

ARIZONA JOURNAL OF ENVIRONMENTAL LAW & POLICY

VOLUME 11

FALL 2020

ISSUE 1

A COMPARISON OF PURPA RENEWABLE ENERGY POLICY CHANGES THROUGHOUT THE UNITED STATES FROM 2014-2019: THERE HAS GOT TO BE A BETTER WAY FORWARD

Benjamin L. Champion*

Abstract

For 40 years, the Public Utility Regulatory Policies Act (PURPA) has served to encourage the diversification of energy sources within the electricity sector, specifically renewable energy technologies, through state-by-state rules enacted consistent with broadly flexible federal rules. More recently, as renewable energy costs have plummeted and the pace of new installations has skyrocketed, many have asked whether PURPA's requirements have become too much of a burden on consumers in the long run. PURPA requires utility companies to purchase energy, without negotiating prices, from utility-scale independent renewable energy producers below a certain size. The past five years have seen a wave of states adjusting their PURPA rules in response to these concerns. The Federal Energy Regulatory Commission (FERC) also promulgated a new set

* Dr. Ben Champion is a U.S. Department of Energy Solar Energy Innovator Fellow, working at the Arizona Corporation Commission on renewable energy regulatory policy. He has a J.D. from the James E. Rogers College of Law at the University of Arizona and a D.Phil. in Geography from the University of Oxford. This note topic was inspired by issues the Arizona Corporation Commission was facing during the summer of 2019, when the author served as a legal extern for the Commission. The author would like to thank the editorial board and editors of AJELP for selecting his note to publish, and for their extensive and professional support in editing the note into this final published form. Thanks also go to Profs. Kirsten Engel and Priya Sundareshan, who were advisors to the note, as well as Matt McDonnell who provided valuable comments throughout the drafting process. Finally, thanks to the staff of the Legal Division of the Arizona Corporation Commission which provided the author invaluable exposure and education while a legal extern about a range of regulatory issues that were the early foundations of this article, a testament to the value of public service internships in furthering timely scholarship on important policy issues.

of PURPA regulations as of July 2020 to radically reduce the scope of independent renewable energy producers who qualify under PURPA and the rates that they would receive.

This Note reviews the history of PURPA and its overall governance regime; explores state responses to controversies and identifies lessons that can be gleaned from the states as laboratories of policy innovation; and examines the implications of the new FERC PURPA regulations. It concludes that the examples of Michigan and North Carolina show that PURPA can play an important role in bringing together diverse stakeholders to develop creative win-win solutions to the challenges of a transforming electricity sector. This role for PURPA should not be abandoned by federal or state regulators without regulatory reforms with equal or greater potential to achieve similar creative solutions.

INTRODUCTION	2
PART I: OVERVIEW OF PURPA	4
A. The History of PURPA	4
B. PURPA’s Cooperative Federalism Regime	6
PART II: VARIOUS STATE RESPONSES TO CONTEMPORARY POLICY ISSUES	8
A. Current Policy Issues	8
B. The Intermountain West: Idaho, Utah & Montana	10
C. Michigan as Model of Progressive Compromise	12
D. North Carolina as Model of Compromise through Legislative Leadership	14
E. Creating Policy Reform through Stakeholder Engagement: Lessons from Michigan and North Carolina PURPA Changes	17
F. Jurisdictional Questions for State PUCs in the Role of Broker for a “Middle Way”	18
G. Case Study of Arizona: Bucking the Trend, Siding with QFs	20
PART III: FERC’S NEW PURPA MODERNIZATION RULES & THEIR IMPLICATIONS FOR STATES	24
A. Overview of FERC’s New PURPA Modernization Rules & Their Implications for States	24
1. “Avoided Cost” Definition	25
2. Project Size Threshold to Receive PURPA Standard Contracts	25
3. Implications for Arizona	26
4. Arguments by Opponents of the New Rule	27
B. Do FERC’s New PURPA Rules Preempt State Regulatory Agencies Who Developed PURPA-Like Rules Based on State Authority?	27
1. Supreme Court Jurisprudence Regarding Federal Preemption of Energy Rules	28
C. Will FERC’s New PURPA Rule Survive Judicial Review?	29
CONCLUSIONS	32

Introduction

A large and growing number of states have made commitments toward a clean energy transition to mitigate their contributions to climate change due to greenhouse gas emissions from the electricity sector. In 1978, Congress passed the Public Utility Regulatory Policies Act (PURPA) with the express purpose of increasing renewable energy production from solar, wind, and geothermal sources to diversify the U.S. energy supply in light of the 1973 energy crisis. For the past 40 years, PURPA has supported several stages of development of the renewable energy

industry through providing access to the electricity grid for independent producers of renewable energy. PURPA's nationwide scheme requires electric utilities to purchase renewable energy from independent power producers at rates equal to or less than the "avoided costs" utilities would otherwise need to pay to procure the energy from other sources. But this scheme also is based on cooperative federalism, delegating authority to states to develop state policies consistent with PURPA's purpose of encouraging renewable energy development. For the last 40 years, PURPA has served its purpose, often operating as a necessary legal support structure to incorporate new renewable energy projects into electricity grids throughout the U.S. Although the Energy Policy Act of 2005 reduced the geographic scope of its applicability, PURPA remains a potent legal force enabling new renewable energy projects to access the electricity grid throughout most of the western and southeastern U.S.

Yet times have changed since PURPA was originally passed, and some question whether it is still needed, to what degree, and what aims it serves. Renewable energy technologies, especially solar panels and wind turbines were in their infancy in 1978. Today, technology and industry development has advanced to the point where solar and wind technology is cost-competitive with the cheapest fossil fuel energy sources. This cost competitiveness suggests that PURPA protections are not necessary to see growth in renewable energy moving forward. Growth in renewable energy installations has reached a fevered pitch, but the question is whether the declining cost curve of new renewable energy installations is sufficient on its own to encourage access to the grid for independent renewable energy producers or whether PURPA still plays an important role in encouraging these independent developments.

In addition, climate change was not a policy consideration in 1978, whereas today concerns about reducing greenhouse gas emissions are an increasing political factor in federal elections and are creating powerful policy shifts at the state level. The combination of the moral force of climate change and the economic driving force of economies of scale might support PURPA's sunset. Yet some advocates see it as a sustained force for much-needed innovation in the electricity sector, especially against the entrenched power of incumbent regulated utility governance structures which prefer to reap long-term profits from their existing energy production assets. To make big shifts now would mean stranding these assets and compromising their fair return on past investments to their shareholders. At the same time, there is money to be made and jobs to be created in the growing renewable energy field.

Amidst this changed political, economic, and moral landscape, state policymakers must balance the interests of electricity ratepayers, utility companies, emerging independent power producers, and the general public. In addition, the landscape continues to change at an accelerating pace.

This Note will consider whether PURPA still plays an important role in expanding renewable energy production in the U.S., as well as who benefits from sustaining or expanding PURPA protections for independent renewable energy producers. Part I reviews the history of PURPA and describes its implementation through a regime of cooperative federalism. Part II reviews a range of recent state policy controversies surrounding PURPA and how each state responded. It concludes with a detailed case study of Arizona's recent decision to expand PURPA supports for independent renewable energy producers. Finally, Part III describes new proposed rules from FERC which would dramatically change the number and types of independent

renewable energy developments that would either qualify or be financially viable under PURPA. In addition, Part III evaluates whether new FERC rules would likely preempt state rules that attempted to imitate current PURPA rules through reviewing recent Supreme Court jurisprudence. Part III concludes with a review of arguments from opponents of the new FERC rules and provides an initial assessment of the strength of these arguments under potential future judicial review.

As seen in the examples of Michigan and North Carolina, PURPA can be a useful backstop for incentivizing reluctant utility companies to come to the negotiating table. But alternative state policies could have equal or greater force while avoiding unintended market disruptions and protecting ratepayer financial interests. To balance utility company and consumer interests while also transforming the grid to address climate change, the combination of aggressive renewable energy portfolio goals, integrated resource planning, and competitive energy procurement processes for utilities may be more capable than PURPA. However, state regulatory agencies need sufficient motivation and leadership to explore these kinds of reforms. While PURPA still has substantial force of law in some states, it has proven to be a motivator for meaningful reforms in at least two states recently.

Part I: Overview of PURPA

A. The History of PURPA

Congress passed PURPA in 1978.¹ PURPA was a policy response during the Carter Administration to the energy scarcity concerns of the 1970's. To address these concerns, Congress intended for PURPA's provisions to reduce dependence on imported fossil fuel energy, to encourage conservation of resources by electric utilities, and to buttress the reliability of the electric grid through diversifying the sources of energy on the grid.²

The central provision of PURPA for the interests of this Note requires electric utilities to purchase electricity from qualifying small producers of renewable electricity.³ "Small producers" are those who are not engaged in sale of electricity other than from small power production facilities—in other words, not electric utility companies.⁴ "Qualifying Facilities" (QFs) must use renewable energy, biomass, or waste energy as their primary source and must be capable of producing no more than 80 megawatts (MW) of electricity.⁵ Finally, electric utility companies are only required to purchase energy from qualifying facilities at rates equal to or below their "avoided cost." Avoided cost is defined as the "incremental cost of alternative electric energy" and "the cost to the electric utility of the electric energy which, but for the purchase from such . . . small power producer, such utility would generate or purchase from another source."⁶ Specifically, the rates must be "just and reasonable" to consumers, must not discriminate against qualifying facilities, and cannot exceed the costs to the electric utility from purchasing the electricity from another source or producing the electricity itself.⁷

In 1990, Congress extended support for renewable energy under PURPA by elaborating on the definition of "small power production facility" to mean "a facility which produces electric

¹ Public Utility Regulatory Policy Act (PURPA), Pub. L. No. 95-617, 92 Stat. 3117 (1978).

² *Id.* § 2, 92 Stat. at 3119.

³ *Id.* § 210, 92 Stat. at 3144–47.

⁴ *Id.* § 201, 92 Stat. at 3134–35.

⁵ *Id.*

⁶ *Id.* § 210(d), 92 Stat. at 3145.

⁷ *Id.* §§ 210(b), 210(d), 92 Stat. at 3144–45.

energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources, or geothermal resources.”⁸ However, these provisions sunset at the end of 1999.⁹

The Energy Policy Act of 2005, ushered in as a result of the Bush Administration’s energy initiatives, took a different tack. This broader act contained provisions to support technology research, development, and commercialization efforts for a wide range of energy technologies, and it encompassed fossil fuels and renewable energies.¹⁰ However, the Act also amended PURPA, dramatically curtailing the geographic scope and market conditions under which utility companies must purchase electricity produced by qualifying small renewable energy facilities. It removed the obligation for utilities to purchase from qualifying renewable energy facilities when those facilities have nondiscriminatory access to sell their electricity through (1) independent real-time wholesale markets, (2) a regional transmission organization (RTO) through which the facilities have meaningful access to wholesale markets, or (3) some other form of equivalent access to wholesale electricity markets.¹¹ This effectively excluded all geographical territories in the U.S. governed by RTOs from the small-scale renewable energy purchasing requirements for electric utilities. As of 2009, approximately 60% of energy customers were within the service territories governed by RTOs, with western and southeastern states representing the primary regions of the U.S. without RTOs to manage wholesale markets.¹²

The 2005 Energy Policy Act also exempted electric utility companies from requirements to provide electricity service to qualifying small renewable energy facilities in states with competitive retail electricity markets.¹³ Specifically, utilities are exempt from PURPA’s sales requirements if there is a competitive retail market of electricity suppliers in the state and if the electric utility is not required by state law to sell electric energy in its service territory.¹⁴ This provision effectively eliminates PURPA support for independent renewable energy producers within states that have enacted one of various forms of deregulation to create competitive retail markets for electricity. The late 1990s and early 2000s saw a widespread movement among states to partially or fully deregulate electric retail sales which allowed retail customers to shop among electricity rate structures from a variety of providers.¹⁵ Proponents of deregulation usually argue that market forces and competition are more effective at keeping consumer costs down than complex regulatory rate-making processes. They also assert that such market forces are more

⁸ Federal Power Act, Pub. L. No. 101-575, § 3, 104 Stat. 2834 (1990).

