> The Commission has noted that the reasons for self-certification “were that the complexity, delays, and uncertainties created by a case-by-case qualification procedure would act as an economic disincentive to owners of smaller facilities.”<sup>43</sup> This is exactly what would happen if, as the NOPR currently proposes, an entity could simply file an objection to a QF self-certification filing to shift the burden to and impose those costs on a QF. There is no evidence, beyond the significant filing fee for a declaratory order petition, that FERC’s existing regulations for the self-certification of qualifying cogeneration facilities are in any way a burden on utilities or utility customers.

U.S. Manufacturers also recognize that a substantial filing fee can create an unnecessary barrier to legitimate challenges to self-certification, and can support removal of that fee. The fee, however, to seek a Commission determination that self-certification is appropriate is roughly equivalent to the fee currently imposed to challenge certification -- \$24,920 and \$28,210 for certification of small power production and cogeneration QFs, respectively, versus \$28,990 for a petition for declaratory order. U.S. Manufacturers support removal of the fee to challenge self-certifications, as long as the fee to seek a Commission determination also is removed.

#### I. U.S. Manufacturers Conditionally Support the NOPR’s Proposal Respecting State Retail Choice Programs

The NOPR proposes that an electric utility’s obligation to purchase from QFs may be reduced to the extent the purchasing electric utility’s supply obligation has been

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<sup>41</sup> See, e.g., *Hi-Tech Furnace Sys. v. FCC*, 343 U.S. App. D.C. 138 (D.C. Cir. 2000).

<sup>42</sup> Order 671-A at P 22. In Order 671 at P 79, responding to comments questioning self-certification, FERC revised its rules make explicit its authority to revoke, on its on motion, the QF status of self-certified QFs.

<sup>43</sup> Order 671 at P 83.

reduced by a state retail choice program. NOPR at ¶¶89-92. U.S. Manufacturers conditionally support this proposal, subject to development of clear and enforceable criteria, except for default supply obligations that utilities meet with their own generation. Competitively procured default service obligation would not be subjected to the MPO.

The NOPR's brief discussion of this issue requires elucidation, as no details are provided on how this provision would be implemented. For example, the mechanics are unclear how this would work where utilities have default obligations met via a competitive procurement that is auditable to ensure independence. Any Final Rule should be clear that, where retail load is being served by any utility-owned generation, the mandatory purchase obligation cannot be lifted under the "retail choice" exception. For example, in the Commonwealth of Virginia, only customers with loads at 5 MWs and above are eligible to choose their electric supplier. Reducing Virginia utilities' mandatory purchase obligation for the amount of load that has actually accessed competitive supply is not necessarily objectionable. However, the erosion of the mandatory purchase obligation should end there. Even though Virginia is, nominally, a partial "retail choice" state, any elimination of the mandatory purchase obligation must be calibrated to match only the amount of load that is actually shopping. A similar phenomenon exists in Michigan, where only 10% of the total load is eligible to access competitive supply.

The issue of the applicability of the change where utilities are still under long-term contracts with QFs also needs to be addressed. Existing long-term QF contracts should be retained for the current term of those contracts, and the output should be included in the default supply portfolio.

### III. CONCLUSION

Wholesale changes to the PURPA regulations are not necessary, appropriate, or legally supportable. The full implementation of PURPA as Congress enacted it continues to play an essential role in promoting competition and benefitting consumers.

Consumers that self-supply through behind the meter generation especially value the PURPA protections, and they are essential to the continued viability of U.S. industry. As discussed in these comments, U.S. Manufacturers support narrow, targeted fixes and improvements to the PURPA regulations. U.S. Manufacturers urge the Commission to uphold the legal and Congressional intent of PURPA to enhance competition and resist calls for broader changes that are inconsistent with PURPA's provisions and intent and that would harm consumers.

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Dated: December 3, 2019



**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused to be served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.:      December 3, 2019

/s/ W. RICHARD BIDSTRUP

W. Richard Bidstrup