⁹ *Id.*

¹⁰ *See generally* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

¹¹ *Id.* § 1253(a), 119 Stat. at 967–68.

¹² *About 60% of the U.S. Electric Power Supply is Managed by RTOs*, U.S. ENERGY INFO. ADMIN. (Apr. 4, 2011), <https://www.eia.gov/todayinenergy/detail.php?id=790>.

¹³ 16 U.S.C. § 824a-3(m)(5) (relevant PURPA statute, as amended by the Energy Policy Act); Energy Policy Act § 1253(a).

¹⁴ 16 U.S.C. § 824a-3(m)(5); Energy Policy Act § 1253(a).

¹⁵ Kimberly Palacios, *Electricity Residential Retail Choice Participation Has Declined Since 2014 Peak*, U.S. ENERGY INFO. ADMIN. (Nov. 8, 2018), <https://www.eia.gov/todayinenergy/detail.php?id=37452>.

effective at optimizing and diversifying the sources of energy on the grid than the integrated resource planning required of regulated monopoly utility companies.¹⁶

Opponents of deregulation argue that typical consumers are not sufficiently knowledgeable about electricity rates to make educated choices about rate plans to drive the kinds of market efficiencies that proponents advocate.¹⁷ In addition, this lack of knowledge among the average consumer means that many consumers may struggle to make informed and rational choices in a competitive electricity marketplace,¹⁸ but vulnerable consumers also may not be adequately protected from fraud or misrepresentation in marketing by sophisticated electricity providers.¹⁹ It is unclear whether consumer choice will drive effective diversification of electricity energy sources and expansion of renewable energies. The 2005 PURPA amendments removed a backstop requiring access to these deregulated retail markets for independent renewable energy producers.

B. PURPA's Cooperative Federalism Regime

PURPA has been implemented as a regime of cooperative federalism between FERC and state utility regulatory agencies. Congress enacted PURPA with generalized language that granted FERC extensive flexibility in implementing its provisions through rulemaking.²⁰ FERC then created rules to comply with PURPA, largely mimicking the statutory language and limits established by Congress. The effect of the FERC rules has been to delegate rulemaking around implementation of PURPA to state regulatory commissions.

FERC promulgated generalized rules that set broad boundary conditions on the size of qualifying independent renewable energy facilities and on the nature of rates to be paid for the energy generated by these facilities. However, the details of defining specific sizes and rates are left to state regulatory commissions.²¹ For instance, FERC regulations state that independent small renewable energy generating facilities “may not exceed 80 megawatts” in capacity, but do not specify whether all facilities smaller than 80 MW in size qualify for the purposes of PURPA.²² Because FERC's rules only state a ceiling for the size of QFs, FERC enabled states to set a smaller

¹⁶ See NERA ECON. CONSULTING, *COMPETITIVE ELECTRICITY MARKETS: THE BENEFITS FOR CUSTOMERS AND THE ENVIRONMENT* 1 (Feb. 2008), https://www.nera.com/content/dam/nera/publications/archive1/PUB_CompetitiveElectricityMarkets_Feb2008.pdf.

¹⁷ Energy Frameworks, *4 Energy Deregulation Disadvantages*, MEDIUM (Jan. 3, 2017), <https://medium.com/@nrgframeworks/4-disadvantages-of-energy-deregulation-f0314a6a7abf>; Ralph Cavanagh & Amanda Levin, *Rehabilitating Retail Electricity Markets: Pitfalls and Opportunities*, in *FUTURE OF UTILS. UTILS. OF THE FUTURE: HOW TECH. INNOVATIONS IN DISTRIBUTED ENERGY RES. WILL RESHAPE THE ELEC. POWER SECTOR* 175–192 (Fereidoon P. Sioshansi ed., 2016).

¹⁸ Energy Frameworks, *supra* note 17.

¹⁹ David Martin, *Some Customers Say They're 'Legally Robbed' by Deregulated Power*, AL JAZEERA AM. (Mar. 26, 2015), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/3/26/deregulated-electricity-fraud.html>.

²⁰ 16 U.S.C. § 824a-3(a)–(b) (requiring that FERC promulgate “such rules as it determines necessary” provided the size of QFs remains below 80MW in size, and that rates for purchased electricity are “just and reasonable to the electric consumers . . . and in the public interest . . . [do] not discriminate against . . . qualifying small power producers,” and do not “exceed[] the incremental cost to the electric utility of alternative electric energy.”). This broad and ambiguous language provides FERC wide discretion in defining QFs by size and determining rates electric utilities must pay QFs for their electricity.

²¹ *Id.* § 824a-3(f)(1) (requiring state regulatory agencies to implement FERC's promulgated rules for each electric utility for which it regulates rates).

²² 18 C.F.R. § 292.204(a)(1) (2019).

size threshold for QF eligibility, and thus states have implicit authority to define the size limits for QFs.

The other major realm of FERC delegation to state regulators within PURPA rules involve rates utilities must pay for purchased power from qualifying small renewable energy facilities. FERC states that the rates must be “just and reasonable” to consumers and the general public and must not “discriminate against qualifying . . . small power production facilities.”²³ The regulation also sets an upper limit on the rates utility companies must pay to these QFs, limited to the utilities’ “avoided costs for purchases.”²⁴ Further regulatory requirements include:

- standard contract terms should be established for qualifying facilities below 100 kilowatts (kW) in size;²⁵
- larger facilities *may* have standard rates established (as opposed to rates based on a case-by-case analysis);²⁶
- avoided costs must be determined based on various factors, including:
 - reliability and dispatchability of the supplied energy;
 - ability to coordinate scheduled outages;
 - usefulness of energy during system emergencies;
 - indirect effects on deferral of developing new power plants; and
 - reductions in fossil fuel use.²⁷

The FERC regulations specify several other parameters that states must consider in defining avoided costs, but none of them dictate how to balance or weigh these respective factors in specifying formulas to calculate avoided costs.²⁸ FERC thus established broad boundary conditions regarding the types of facilities and the rates these facilities would be paid by utility companies forced to purchase their energy under PURPA and deferred to state regulators to establish precise definitions.

The details of size characteristics for QFs and the calculation of avoided cost rates paid to QFs were left to state public utility commissions (PUCs) through their authority to regulate both intrastate infrastructure and rates associated with regulated utilities. This cooperative federalism regime between federal and state authority has operated since 1935 to regulate the entirety of the nation’s electricity grid.²⁹ Congress enacted PURPA as an amendment to various sections of the

²³ *Id.*; see also 16 U.S.C. §§ 824a-3(a)-(b) (illustrating analogous statutory language which FERC mimics in its own rules).

²⁴ § 292.304(a)(2); see also 16 U.S.C. § 824a-3(b) (demonstrating statutory language that reflects the concept of a rate ceiling for purchased energy from QFs as that of avoided costs: “No such rule prescribed . . . shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.”).

²⁵ § 292.304(c).

²⁶ *Id.*

²⁷ *Id.* § 292.304(e).

²⁸ See generally § 292.304.

²⁹ Robert R. Nordhaus, *The Hazy “Bright Line”: Defining Federal and State Regulation of Today’s Electric Grid*, 36 ENERGY L.J. 203, 203 (2015).

Federal Power Act of 1935 (FPA).³⁰ The FPA established the FERC and charged it with implementing a regulatory regime for electricity grids. FERC maintains authority to regulate the transmission and wholesale sales of electricity in interstate commerce while the FPA expressly preserves any state authority to regulate intrastate distribution and retail sales of electricity.³¹ In this regime, wholesale is defined as the “sale of electric energy to any person for resale.”³² The Supreme Court has largely interpreted the FPA as creating a federalism regime with a clear “bright line” division of labor between federal and state regulatory authority over the electricity grid.³³ This scheme thus created what some have called “dual federalism” or “concurrent jurisdiction” between federal and state governments in regulating electricity infrastructure and management.³⁴

This regime has resulted in a national patchwork of state policies, driving uneven geographies of development that have created demand for policy reforms within states and even at the federal level. The terms FERC has left to states to define constitute the heart of PURPA’s provisions for independent renewable energy projects and largely determine the attractiveness of a given state for developers of these projects. With the diversity of state regulations implementing PURPA, some states are more friendly to renewable energy projects due to their respective definitions of avoided cost rates, qualifying sizes for QFs, and standard contract terms—especially minimum contract lengths. This has led to a geographically uneven pattern of development of renewable energy projects under PURPA. The following section tells the stories of several states that have recently revised their definitions of QF sizes, standard contract lengths, and formulas for calculating avoided cost. It also discusses the implications for developers and the growth of renewable energy under PURPA in these states. These stories convey a mixture of trends in the evolving ecosystem of state-level experimentation of PURPA throughout the U.S.

Part II: Various State Responses to Contemporary Policy Issues

A. Current Policy Issues

Natural gas costs have declined dramatically since PURPA was originally passed. However, renewable energy costs have also decreased dramatically, making it cost competitive with fossil fuel electricity sources.³⁵ This means renewables can often outcompete existing and new fossil fuel energy and thus can often still be profitable even under avoided cost formulas required by PURPA. As a result, renewable energy developers see PURPA as a potentially valuable tool for gaining access to the grid in the many states that lack well-developed wholesale markets for electricity.³⁶ Since the sunbelt states of the western and southeastern U.S. both have

³⁰ See PURPA §§ 201, 210, 92 Stat. at 3134, 3144 (amending the Federal Power Act, 16 U.S.C. §§ 796, 824 to include definitions of small power production facilities in § 796 and adding § 824a-3 regarding requirements for electric utilities to purchase electricity from such facilities).

³¹ 16 U.S.C. § 824(b)(1).

³² *Id.* § 824(d).

³³ Nordhaus, *supra* note 29, at 206 (discussing *Fed. Power Comm’n v. S. Cal. Edison Co.*, 376 U.S. 205 (1964)).

³⁴ Joseph H. Margolies, *Powerful Friends: EPSA, Hughes, and Cooperative Federalism for State Renewable Energy Policy*, 118 COLUM. L. REV. 1425, 1426 (2018) (use of “dual federalism”); Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 430–36 (2016) (extensive discussion of the modern interpretation of FPA’s “concurrent jurisdiction” regime).

³⁵ Gavin Bade, *10 Trends Shaping the Electric Power Sector in 2019*, UTIL. DIVE (Jan. 2, 2019), <https://www.utilitydive.com/news/10-trends-shaping-the-electric-power-sector-in-2019/545119/>.

³⁶ Since the Energy Policy Act of 2005 exempted states with well-developed wholesale markets from enforcing the must-purchase provisions of PURPA. *See generally* Energy Policy Act, 42 U.S.C. § 1253 (creating exemptions from

the greatest potential solar energy resource, and also lack RTOs or Independent Service Operators (ISOs) governing wholesale markets, these states are primed for explosive growth in solar energy. PURPA holds the potential to be a powerful tool for renewable energy developers in many of these states. This makes PURPA a critical legal and regulatory battleground for who will own solar energy resources and who will shape renewable energy markets.

Yet concerns are rising regarding the above anti-competitive implications of PURPA. These implications are ironic because Congress intended for PURPA to generate competition in the electricity sector by giving independent developers access to the grid that they were previously denied by entrenched incumbent utility companies. But today, renewable energy developers who fail to compete in competitive requests for proposals (RFPs) for new electricity generation have PURPA as a second route for their developments. In using PURPA to develop their projects, they can end up displacing the very projects that outcompeted them in RFPs, resulting in higher costs to consumers as an unintended consequence of PURPA today.³⁷ Voices raising these types of concerns generally point out the tension between the opportunities for consumer savings due to continually declining costs of production of new renewable energy and natural gas on the one hand and PURPA's mandated long-term must-take energy contracts for new renewable energy by utility companies on the other.³⁸

In this landscape, regulators creating PURPA policies for their states are caught between two standards imposed by PURPA rates: (1) that they "shall be just and reasonable to electric consumers" and (2) "shall not discriminate against qualifying small power producers."³⁹ States have responded in a variety of ways in recent years to the need to balance these twin objectives while also adjusting state PURPA policies to reflect the rapidly changing economics and political environment in the electricity sector generally and around renewable energy development in particular. The following subsections tell a range of stories of this balancing act from states in which PURPA still has substantial legal force.

PURPA requirements to purchase energy from QFs in states where one of three forms of access to wholesale markets exists for QFs); *see also supra* notes 13-14 and associated text.

³⁷ Travis Kavulla & Jennifer M. Murphy, Nat'l Ass'n of Regulatory Util. Comm'rs, *Aligning PURPA With the Modern Energy Landscape: A Proposal to FERC* 4-5 (Oct. 2018), <https://pubs.naruc.org/pub.cfm?id=E265148B-C5CF-206F-514B-1575A998A847> (discussing the case of a developer in Colorado who did not succeed in an RFP for renewable energy by Xcel utility company and turned around to apply for 17 total solar and wind projects under PURPA, totaling 1,400 MW of new generation capacity, which Xcel would be required to purchase under PURPA and would obviate Xcel's need for the energy from its RFP which would have come at a much cheaper cost to consumers).

³⁸ Renewable energy is likely to cost even less in the years to come, so why lock utility companies into long-term contracts for renewable energy now, when these could also become stranded assets in the future?

³⁹ 16 U.S.C. § 824a-3(b) (statutory requirements for non-discriminatory, but just and reasonable rates); 18 C.F.R. § 292.304 (FERC regulation regarding rates for purchased energy under PURPA); National Association of Regulatory Utility Commissioners, Comments on September 19, 2019 Proposed Rulemaking to Revise Sections 201 and 210 of PURPA (Dec. 3, 2019), <https://pubs.naruc.org/pub/EA6CB2BF-155D-0A36-310E-716EF69AABC0>.

B. The Intermountain West: Idaho, Utah & Montana

A common storyline for recent state histories regarding PURPA policies begins with a surge of applications for contracts by QFs in the 2014–2016 timeframe. Next follows a reaction by state regulators to restrict the size of allowable QFs, to reduce the “avoided cost” rates for contracts, and to reduce the mandatory minimum term length of fixed price PURPA contracts. These changes all have the effect of reducing the number and size of renewable energy projects that can qualify to gain access to the grid to sell their electricity or obtain financing to develop their projects. These moves effectively reduce the impact of PURPA in fostering renewable energy projects.

In Idaho and Utah, Rocky Mountain Power, the largest public utility company in either state with an extensive six-state footprint in the western electricity grid, led these shifts. As a result, in 2015 the Idaho Public Utilities Commission reduced minimum PURPA contract term lengths from 20 years to two years, with the implication that QFs greater than 100 kW in size would be much better off negotiating contracts through the utility’s regulated Integrated Resource Planning process.⁴⁰ Utah, on the other hand, only reduced its PURPA contract term lengths from 20 years to 15 years, even though Rocky Mountain Power had advocated for a three-year maximum.⁴¹ The difference in Utah is that a substantial renewable energy advocacy lobbying effort engaged the Utah Public Service Commission to defend long-term contracts for PURPA projects.⁴² The reduction in maximum contract term length from 20 years to 15 years is not as likely to make a substantial impact in the demand for PURPA contracts among QFs in Utah as the shift from 20 years to two years in Idaho.

Montana has seen greater litigation over its changes to PURPA policies than most of the other states reviewed here. The Montana Public Service Commission (Montana PSC) started with an emergency order in 2016 to suspend its avoided cost rates for PURPA QFs from the \$66 per megawatt hour (MWh) rate set in 2012.⁴³ Instead, small renewable energy QFs would have to negotiate with NorthWestern, Montana’s primary utility company, on a case-by-case basis.⁴⁴ The emergency order came at the request of NorthWestern based on the rapid and large surge of applications of small solar farms for QF standard contracts under PURPA under the \$66 per MWh rate.⁴⁵ FLS Energy, the developer of a number of these solar farms, filed a complaint with FERC arguing that the emergency order violated FERC rules under PURPA by arbitrarily eliminating a rate that had been set through appropriate rate-making procedures. FLS also asserted that imposing a requirement to negotiate rates with utilities on a case-by-case basis also contravened FERC regulations.⁴⁶ FERC found the emergency order to be a violation of PURPA on the grounds that

⁴⁰ Robert Walton, *Idaho Regulators Trim Renewables Integration Rates Under PURPA for Rocky Mountain Power*, UTIL. DIVE (Dec. 11, 2017), <https://www.utilitydive.com/news/idaho-regulators-trim-renewables-integration-rates-under-purpa-for-rocky-mo/512696/>.

⁴¹ Krysti Shallenberger, *Utah Regulators Slim Down PURPA Contracts to 15 Years*, UTIL. DIVE (Jan. 8, 2016) <https://www.utilitydive.com/news/utah-regulators-slim-down-purpa-contracts-to-15-years/411790/>.

⁴² *Solar’s Future Still Shining Bright in Utah*, WESTERN RES. ADVOCATES (Feb. 22, 2016), <https://westernresourceadvocates.org/blog/solars-future-still-shining-bright-in-utah/>.

⁴³ Peter Maloney, *Montana PSC Suspends PURPA Rates for Small Solar Farms*, UTIL. DIVE (June 20, 2016), <https://www.utilitydive.com/news/montana-psc-suspends-purpa-rates-for-small-solar-farms/421151/>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Robert Walton, *FERC Rejects Montana Decision to Suspend PURPA Rates for Small Solar Farms*, UTIL. DIVE (Dec. 19, 2016), <https://www.utilitydive.com/news/ferc-rejects-montana-decision-to-suspend-purpa-rates-for-small-solar-farms/432612/>.

case-by-case negotiations violated the statute's principles due to the ability for utility companies to drag out cost studies and negotiations, especially since the intent of PURPA was to provide QFs guarantees that were not contingent on the approval of utility companies.⁴⁷ FERC ultimately decided against initiating an enforcement action against Montana regarding this finding, but instead used its discretion under FERC's own rules from 1983 to defer to the parties to litigate enforcement of FERC's finding.⁴⁸

Following the emergency order, in 2017 the Montana PSC set a new avoided cost rate of \$31 per MWh and reduced contract term lengths from 25 years to 15 years.⁴⁹ These changes were followed by complaints and litigation from QFs that argued that both the reduction in contract term length and avoided costs were arbitrary, unreasonable, and discriminatory.⁵⁰ Among the evidence in the record were statements by a Montana Commissioner heard via live microphone prior to the vote that, "The ten year might do it if the price doesn't. . . . [J]ust dropping the rate that much probably took care of the whole thing."⁵¹ The statements were a response to a staff member saying that the contract term length change is "going to probably kill . . . development entirely."⁵²

In April 2019, the Montana District Court ruled on this lawsuit and found that cutting avoided costs in half as well as reducing term lengths of contracts were both arbitrary and unreasonable for various procedural, precedential, evidentiary, and analytical reasons.⁵³ The court vacated and modified the Montana PSC's Final Orders in NorthWestern's 2017 rate case, dictating that standard contract terms would be for 25 years, that the rates should be based on prior staff memoranda, and that they must include the value of carbon emissions saved from renewable energy.⁵⁴ The PSC appealed to the Montana Supreme Court which ruled in August 2020 that the district court did not err in its determinations that the PSC orders were arbitrary and unreasonable.⁵⁵

In the meantime, independent QF developers sued to compel FERC to require the Montana PSC to revert to its 2012 avoided cost rate of \$66 per MWh until it could develop a new avoided cost rate through a full ratemaking proceeding pursuant to its decision that the Montana PSC's 2016 emergency order had violated PURPA.⁵⁶ In June 2019, the Ninth Circuit Court of Appeals

⁴⁷ FLS Energy, Inc., 157 FERC 61,211, ¶4 (2016), 2016 WL 7381091 (providing no reasoning for its decision not to seek enforcement action, but merely asserted its discretion to do so).

⁴⁸ See Walton, *supra* note 46; FLS Energy, 157 FERC at ¶¶ 7-8, 11. FERC provided no reasoning for its decision not to seek enforcement action, but merely asserted its discretion to do so.

⁴⁹ Catherine Morehouse, *Montana Judge Rules PSC Intentionally Set PURPA Rates to Kill Solar Projects*, UTIL. DIVE (Apr. 8, 2019), <https://www.utilitydive.com/news/montana-judge-rules-psc-intentionally-set-purpa-rates-to-kill-solar-project/552236/>.

⁵⁰ Petition for Review at 29-30, *Vote Solar v. Mont. Dept. of Pub. Serv. Regulation*, (Mont. Dist. Dec. 13, 2017) (No. BDV-17-0776), 2017 WL 11426654.

⁵¹ *Id.* at 18, ¶ 52.

⁵² *Id.*

⁵³ Order Vacating and Modifying Montana Public Service Commission Order Nos. 7500c & 7500d at 1-13, *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation* (Mont. Dist. Apr. 2, 2019) (No. BVD-17-0776).

⁵⁴ *Id.* at 13.

⁵⁵ *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, 473 P.3d 963, 980, 981, 983 (Mont. 2020).

⁵⁶ Catherine Morehouse, *Ninth Circuit Rules It Can't Make NorthWestern Pay Higher PURPA Rates for Solar Facilities*, UTIL. DIVE (June 6, 2019), <https://www.utilitydive.com/news/ninth-circuit-montana-psc-purpa-rates-solar-facilities/556283/>.

found that the states are the right province for addressing these issues and that to require Montana to go back to 2012 rates would violate the Eleventh Amendment's protection of states against suits by the federal government for past conduct because the Montana commission had adjusted rates by a full ratemaking process in 2017.⁵⁷ This ruling could have significant implications for the ability of FERC to take action against state commissions in other circumstances as well.

These two decisions could leave the status of Montana's avoided costs for QFs under PURPA in a state of uncertainty. On the one hand, the Ninth Circuit prevented a reversion to the 2012 \$66 per MWh avoided cost rates on Eleventh Amendment grounds because the Montana PSC had subsequently created new avoided cost rates in 2017. On the other hand, only two months prior to the Ninth Circuit decision, the Montana district court vacated those same 2017 rates as arbitrary and capricious. Now that the Montana Supreme Court upheld the findings of the district court, it is unclear whether a reversion to the 2012 rates based on a finding of arbitrary and capricious rate-setting would conflict with the holding of the Ninth Circuit. However, if this controversy is resolved in the end, the Montana PSC will eventually establish new avoided cost rates through an appropriate decision-making process. Thus far, the direction of its actions has clearly been to recognize the large reductions in electricity cost in the western grid and to build these cost reductions into the avoided cost rates available to QFs under PURPA. Just as in other states, this will make it more difficult to finance renewable energy projects in Montana under PURPA.

Outside of western states, there have been some interesting stories of compromise between independent energy producer interests and public utilities over PURPA contract terms. Michigan and North Carolina are two examples.

C. Michigan as Model of Progressive Compromise

In June 2019, Michigan's Public Services Commission brokered a settlement with Consumers Energy—the largest utility company in the state—as well as an array of renewable energy developers and environmental advocacy groups.⁵⁸ This settlement commits Consumers Energy to retire a significant amount of coal-fired electricity generation as well as initiate competitive procurement of 1,200 MW of new solar energy by 2021, and half of this energy must come from independent producers.⁵⁹ As a result, the bulk of Consumers Energy electric power procurement through 2021 will occur contractually and outside Michigan PSC-regulated PURPA development queues. Rather than receiving fixed avoided cost rates, independent producers will receive rates set in power purchase agreements between independent producers and Consumers Energy based on Consumers Energy's integrated resource planning and competitive bidding processes within RFPs for renewable energy projects.⁶⁰ In other words, the settlement effectively eliminates PURPA protections for independent developers of renewable energy while creating large opportunities for these independent developers to bid on developing renewable energy projects for the utility company under its commitment within the settlement to new renewable energy.

⁵⁷ *Bear Gulch Solar, LLC v. Mont. Pub. Serv. Comm'n*, 755 Fed. Appx. 295, 298 (9th Cir. 2019) (declining to provide relief to Plaintiffs to set retroactive rates, since it is barred by doing so by the Eleventh Amendment).

⁵⁸ See Press Release, Michigan Public Service Commission, MPSC Approves Consumers Energy's Integrated Resource Plan (June 7, 2019), https://www.michigan.gov/mpsc/0,9535,7-395-93307_93313_17280-498156--y_2017,00.html.

⁵⁹ See *id.*

⁶⁰ See *id.*

The Michigan story starts in 2017 with changes the Michigan Public Service Commission (Michigan PSC) made to PURPA contract term lengths and QF sizes. The Michigan PSC increased contract term lengths to 20 years for independent renewable energy projects up to two MW in size.⁶¹ Two MW is large enough to create economies in scale for solar farms and 20 years is long enough for independent developers to secure financing. Indeed, the aim of the Michigan PSC was to accelerate renewable energy development in the state.⁶² The Michigan PSC achieved its aim, so much so that it created a backlash. By the end of 2018, Consumers Energy had more than 100 solar projects in its development queue from independent developers requesting contracts under PURPA, for a total of 296 MW of new solar capacity to come online.⁶³ Consumers Energy cried foul to the Michigan PSC, arguing it had no need for any new electricity generation capacity for the next ten years, and that these 100 projects would exceed the cumulative capacity of all solar electricity facilities in the state thus far.⁶⁴ In response to these concerns, the Michigan PSC halted implementation of its 2017 rules in December 2018, which independent renewable energy developers and environmental advocates protested.⁶⁵ After months of negotiations between the developers, environmental advocates, Consumers Energy, and the Michigan PSC, Consumers Energy and the Michigan PSC finally reached a settlement in September of 2019.⁶⁶

The settlement balances the interests of the utility company, independent renewable energy developers, environmental advocates, and ratepayer advocates. Consumers Energy is not forced to take renewable energy it does not need. Rather, it will now be forced to decommission greenhouse gas-intensive coal energy facilities and to finance the plant closings on its own rather than through utility rates.

This is a large concession for a utility company whose primary business model is to extract return on its capital investments in energy infrastructure through rates. The purpose of decommissioning plants is to create a gap in energy supply that renewable energy can then fill—in effect to create a need for renewable energy. Once this happens, independent renewable energy developers have an opportunity to bid on development of these renewable energy resources through utility company RFPs. But, in exchange for the guarantee of large quantities of new renewable energy development, the independent developers must give up their guarantee of long-term set-rate must-take PURPA contracts. Now they will have to compete with each other, and with the utility company itself, for the right to develop the energy. Environmental advocates are the biggest winners, achieving the decommissioning of dirty coal plants and securing replacement by clean energy alternatives. Ratepayers will not be forced to continue paying for the coal plants

⁶¹ Grace Kankindi, *PURPA Reign: Michigan Could Grow Solar Market with New Avoided Cost Methodology*, SOL SYS. (June 21, 2017), <https://www.solsystems.com/blog/2017/06/21/mi-solar-growth-with-avoided-cost/>.

⁶² *Id.*

⁶³ Christian Roselund, *Consumers Energy Tries to Evade PURPA in Michigan*, PV MAG. (Jan. 26, 2018), <https://pv-magazine-usa.com/2018/01/26/consumers-energy-tries-to-evade-purpa-in-michigan/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Emma Foehringer Merchant, *Michigan PURPA Settlement Set to More Than Triple State's Solar Capacity*, GREENTECHMEDIA (Sept. 12, 2019), <https://www.greentechmedia.com/articles/read/final-purpa-settlement-in-michigan-set-to-more-than-triple-states-solar-ins>.

as “stranded assets” for the next several decades as they normally would but will instead pay through their rates for new renewable energy in its place, which is currently some of the cheapest energy available.

In the spirit of compromise, most parties have a mixture of pain and success in this settlement, but overall, it demonstrates several important lessons. First, it is possible to structure creative deals to advance state policy toward clean energy transitions—to quickly accelerate development of new clean energy resources while addressing the “stranded assets” problem of decommissioning legacy dirty energy infrastructure. Second, even though the settlement has the effect of bypassing PURPA within Michigan, it is clear that addressing the requirements of PURPA was the precipitating agent that created leverage toward development of this creative settlement. PURPA’s role as motivator of diverse parties toward a settlement should not be ignored in this case. Third, PSCs can play more than just the role of regulatory rate-setter. They have the opportunity to play the role of broker among diverse sets of stakeholders to find creative solutions to contested debates.

D. North Carolina as Model of Compromise through Legislative Leadership

North Carolina offers a counterpoint to the story of Michigan. North Carolina has historically had strong PURPA provisions of up to 15-year contracts and substantial avoided cost rates adjusted every two years. The state enacted these provisions shortly after Congress passed PURPA in 1978.⁶⁷ In addition, North Carolina has had a renewable portfolio standard with a goal of 12.5% of electricity from renewable energy by 2021 as well as a state tax credit of 35% for renewable energy projects.⁶⁸ This combination of incentives for renewable energy created a massive surge in renewable energy development in North Carolina starting between 2013 and 2014, especially for solar energy.⁶⁹ The surge made North Carolina one of the early hot spots of solar energy development as solar prices declined rapidly in the early 2010s, giving it the third-highest installed capacity of solar energy in the U.S. by 2018 and second-highest by the middle of 2019.⁷⁰

However, starting in 2015, North Carolina began to retract incentives for renewable energy under PURPA rules because this growth began to put financial and grid stability strain on utility companies. The North Carolina legislature allowed the 35% tax credit for renewable energy

⁶⁷ NAT’L RENEWABLE ENERGY LAB., CORPORATE RENEWABLE ENERGY PROCUREMENT PATHWAYS IN THE SOUTHEAST: NORTH CAROLINA 2 (Feb. 2019), <https://www.nrel.gov/docs/fy19osti/72486.pdf> (includes chart of historical standard contract term lengths compared with what was proposed in 2017 legislation); N.C. GEN. STAT. § 62-156(b) (for standard contract requirements—including the adjustments to rules every two years). Originally passed in 1979, and amended 2017 and 2019, the statute doesn’t provide specific formulas for the details of avoided costs, and only its recent 2017 and 2019 versions provide specific standard contract term lengths, whereas the original version left contract term length to be determined by the North Carolina PUC rules. *See* N.C. GEN. STAT. § 62-156.

⁶⁸ N.C. GEN. STAT., ART. 3B § 105-129.16A, https://www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_105/Article_3B.html (for 35% tax credit); Act of Aug. 20, 2007, 2007 N.C. Sess. Laws 397, <https://www.ncleg.net/Sessions/2007/Bills/Senate/PDF/S3v6.pdf> (for REPS—Renewable Energy Performance Standard).

⁶⁹ *North Carolina Solar*, SOLAR ENERGY INDUS. ASS’N, <https://www.seia.org/state-solar-policy/north-carolina-solar> (last visited Mar. 22, 2021).

⁷⁰ *Id.*

development to sunset at the end of 2015.⁷¹ The following year, utility companies in the state argued in the biennial proceeding to adjust rates for contracts with QFs pursuant to N.C. Gen. Stat. § 62-156 to reduce PURPA protections for independent producers.⁷² Specifically, they sought to reduce both the standard contract term lengths and the maximum capacity limit for QFs due to the exponential expansion of development and growth in the queue of projects waiting their turn to develop.⁷³ Duke Energy, the state's largest utility company, claimed it would pay \$2.9 billion to independent producers throughout the duration of long-term contracts established thus far under PURPA.⁷⁴ If it were to pay for the same energy under current pricing, it would only pay \$1.9 billion over the same time period—a differential that would grow exponentially with the scale of renewable energy growth under existing PURPA rules.⁷⁵ Duke Energy also unilaterally ceased adhering to mandated PURPA standard contract term lengths without regulatory approval.⁷⁶ Renewable energy developers pushed back, arguing the unilateral change in contract term lengths was illegal⁷⁷ and that such a diminishing cost curve is not unique to renewables.⁷⁸ Thus, the utility was applying a double-standard. Fossil fuel capital investments had experienced economies of scale over the years such that older investments were not as economical as later investments would have been—and yet the utility company still recouped those older higher-cost investments in full through rates.⁷⁹

This series of events and controversies set up the potential for an adversarial struggle which could have played out similarly to other states, such as Idaho or Montana, where the states' largest utility company made similar arguments much to the chagrin of the renewable energy industry in those states.⁸⁰ Instead, the interested parties reached out to legislators and entered into extended negotiations together, which ultimately produced legislation representing a compromise.⁸¹ The

⁷¹ *Renewable Energy Tax Credit (Personal)*, DSIRE NC CLEAN ENERGY TECH. CTR. (last updated Feb. 2, 2017), <https://programs.dsireusa.org/system/program/detail/541> (for information on North Carolina renewable energy tax credits).

⁷² Duke Energy Carolinas, LLC, N.C. Util. Comm'n Docket No. E-100, SUB 148, 19-34 (Oct. 11, 2017) (Order), https://s3.amazonaws.com/dive_static/paychek/NC_Avoided_Cost_Ruling_2017.pdf; Christian Roselund, *Duke Proposes Dismantling PURPA for Solar in North Carolina*, PV MAG. (Mar. 1, 2017), <https://pv-magazine-usa.com/2017/03/01/duke-proposes-dismantling-purpa-for-solar-in-north-carolina/>; Daniel Tait, *Dukeuplicity on PURPA*, ENERGY AND POLICY INST. (Mar. 13, 2019), <https://www.energyandpolicy.org/dukeuplicity-on-purpa/>.

⁷³ Tate, *supra* note 72.

⁷⁴ DSIRE NC CLEAN ENERGY TECH. CTR., *supra* note 71, at 11.

⁷⁵ *Id.*; John Downey, *Solar Industry Disputes Duke Energy's \$1B Overpayment Claim*, CHARLOTTE BUS. J. (Apr. 19, 2017), <https://www.bizjournals.com/charlotte/news/2017/04/19/solar-industry-disputes-duke-energys-1b.html>.

⁷⁶ John Downey, *Developer Accuses Duke Energy of Illegally Restricting Solar Power Deals*, CHARLOTTE BUS. J. (Jan. 30, 2017), <https://www.bizjournals.com/charlotte/news/2017/01/30/developer-accuses-duke-energy-of-illegally.html>.

⁷⁷ *Id.*

⁷⁸ See *id.* (noting cross examination of Duke by Lauren Bowen inquiring “whether Duke received payment from customers for the full costs of building plants years ago that could be built more cheaply now,” implying a double-standard in Duke's expectations for repayments of its own energy investments compared with what it proposes for independent developers which it seeks to deprive of similar financial guarantees).

⁷⁹ See *id.*

⁸⁰ See *supra* notes 40 through 57 and associated text.

⁸¹ Elizabeth Ouzts, *Critics Say Duke-Backed North Carolina Bill Will ‘Crush Renewables’*, ENERGY NEWS NETWORK (May 2, 2017), <https://energynews.us/2017/05/02/southeast/critics-say-duke-backed-north-carolina-bill-will-crush->

North Carolina legislature passed H.B. 589 in June 2017, which restricted access to traditional PURPA standard contracts for independent renewable energy developers. The legislation also created a new competitive sourcing program that would guarantee these developers the opportunity to win large-scale development contracts with the largest utility companies in the state.⁸² The amendments to traditional PURPA standard contracts included limiting contract term lengths to ten years from the previous maximum of 15 years.⁸³ The bill also reduced the maximum size of small producers able to take advantage of PURPA guarantees from 5 MW to 1 MW and further to 100 kW once an aggregate of 100 MW of QFs were granted access.⁸⁴ On the other hand, H.B. 589 created a requirement that utility companies source at least 2,660 MW and up to 3,500 MW of new renewable energy through competitive procurement processes with a maximum of 30% of new capacity developed by the utilities themselves.⁸⁵ The legislation was the result of extended negotiation between utility companies, renewable energy developers, and environmental advocates, much like the negotiation environment in Michigan.⁸⁶ However, in North Carolina's case, it was instigated by partisan legislative leaders rather than through a multi-stakeholder PUC settlement process.

Following enactment of H.B. 589, the North Carolina PUC then took up its standard biennial review of PURPA provisions only a few months later.⁸⁷ It formalized the provisions of H.B. 589 and also reduced the rates for allowable avoided costs under PURPA because natural gas prices had continued to decline in the preceding two years.⁸⁸ The net effect was a large shift away from PURPA as the means of access for independent renewable energy producers and toward competitive procurement processes managed by the utility companies.

Several broad lessons arise from the North Carolina example. First, it is another illustration, in addition to that of Michigan,⁸⁹ of a compromise where utility companies received relief from federal mandates of must-take contracts with small renewable energy producers in exchange for commitments to greatly increase their procurement of renewable energy. This creates substantial opportunities for renewable energy developers to vie for this additional development but under a competitive model rather than a guaranteed contract model. Second, it illustrates a model different from the Michigan approach because overt partisan political leadership led the process which leads to a much higher likelihood of disproportionate political clout on the part of the utility companies than the independent solar industry. With the legislature leading the way, rather than the PUC, the decision-making process lacked any of the procedural due process elements that might be included in an agency process. Indeed, only months after the legislature passed H.B. 589, the independent solar industry was already claiming "bad faith" on the part of

renewables/ (noting negotiations had been held "at the behest of [state] House Republican leaders," and recounting disputes among the parties in the middle of negotiations); Herman K. Trabish, North Carolina Wind Moratorium Threatens Hard-Won Solar Compromise, UTIL. DIVE (July 6, 2017), <https://www.utilitydive.com/news/north-carolina-wind-moratorium-threatens-hard-won-solar-compromise/445761/>.

⁸² Act of Jul. 27, 2017, 2017 N.C. Sess. Laws 1340, 1340 (2017); N.C. GEN. STAT. § 62-156, 62-110.8.

⁸³ § 1.(b), 2017 N.C. Sess. Laws at 1340; NAT'L RENEWABLE ENERGY LAB., *supra* note 67.

⁸⁴ § 1.(b), 2017 N.C. Sess. Laws at 1340 (revising N.C. GEN. STAT. § 62-156(b)(1)).

⁸⁵ Id. § 2(a) (establishing N.C. GEN. STAT. § 62-110.8 (with the relevant subsections as 62-110.8(a)-(b))).

⁸⁶ Trabish, *supra* note 81.

⁸⁷ Peter Maloney, *New North Carolina Regulatory Order Trims PURPA Avoided Cost Rates*, UTIL. DIVE (Oct. 18 2017), <https://www.utilitydive.com/news/new-north-carolina-regulatory-order-trims-purpa-avoided-cost-rates/507505/>.

⁸⁸ *Id.*

⁸⁹ *See generally* Merchant, *supra* note 66.

Duke Energy in its negotiations over the bill.⁹⁰ A legislatively brokered negotiation such as in North Carolina is most applicable for states with more politically or jurisdictionally limited PUCs, where legislatures are highly engaged with energy issues, or where the parties have substantial political relationships with the legislature. In such situations, well-funded and sophisticated utility companies may have more influence due to their greater access to information, financial resources, or political influence.

E. Creating Policy Reform through Stakeholder Engagement: Lessons from Michigan and North Carolina PURPA Changes

As the above sections outline, PURPA provisions today are engulfed in a contentious adversarial national conversation around the importance of renewable energy development and the value of mandates for utility companies to purchase renewable energy from independent developers. Advocates of reform argue that the electricity markets and institutions have evolved dramatically since Congress passed PURPA 40 years ago and that PURPA is no longer as necessary to spur diversification of energy sources. Advocates for stronger PURPA provisions argue that utility companies still maintain disproportionate information and resource advantages that prevent independent developers from having fair access to the grid. Of the states that have modified their PURPA rules in the past several years, the results in nearly every case would support the conclusion that either one or the other side of this debate won in that jurisdiction. In addition, the proposals within the recently published FERC Notice of Proposed Rulemaking (NOPR) suggest that the balance of power in this debate has shifted decidedly among FERC commissioners toward the side of a pro-utility and traditional business model. Yet the stories of Michigan and North Carolina suggest that a third way is possible to find win-win solutions between the two sides of this debate.

Michigan and North Carolina are both outliers in the recent history of PURPA reforms within state regulatory schemes. Each state ended up adjusting avoided cost calculations downward and reducing the minimum term length of standard contracts under PURPA. However, utilities achieved these detriments to independent developers in exchange for guarantees that the utilities would make large investments in procuring new renewable energy resources and would allow independent developers to bid for these projects through transparent competitive procurement processes. These compromises each entailed agreement between the same complex assemblage of stakeholder interests that commonly offer comments and testimony in PUC hearings around the country regarding PURPA. These interests include:

- utility companies seeking to minimize the number of “must-take” PURPA contracts, which reduces the amount of energy supply they can develop and profit from;
- ratepayer advocates siding with the utility companies in hopes of minimizing cost impacts on ratepayers, arguing that long-term PURPA contracts are not the long-term least-cost scenario;

⁹⁰ John Downey, *New Complaint Accuses Duke Energy of Bad Faith in Solar Negotiations*, CHARLOTTE BUS. J. (Oct. 19, 2017), <https://www.bizjournals.com/charlotte/news/2017/10/19/new-complaint-accuses-duke-energy-of-bad-faith-in.html>.

- free-market advocates promoting deregulation of utility rates as a better way to develop a clean-energy grid while minimizing costs;
- independent renewable energy developers seeking long-term minimum standard contract term lengths and accommodating avoided cost formulas to increase their chances of obtaining financing for projects and maximizing profitability; and
- environmental advocates hoping to leverage PURPA for rapid build-out of renewable energy for its own sake and in hopes of pressuring utility companies into early retirement of existing fossil fuel generation.

In both North Carolina and Michigan, the resulting compromise met the core priorities of each of the above stakeholder interests and created win-win solutions that have not occurred in other state PURPA actions. In both North Carolina and Michigan, PURPA minimum contract term lengths were reduced and avoided cost rates were adjusted which reduced the viability of PURPA as a mechanism for independent renewable energy developments in the state and satisfied the desires of utility companies and consumer and free-market advocates.⁹¹ At the same time, environmentalists achieved desired coal plant closures in Michigan and large-scale expansions of renewable energy development in both states.⁹² Independent developers received the opportunity to bid into large-scale procurement processes by utility companies and ended expensive procedural and lobbying gridlock within PUC administrative processes.⁹³

Yet neither of these breakthroughs occurred through structured multi-stakeholder discussions facilitated by the PUCs themselves. In North Carolina, the legislature brokered the conversation in a process steeped in insider political influence and ultimately acted through passing legislation as part of the deal—a partisan, legislatively-facilitated negotiation process.⁹⁴ In Michigan, the negotiations played out in reaction to recently adopted PURPA rules by the Michigan PSC.⁹⁵ The Michigan PSC rulemaking was a formal rulemaking process subject to open meeting laws and other more formalized trappings of regulatory agency proceedings. Such processes focus on hearings where different stakeholders can voice their opinions,—often focusing on points of conflict in a reactive manner—and in so doing fail to fully uncover the needs of all potential stakeholders or to discover win-win-win solutions. Some advocates for grid transformation to achieve clean energy goals are beginning to advocate for new models of stakeholder engagement to broker breakthroughs out of our current paradigm and into a grid built and managed with the future in mind. The Michigan and North Carolina examples demonstrate success in creating win-win outcomes out of multi-stakeholder conflicts and can be models for other states.

F. Jurisdictional Questions for State PUCs in the Role of Broker for a “Middle Way”

The ways that PUCs engage stakeholders and make decisions are coming under increasing scrutiny as the traditional model of utility regulation strains to rise to the challenge of addressing pressing needs for reform in the electricity grid.⁹⁶ Some state PUCs are actively developing and

⁹¹ Merchant, *supra* note 66; 2017 N.C. Sess. Laws at 1340.

⁹² Merchant, *supra* note 66; 2017 N.C. Sess. Laws at 1340.

⁹³ Merchant, *supra* note 66; 2017 N.C. Sess. Laws at 1340.

⁹⁴ See generally notes 81-82 and associated text.

⁹⁵ Merchant, *supra* note 66.

⁹⁶ DAN CROSS-CALL, CARA GOLDENBERG, & CLAIRE WANG, ROCKY MOUNTAIN INST., PROCESS FOR PURPOSE: REIMAGINING REGULATORY APPROACHES FOR POWER SECTOR TRANSFORMATION 7 (2019), <https://rmi.org/insight/process-for-purpose/> [hereinafter PROCESS FOR PURPOSE].

implementing reforms to their stakeholder engagement and decision-making processes to facilitate grid transformation.⁹⁷ The scalability of such reforms across the country will, in part, hinge on state-by-state questions about the limits of state PUC authority to restructure their decision-making in light of the variety of constitutional, statutory, and judge-made laws enabling and constraining their processes.

Traditional regulatory processes focus on formal docketed interactions among stakeholders and state regulators through state regulatory proceedings and utilize quasi-judicial hearing and decision-making environments which tend to create adversarial dynamics to proceedings.⁹⁸ However, interests in grid modernization to create enhanced reliability and safety, desire for clean energy commitments and achieving greenhouse gas reductions, cost concerns about over-development of energy generation, and the capacity to respond to catastrophic events have all driven states to attempt to develop reforms that challenge the traditional regime of decision-making.⁹⁹ Features of such emerging regulatory processes include more robust stakeholder engagement to help build consensus around vision and goals while creating foundations for collaborative outcomes, more extensive use and sharing of data, and use of pilot initiatives and performance metrics to design, evaluate, and scale regulatory reforms.¹⁰⁰ The growing attention by PUCs toward the design of their processes will be critical to successfully integrate renewables at larger scales. Such emerging regulatory processes represent the leading edge of a more sophisticated approach to a clean energy transition than PURPA's crude system of mandated must-take contracts. Even so, in the cases of Michigan and North Carolina, the blunt instrument of PURPA provided a valuable "stick" to incentivize multi-stakeholder engagement in search of a better approach and led to more creative solutions. Yet without adequate leadership to design new high-functioning processes to inform regulatory decision-making, FERC and state regulators will be forced to choose between crude instruments or none at all.¹⁰¹

PUCs are typically charged with regulating private utility companies to ensure just and reasonable rates for ratepayers, universal service, reliability, and safety.¹⁰² This responsibility and authority derives from basic principles underpinning public utility doctrine.¹⁰³ Yet the examples of North Carolina and Michigan suggest that politically and economically efficient outcomes elude most states where there is likely hunger among stakeholders for creative win-win agreements along the lines of what these two states were able to broker. Policymakers and interested stakeholders in every state in the country should be asking the question of which entity could and should seek to broker these kinds of outcomes. The answer to this question may consistently and logically be the state's PUC. If this is so, the question becomes whether state PUCs have sufficient legal

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 7, 13.

¹⁰⁰ *Id.* at 7. The Rocky Mountain Institute has identified a list of "emerging regulatory processes" in their survey of states who have initiated regulatory reform processes.

¹⁰¹ *Id.*

¹⁰² *Id.* at 16; Inara Scott, *Teaching an Old Dog New Tricks: Adapting Public Utility Commissions to Meet Twenty-First Century Climate Challenges*, 38 HARV. ENVTL. L. REV. 371, 379 (2014).

¹⁰³ Scott, *supra* note 102, at 378–386.

authority to structure stakeholder engagement processes that avoid the adversarial processes that currently limit creativity in the outcomes of PUC proceedings.

It is beyond the scope of this Note to survey the variety of jurisdictional challenges that various states will encounter as they seek to create more collaborative processes to achieve win-win solutions among multiple stakeholders toward grid transformation challenges. While some scholars have assessed the impact of constitutional limitations on the ratemaking and policy flexibility of PUCs generally,¹⁰⁴ an exploration of the state-by-state variations in PUC authority for innovative regulatory reform could become a promising new arena for a renewed twenty-first century movement in public utility doctrine.

G. Case Study of Arizona: Bucking the Trend, Siding with QFs

Arizona established its PURPA policy in 1981 shortly after Congress passed the Act. In contrast to other states that established minimum contract term lengths for standard contracts under PURPA, the Arizona Corporation Commission (ACC) required no explicit standard contract term length in its initial policy but only mandated that regulated utilities establish standard contracts for QFs below 100 kW in size. The ACC also required utilities to negotiate contract terms for QFs above 100 kW in size, subject to ACC approval, with the standard contracts for sub-100 kW QFs as the starting point for negotiations.¹⁰⁵ Prior to 2019, the ACC had not amended these elements of its PURPA policy since they were originally established in 1981.¹⁰⁶

Throughout 2019, the ACC reconsidered its PURPA rules as applied to the three major investor-owned utilities (IOUs) in Arizona as both utility companies and independent renewable energy developers pushed for greater clarity in PURPA rules and to further their own interests.¹⁰⁷ This took place in a political context where political dark-money scandals, allegations of exploitative rate structures, and concerns about lack of investment in renewable energy have plagued Arizona electric utility companies and the ACC in recent years.¹⁰⁸ In reaction, the ACC's

¹⁰⁴ Inara Scott, *Incentive Regulation, New Business Models, and the Transformation of the Electric Power Industry*, 5 MICH. J. ENVTL. & ADMIN. L. 319, 327-329 (2016).

¹⁰⁵ In re Consideration by the Commission of Design of Rates for Cogeneration and Small Power Production, Docket No. 81-045, Ariz. Corp. Comm'n Dec. No. 52345 at 4-8 (Jul. 27, 1981) (Opinion and Order).

¹⁰⁶ UNS Elec., Inc., Docket No. E-04204A-18-0087, Ariz. Corp. Comm'n Dec. No. 77514 at 4-5 (Dec. 17, 2019) (Opinion and Order); *Staff's Notice of Filing Direct Testimony*, In the Matter of the Application of UNS Electric, Inc. for Approval of Revised UNSE Qualified Facilities Tariffs QF-A, QF-B and QF-C., Ariz. Corp. Comm'n, 7-8 (Aug. 16, 2019) (Docket No. E-04204A-18-0087).

¹⁰⁷ Arizona Corporation Commission, *Opinion and Order: In the Matter of the Application of Arizona Public Service Company for Approval of a Revised APS Partial Requirements Rate Schedule EPR-2*, Ariz. Corp. Comm'n Docket No. E-01345A-16-0272, Dec. No. 77512, 26-32 (Dec. 17, 2019) (APS PURPA docket); Arizona Corporation Commission, *Opinion and Order: In the Matter of the Application of Tucson Electric Power Company for Approval of Revised TEP Partial Requirements Rate Schedule Rider-11 (R-11)*, Ariz. Corp. Comm'n Docket No. E-01933A-17-0360, Dec. No. 77513, 28-33 (Dec. 17, 2019) (TEP PURPA docket); Arizona Corporation Commission, *Opinion and Order: In the Matter of UNS Electric, Inc. for Approval of Revised UNSE Qualified Facilities Tariffs QF-A, QF-B and QF-C*, Ariz. Corp. Comm'n Docket No. E-04204A-18-0087, Dec. No. 77514, 27-33 (Dec. 17, 2019) (UNS Electric PURPA docket).

¹⁰⁸ Ryan Randazzo, *APS Acknowledges Spending Millions to Elect Corporation Commission Members, After Years of Questions*, THE ARIZ. REPUBLIC (Mar. 29, 2019), <https://www.azcentral.com/story/money/business/energy/2019/03/29/arizona-public-service-admits-spending-millions-2014-corporation-commission-races/3317121002/> (recounting disclosures of 2014 "dark money" political spending by Arizona's largest investor-owned utility (Arizona Public Service) to back candidates for the ACC that would side with its interests over those of the independent solar energy industry); Robert Walton, *Report: APS*

elected board of commissioners (Commission) opened rulemaking dockets to explore different potential avenues for disrupting the regulatory status quo and pushing electric utilities toward new business models.¹⁰⁹ Each of these regulatory policy dockets raises questions about the value of the traditional regulated monopoly business model for electric utilities in the face of shifting circumstances. Changes in energy economics and technologies, along with the politics of climate change, add new dimensions to perennial debates about the best ways of establishing just and reasonable rates for consumers. Relatively recent evidence of political corruption among utility companies and regulators add layers of distrust to the conversation as well. State regulators must navigate all of these contentious issues in studying the viability of reforms to regulatory rules and utility business models.

In December 2018, the Commission decided to request a hearing regarding three stalled PURPA dockets opened in recent years by the three major IOUs in Arizona: Arizona Public Service (APS), Tucson Electric Power (TEP), and Unisource Electric (UNS).¹¹⁰ The decision was announced after an election in November 2018 that elected new commissioners focused on promoting renewable energy and holding utility companies accountable for corruption. Each of the IOUs had individually requested new PURPA standard contract terms for itself, specifically restricting standard contracts to two-year maximum term lengths and arguing that such provisions

Parent Company Spent \$4.1M on Arizona's 2016 Political Race, UTIL. DIVE (Mar. 22, 2017), <https://www.utilitydive.com/news/report-aps-parent-company-spent-41m-on-arizonas-2016-political-race/438574/> (explaining a continued pattern of political spending in 2016 ACC elections by the parent company of APS); Elizabeth Whitman, *APS Documents Revealing Millions in Spending Leave Many Questions Unanswered*, PHX. NEW TIMES (Apr. 4, 2019), <https://www.phoenixnewtimes.com/news/dark-money-disclosures-aps-questions-utility-spending-forese-little-11263984> (APS's disclosures in response to information requests on political spending by ACC commissioners confirmed some of the concerns about political spending to elect preferred utility regulators, but the disclosures also were not fully transparent as to who received funding and for which purposes, raising continued questions); Ryan Randazzo, *APS Parent Company Spent \$37.9M Fighting Clean-Energy Measure*, THE ARIZ. REPUBLIC (Jan. 17, 2019, 12:23 PM), <https://www.azcentral.com/story/news/politics/arizona/2019/01/17/pinnacle-west-spent-38-million-fight-arizonas-prop-127-clean-energy-measure/2595711002/> (in the 2018 election cycle, APS's parent company also spent nearly \$38 million to defeat a voter initiative to require 50% of electricity to be sourced from renewable energy by 2030).

¹⁰⁹ Elijah O. Abinah, *Request for a New Docket – In the Matter of Possible Modifications to the Commission's Energy Rules*, Ariz. Corp. Comm'n Docket No. RU-00000A-18-0284, Doc. No. 0000191382 (Aug. 17, 2018) (generalized omnibus energy rules docket, addressing a wide variety of rules and topics such as the Renewable Energy Standard and Tariff (REST), energy efficiency, net metering, resource planning and procurement, electric vehicle infrastructure, and more); Tom Forese, *Request for a New Docket - In the Matter of Possible Modifications to the Commission's Retail Electric Competition Rules*, Ariz. Corp. Comm'n Docket No. RU-00000A-18-0405, Doc. No. 0000194640 (Dec. 19, 2018) (deregulation docket).

¹¹⁰ *Procedural Order*, Ariz. Corp. Comm'n (May 30, 2019) (Docket No. E-01345A-16-0272) (timeline of procedural decisions, including the Dec. 2018 Commission direction); *Application*, Ariz. Corp. Comm'n 1 (Aug. 5, 2016) (Docket No. E-01345A-16-0272) (original Arizona Public Service (APS) application to revise its PURPA tariffs); *Application*, Ariz. Corp. Comm'n 3-4 (Dec. 5, 2017) (Docket No. E-01933A-17-0360) (original Tucson Electric Power (TEP) application to revise its PURPA tariffs); *Application*, 3-4, Ariz. Corp. Comm'n (Apr. 9, 2018) (Docket No. E-04204A-18-0087) (original Unisource Electric, Inc. (UNS) application to revise its PURPA tariffs).

would protect the interests of ratepayers in mitigating risks of overpaying for renewable energy given its declining costs over time.¹¹¹

In the proceedings that followed, independent developers and renewable energy advocates pushed back against these utility proposals.¹¹² They argued in their testimony that 15 years is a reasonable compromise for the length of standard contracts because that time period is 50% of the expected useful life of a utility-scale solar facility and thus balances 15 years of price certainty with 15 years of market price risk for developers.¹¹³ Further, they argued that the shorter contracts that utilities are currently offering, along with the proposed two-year maximum, are inconsistent with both ACC's and FERC's existing PURPA policies because they would make financing QFs infeasible due to the lack of investors willing to risk investing in QFs without rates they can rely on to project revenues sufficient for a return on investment.¹¹⁴ In sum, they argued that without resolution in favor of long-term contract term lengths, Arizona would lose out on the economic development associated with large, rapid investments in renewable energy pending in the state.

After several procedural hearings and open comment periods involving these arguments, the Commission directed ACC staff to undertake a rulemaking process that would conclude before the end of 2019 to preserve the opportunity for the solar industry to take advantage of the federal Investment Tax Credit (ITC) before it began to wane in 2020.¹¹⁵ As part of rulemaking, ACC staff analyzed the parties' arguments and investigated policies in other states to develop a proposed set of new PURPA policies for Arizona. The staff proposal included a standard contract term length of at least nine years for QFs of up to 2 MW in size and an aggregate QF capacity of up to 50 MW among all QFs for each utility. The staff proposal excluded projects larger than 2 MW in size from the standard contracts in favor of negotiated contracts instead.¹¹⁶ The administrative law judge (ALJ) did not forward the 2 MW limitation to the Commission but rather concluded that ratepayers would benefit from reduced costs of production due to economies of scale for larger utility-scale projects. Thus, projects larger than 2 MW should also have access to standard contract term lengths up to the 50 MW aggregate limit.¹¹⁷ This would expand the size of eligible projects, but a relatively small number of projects could take advantage of PURPA provisions before the 50 MW aggregate limit would be reached.

¹¹¹ Tim Sylvia, *PURPA Under Attack in Arizona*, PV MAG. (Dec. 18, 2018), <https://pv-magazine-usa.com/2018/12/18/purpa-under-attack-in-arizona/>; *Application*, Ariz. Corp. Comm'n 1 (Docket No. E-01345A-16-0272); *Application*, Ariz. Corp. Comm'n 3–4 (Docket No. E-01933A-17-0360); *Application*, Ariz. Corp. Comm'n 3–4 (Docket No. E-04204A-18-0087) (the three PURPA tariff amendment applications from APS, TEP, and UNS).

¹¹² UNS Elec., Inc., Docket No. E-04204A-18-0087, Ariz. Corp. Comm'n Dec. No. 77514 at 16–22 (Dec. 17, 2019) (Opinion and Order). The state administrative law judge issued the *Opinion and Order* on all three applications on the same date, with the same substantive recommendations in each, so APS and TEP both have analogous *Opinion and Order* documents on the same date in their respective dockets.

¹¹³ *Id.* at 20.

¹¹⁴ *Id.* at 19; In re Consideration by the Commission of Design of Rates for Cogeneration and Small Power Production, Docket No. 81-045, Ariz. Corp. Comm'n Dec. No. 52345 at 1 (Jul. 27, 1981) (Opinion and Order) (stating the policy of ACC to “encourage the development of . . . small power production”); Windham Solar, LLC & Allco Fin. Ltd., 157 FERC 61,134, ¶8 (2016) (stating that QF contract terms should be “long enough to allow QFs reasonable opportunities to attract capital from potential investors”).

¹¹⁵ Scott Hesla, *Recommended Opinion and Order*, Ariz. Corp. Comm'n. Docket No. E-04204A-18-0087, Doc. No. E000003797, § III, 5 (Nov. 26, 2019).

¹¹⁶ *Staff's Notice of Filing Direct Testimony*, In the Matter of the Application of UNS Electric, Inc. for Approval of Revised UNSE Qualified Facilities Tariffs QF-A, QF-B and QF-C., Ariz. Corp. Comm'n, 16–17 (Aug. 16, 2019) (Docket No. E-04204A-18-0087).

¹¹⁷ *UNS Elec., Inc.*, Docket No. E-04204A-18-0087, Ariz. Corp. Comm'n Dec. No. 77514 at 33–34.

The ALJ issued these recommendations on November 26, 2019—just in time for the Commission to decide prior to the end of 2019 (given the concerns about reduced tax credits at the end of 2019), which it finally did on December 17.¹¹⁸ In its decision, the Commission took a radically different approach than the ACC’s ALJ and staff recommended. The Commission disregarded the project size and aggregate capacity limitations entirely in the new rule and greatly expanded the minimum standard contract term length to 18 years.¹¹⁹ This means that QF size restrictions are only limited by FERC’s PURPA policies and that there are no restrictions on the total amount of capacity that independent developers may add to the grid in Arizona under PURPA. These limited restrictions are in addition to the guaranteed contract length of 18 years. This outcome heads in a dramatically different direction than the trend of other states curtailing the guaranteed minimum contract term length or size of QFs eligible for standard contract provisions.¹²⁰

The Commission’s decision amounts to a large accommodation for independent renewable energy developers in Arizona. If new FERC rulemaking does not preempt the ACC’s December decision, it will be interesting to watch Arizona over the next year or two to see the number and size of QFs which apply for PURPA standard contracts.¹²¹ Given the solar resources available in the state, the continued—albeit diminishing—availability of federal investment tax credits, and the continued declines in cost per unit of energy capacity in the development of utility-scale solar energy, Arizona likely will become a magnet for independent renewable energy development. The

¹¹⁸ *Id.* at 34; *Recommended Opinion and Order*, Ariz. Corp. Comm’n. Docket No. E-04204A-18-0087 at 5. The ACC issued Decisions on all three applications on the same date, with the same substantive orders contained in each, so APS and TEP both also have analogous Decisions issued by the ACC on Dec. 17, 2019 in their respective dockets (Dec. No. 77512 for APS, and Dec. No. 77513 for TEP).

¹¹⁹ *UNS Elec., Inc.*, Docket No. E-04204A-18-0087, Ariz. Corp. Comm’n Dec. No. 77514 at 26, 31-32. New PURPA rules were issued for each of the three major IOUs as follows:

- APS, TEP, & UNSE will provide QFs with a contract term of no less than eighteen (18) years, applicable to a QF with nameplate capacity over 100 kW.
- The three utilities shall offer QFs contracts that have business terms that are reasonably similar to other PPAs that the utility has entered into previously.
- The rate paid to the QF will be established using the utilities’ long-term avoided costs, and they shall use the long-term avoided cost methodology established by the Commission.
- The three utilities shall make their application and contracting procedures readily available to QFs.
- A QF must follow the interconnection procedures outlined by the respective contracting utility. The three utilities are obligated to make all the necessary interconnections with the qualifying facility to accomplish purchase or sales of energy and capacity.
- For tracking of actual impact of QF development on the utilities’ Integrated Resource Plans, the decision requires the utilities to report all relevant QF data, including but not limited to the following, every three years in tandem with, or as part of their Integrated Resource Plans:
 - number of QF contracts entered into to date,
 - nameplate capacity for each interconnected QF to date, and
 - the avoided cost rate for each QF interconnected to date.

¹²⁰ *See generally supra* notes 40 through 90 and associated text (regarding patterns in PURPA policies among states).

¹²¹ Part III below discusses the preemptive effect of new FERC PURPA modernization rules over state regulations implementing PURPA.

rate of development could rival the rapid pace of development North Carolina experienced prior to its PURPA policy changes surrounding standard contracts at the end of 2015 and in 2017.

If similar rapid development were to occur, one could expect PURPA to continue to be an urgent policy concern in Arizona for the foreseeable future. Utility companies could see increasing portions of their energy supply dictated by the terms of PURPA standard contracts rather than other potentially more competitive and lower cost sources of electricity. The utility companies will then recoup these additional costs through their rates and consumer advocates will likely take increasing aim at the new ACC PURPA standard contract terms as regressive for the interests of consumers in minimizing their energy costs. The impact on consumer costs could swing the pendulum of concern among the ACC commissioners toward a different approach than what they passed in 2019.

Part III: FERC's New PURPA Modernization Rules & Their Implications for States

A. Overview of FERC's New PURPA Modernization Rules & Their Implications for States

In July 2020, FERC issued a new final rule revising its regulations for PURPA implementation.¹²² This new rule followed from FERC's NOPR in September 2019.¹²³ These new regulations could have dramatic implications for PURPA implementation among the states—especially in Arizona.

The new rule grants states much more flexibility to determine avoided cost rates for QF contracts by allowing states to use market prices and forecasted prices in setting contract rates.¹²⁴ It also permits states to create variable contract rates at different time periods within the contract.¹²⁵ These additional areas of flexibility for states increase the range of mechanisms available to discourage independent renewable energy developments by undermining their ability to secure financing. States that adopt one or more of these new flexible rate structure mechanisms for their own PURPA rules will likely reduce the number of renewable energy projects developed by independent developers as QFs under PURPA because these mechanisms all significantly reduce the predictability of revenue from energy sales and the ability to obtain financing to develop the projects. The new rule also reduces the size of renewable energy projects that can qualify as a QF and receive standard contracts under PURPA, which would also reduce the number of potential QFs.¹²⁶

These proposed rules amount to a major reform of PURPA rules, restricts the eligible size of QFs, and creates several new options for states to define avoided costs in ways that will disadvantage independent renewable energy developers. FERC Commissioner Glick's dissent to the NOPR and some of the comments to the proposed rules outline a range of challenges to these rules: that they run counter to the plain meaning of the statute and misinterpret Congressional

¹²² Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, 85 Fed. Reg. 54,638 (Sept. 2, 2020) (to be codified at 18 C.F.R. pt. 292 & 18 C.F.R. pt. 375) [hereinafter Final Rule].

¹²³ Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, 84 Fed. Reg. 53,246 (proposed Oct. 4, 2019) (to be codified at 18 C.F.R. pt. 292 & 18 C.F.R. pt. 375) [hereinafter NOPR].

¹²⁴ Final Rule, 85 Fed. Reg. at 54,645, ¶¶ 36-38, 58; NOPR, 84 Fed. Reg. at 53,251, ¶¶ 32-34.

¹²⁵ Final Rule, 85 Fed. Reg. at 54,645, ¶¶ 36-38, 59; NOPR, 84 Fed. Reg. at 53,251, ¶¶ 32-34.

¹²⁶ Final Rule, 85 Fed. Reg. at 54,641, 54,649, ¶¶ 4, 64; NOPR, 84 Fed. Reg. at 53,263, ¶ 126.

intent; that they are not well-supported by evidence; that they contain errors in reasoning; and that they will ultimately not encourage small power producers because they will not effectively counter discriminatory tendencies in grid access for QFs.¹²⁷

1. “Avoided Cost” Definition

The bulk of the amendments to PURPA regulations in the final rule add flexibility to the allowable methods by which states can calculate avoided costs in order to set rates for contracts between QFs and utilities.¹²⁸ For fixed-price contracts, the new rules give states the latitude to use market forecasts of marginal electricity costs to stand for the “avoided costs” in these contracts.¹²⁹ The rules further allow fixed-price contracts to set prices that vary over time based on varying prices in market forecasts.¹³⁰ Moreover, states can base avoided cost calculations on the results of competitive bidding processes¹³¹ rather than more traditional methods such as cost-of-service calculations or even market price data. Renewable energy developments would experience significant impacts from these changes to fixed-price contract types because their main expenses come from up-front installation costs because their “fuel source” (sun and wind) is free. This makes their business models very capital intensive, requiring long-term contract certainty in order to obtain financing for these up-front capital costs of development. Thus, adjustments to fixed-price rates based on speculative formulas would create greater uncertainty in projected revenues for renewable energy developments and would make it harder to finance them.

2. Project Size Threshold to Receive PURPA Standard Contracts

Other proposed rules would reduce the scope of developments that would qualify under PURPA. The final rule included a new rebuttable presumption of non-discriminatory market access for all developments above 5 MW in size¹³²—up from the proposed threshold of 1 MW in the NOPR¹³³ but down from the previous threshold of 20 MW. This means any proposed independent renewable energy development larger than 5 MW will be ineligible for PURPA-based

¹²⁷ Final Rule, 85 Fed. Reg. at 55,737 ¶¶ 7-29 (Glick, Commissioner dissenting in part); Harvard Electricity Law Initiative, Comment Letter on Proposed Rule Regarding Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978 (Dec 3, 2019), <http://eelp.law.harvard.edu/wp-content/uploads/Harvard-ELI-PURPA-Comment-webpost.pdf> [hereinafter HELI Comment].

¹²⁸ See Final Rule, 85 Fed. Reg. at 54,648, ¶ 57; NOPR, 84 Fed. Reg. at 53,251, ¶ 32

¹²⁹ Final Rule, 85 Fed. Reg. at 54,648-49, ¶¶ 58-59; NOPR, 84 Fed. Reg. at 53,255, ¶¶ 61-62 (allowing states flexibility to use market forecasts for locational marginal prices within RTO/ISO regions, for marginal prices in liquid market hubs outside RTOs/ISOs, and for expected natural gas commodity costs in other circumstances).

¹³⁰ Final Rule, 85 Fed. Reg. at 54,648, ¶ 57; NOPR, 84 Fed. Reg. at 53,256, ¶ 65 (allowing states to limit QF options to elect a static energy rate for the entire term of a contract, but rather to allow fixed contract terms with energy rates that vary from year to year throughout the duration of the contract).

¹³¹ Final Rule, 85 Fed. Reg. at 54,649, ¶ 60; NOPR, 84 Fed. Reg. at 53,258, ¶ 82 (allowing states flexibility to use competitive solicitations (RFPs) in order to set avoided cost/capacity rates used in QF contracts).

¹³² Final Rule, 85 Fed. Reg. at 54,641, 54,649, ¶¶ 4, 64.

¹³³ NOPR, 84 Fed. Reg. at 53,263, ¶ 126.

contracts nationally.¹³⁴ This rule would go beyond the 2005 Energy Policy Act's provisions,¹³⁵ which declared grid regions operated by RTOs and ISOs must provide non-discriminatory market access for QFs but implicitly suggested that regions of the country without transmission grid managers did not have non-discriminatory access. States can still fashion their own state policies with more generous allowances, but it would not be through federal authority under PURPA. These allowances would instead arise from their own internal state regulatory authority over utility rules and rates. This would impose substantial procedural and political burden on states to develop new rules if they wished to retain the same scope of QFs for PURPA-like contracts under state authority. In addition, some state PUCs may not have adequate authority to do so.

3. Implications for Arizona

The impacts of these changes to FERC regulations on Arizona's PURPA rules could be profound. PURPA statute requires Arizona to enact state energy rules to implement FERC's new PURPA rules within one year their issuance.¹³⁶ Arizona's rules as applied to the three largest regulated utilities in the state currently have no size limit to qualify for a standard contract as a QF.¹³⁷ The reduction in potential size of QFs to 5 MW would effectively undermine most utility-scale independent renewable energy development through PURPA. In addition, while the commissioners' current priorities are to buttress and support PURPA provisions, two of the five commission seats turned over in the November 2020 election and these priorities may change when the new commissioners are seated. A new commission may be inclined to adopt the optional variable-rate avoided cost approach for standard contracts under the new FERC rule. Given that Arizona has no statewide wholesale market, this would place independent developers at the whim of forecasts for liquid market hubs (Hubs) such as the Palo Verde generating station outside Phoenix, which serves as the primary Hub in Arizona.¹³⁸ This Hub increasingly experiences very low to negative daytime pricing due to excess energy availability from California's solar energy production as provided through the regional Energy Imbalance Market (EIM), and this trend will likely accelerate in the coming years.¹³⁹ Forecasting of low or negative daytime prices at the Palo

¹³⁴ Under PURPA statute, states must implement rules consistent with any new or revised FERC rules within one year of FERC promulgating such rules. 16 U.S.C. § 824a-3(f)(1).

¹³⁵ Energy Policy Act, Pub. L. No. 109-58, 119 Stat. 594 (2005); U.S. ENERGY INFO. ADMIN., *supra* note 12.

¹³⁶ § 824a-3(f)(1).

¹³⁷ UNS Elec., Inc., Docket No. E-04204A-18-0087, Ariz. Corp. Comm'n Dec. No. 77514 at 22, 26, 31-32, ¶ 39 (Dec. 17, 2019) (Opinion and Order) (for new PURPA tariff rules enacted by the ACC for UNS Electric, with analogous Orders and identical terms for APS (Dec. No. 77512) and TEP (Dec. No. 77513) in Dec. 2019).

¹³⁸ *Electricity*, U.S. ENERGY INFO. ADMIN, <https://www.eia.gov/electricity/wholesale/> (last visited Nov. 14, 2020) (listing and mapping the price hub locations for wholesale electricity throughout the contiguous U.S., with the Palo Verde Hub designated for the Southwest region of the U.S.).

¹³⁹ See CAL. IND. SYS. OPERATOR, Q2 REPORT ON MARKET ISSUES AND PERFORMANCE 14-15 (Sept. 5, 2019), <http://www.caiso.com/Documents/2019SecondQuarterReportonMarketIssuesandPerformance.pdf> (reporting high frequencies of negative pricing in California wholesale electricity prices during springtime months for 2018 and 2019, with an increasing trend driven by increasing levels of solar energy on the grid); see also Jesse A. Millard, *Regional Energy Play Gathers Momentum for Arizona*, AZ BIG MEDIA (May 27, 2018), <https://azbigmedia.com/business/arizona-energy-industry/regional-energy-play-gathers-momentum-for-arizona/> (noting APS's benefits from joining the EIM market, including lower prices during daytime hours generally and negative pricing at times, due to excess solar production in California); see David Wichner, *Tucson Electric to Save \$13M Through Partnership with 'Real-Time' Wholesale Power Market*, ARIZ. DAILY STAR (May 13, 2019), https://tucson.com/business/tucson-electric-to-save-m-through-partnership-with-real-time/article_661493bc-0de9-

Verde Hub could generate avoided cost forecasts below the costs of production for new solar projects in Arizona, thus rendering them uneconomical.

4. Arguments by Opponents of the New Rule

Opponents laid the groundwork for legal challenges to the new FERC rule in comments made on the PURPA NOPR as well as in Commissioner Glick’s dissent to both the proposed rules and the final rule. A coalition of opponents to the new rule has already requested a re-hearing of the final rule by FERC and have preemptively filed for judicial review of the new rule in the Ninth Circuit Court of Appeals.¹⁴⁰

In his dissent to the FERC NOPR, Commissioner Glick outlined a number of arguments against the rules and requested parties opposed to the proposals to submit comments elaborating on their opposition.¹⁴¹ Commissioner Glick argued the proposed rules rest on a flawed assumption that Hubs and locational marginal prices (LMPs) are de facto just and reasonable avoided cost rates.¹⁴² He asserted that this assumption is flawed since independent developers do not have consistently non-discriminatory access to these Hubs and general wholesale electricity auctions (where LMPs are established) to sell their energy.¹⁴³ The question of whether the new rules go so far as to subvert Congress’s intent and the purpose of PURPA—which FERC is responsible for implementing—will now become a focal point of litigation as renewable energy industry groups seek judicial review of the new FERC rule.

B. Do FERC’s New PURPA Rules Preempt State Regulatory Agencies Who Developed PURPA-Like Rules Based on State Authority?

Because the new FERC rules provide some new flexibility for states implementing PURPA while also limiting the scale of qualifying QFs, some state regulators may wish to fashion more supportive rules through their own state authority. A key question for states is whether FERC’s new rule preempts state authority to establish PURPA-like rules for the utility companies over which they have regulatory jurisdiction. This question arises due to the sometimes “hazy” distinction between wholesale and retail spheres of regulation that is the line dividing federal and state authority under the Federal Power Act (FPA).¹⁴⁴ In this case, purchases of electricity from “small power producers” by utility companies would seem to fall under PURPA’s definition of

[5f20-8995-df8aa6f141a1.html](https://www.federalregister.gov/documents/2020/09/17/2020-09-17-5f20-8995-df8aa6f141a1.html) (TEP deal to join EIM in 2022, noting APS has received negative pricing at times and generally benefits from purchasing cheap excess renewable energy from California).

¹⁴⁰ Catherine Morehouse, *Groups challenge FERC’s PURPA rule, accuse commission of ‘actively discouraging’ small power facilities*, UTIL. DIVE (Sept. 21, 2020), <https://www.utilitydive.com/news/groups-challenge-fercs-purpa-rule-accuse-commission-of-actively-discouraging/584056/> (last visited Oct. 9, 2020); see also Petition for Review at 1, *Solar Energy Indus. Ass’n v. Fed. Energy Reg. Comm’n*, No. 20-72788 (9th Cir. Sept. 17, 2020).

¹⁴¹ NOPR, 84 Fed. Reg. at 53, 273, ¶ 10 (Glick, Commissioner dissenting in part).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Supra* notes 29 through 34 and associated text; 16 U.S.C. § 824(b)(1). PURPA applies only “to the sale of electric energy at wholesale in interstate commerce.”

“wholesale.”¹⁴⁵ On the other hand, FERC does not have authority to regulate “over facilities used for the generation of electric energy . . . only for the transmission of electric energy in intrastate commerce.”¹⁴⁶ This raises an issue of concurrent jurisdiction that has been the focus of several recent Supreme Court decisions. These decisions acknowledge concurrent jurisdiction between federal and state regulators under the FPA, but also tend to side with federal authority and preemption when ambiguities arise over whether a regulatory action impacts wholesale or retail rates. However, the cases do not specify whether such controversies should be resolved through field or conflict preemption. Because the Supreme Court has only interpreted these ambiguities through the lens of the FPA generally, and not in light of the PURPA statute, the lack of declaration of a field preemption approach to ambiguities in the FPA’s cooperative federalism regime leaves substantial uncertainty about whether preemption would apply in the case of PURPA “small power producer” rules.

1. Supreme Court Jurisprudence Regarding Federal Preemption of Energy Rules

As the electricity grid continues to evolve and modernize, a wide range of policies and programs have arisen that seemingly blur the line between wholesale and retail arenas since they have impacts on rates in both. These programs challenge the simplistic and formalistic division in the FPA between federal and state authority for wholesale and retail arenas, respectively,¹⁴⁷ and courts have struggled to police the line between them.¹⁴⁸ Most recently, the Supreme Court grappled with policing this line with regard to demand-response programs in *Fed. Energy Regulatory Comm’n v. Elec. Power Supply Ass’n (EPSA)*¹⁴⁹ and state incentives for a utility company it regulates to build new electricity generating capacity in *Hughes v. Talen Energy Mktg., LLC*.¹⁵⁰ In *EPSA*, the Court interpreted the FPA to say that federal authority extends to regulating activity that “directly affects” wholesale rates of electricity as long as it does not also regulate “retail electricity sales.”¹⁵¹ In finding federal regulation of the state program legitimate because it directly affected wholesale rates, the Court also channeled its prior holdings in *Miss. Power & Light* and *Nantahala Power & Light* that mere effects on retail prices do not constitute regulation of retail prices.¹⁵² Thus, the Court has fashioned a rule that is quite deferential to federal authority and skeptical of state authority when there appears to be concurrent federal and state jurisdiction over a program under the plain terms of the FPA.¹⁵³ However, the Court left ambiguous whether its holding had expressed a form of conflict or implied preemption. If courts apply conflict preemption, they will not foreclose development of creative state programs to address the

¹⁴⁵ § 824(d).

¹⁴⁶ *Id.* § 824(b)(1).

¹⁴⁷ Nordhaus, *supra* note 29.

¹⁴⁸ Rossi, *supra* note 34.

¹⁴⁹ *Fed. Energy Reg. Comm’n v. Elec. Power Supply Ass’n*, 136 S.Ct. 760 (2016).

¹⁵⁰ *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288 (2016).

¹⁵¹ *Elec. Power Supply Ass’n*, 136 S.Ct. at 764, 774–776 (finding that a state program to pay retail customers to reduce their energy consumption during times of peak demand fell under federal authority because it directly affected wholesale rates, and because the fact that a regulation affects retail prices is not sufficient to constitute regulation of retail sales).

¹⁵² *Id.* at 776 (citing *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 365, 370–73 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 959–961, 970 (1986)).

¹⁵³ Rossi, *supra* note 34, at 436–40.

existential challenges around integration of renewable energy and energy efficiency programs to decarbonize the electricity grid and address climate change.¹⁵⁴

The *EPSA* ruling would seem to foreclose states' ability to successfully assert their own authority to maintain PURPA rules on the basis of impacts on retail rates. No one could seriously argue that PURPA provisions do not directly affect wholesale rates of electricity. In Arizona, for example, wholesale prices of electricity in springtime during the day increasingly dip below \$0 since Arizona utilities have access to wholesale energy through California's Western Energy Imbalance Market (Western EIM) and oversupply of solar energy in California in springtime drives these low wholesale prices.¹⁵⁵ Likewise, if demand-response programs¹⁵⁶ don't have sufficient impacts on retail rates to overcome the Court's deference toward federal authority, PURPA's impacts on retail rates also likely would not overcome federal preemption due to its impacts on wholesale prices. Furthermore, PURPA rules have their origin in federal statute, whereas *EPSA*'s demand-response program originated in state authority, making the argument for federal authority even stronger in the case of PURPA rules. Federal preemption of states over PURPA issues is therefore a near-certainty.

C. Will FERC's New PURPA Rule Survive Judicial Review?

Opponents of the new FERC rule may still challenge FERC's final rule promulgation as arbitrary and capricious under the Administrative Procedures Act (APA).¹⁵⁷ But a threshold question for judicial review of promulgated PURPA rules is whether the new rules would receive deference under the *Chevron* Doctrine. *Chevron* Doctrine provides that courts will provide deference to an agency's action in interpreting a statute only (1) when the statute is ambiguous and (2) when the agency's interpretation is based on a permissible construction of the statute.¹⁵⁸ Each of the two steps in *Chevron* analysis depends on the court's reading of the statute in terms of principles of statutory construction.¹⁵⁹ In addition, while an explicit statutory delegation of authority to the agency yields an arbitrary and capricious standard of review, an implicit statutory grant of legislative authority to the agency means the court should defer to "any reasonable

¹⁵⁴ *Id.* at 449; William Boyd & Ann E. Carlson, *Accidents of Federalism Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 877-88 (2016).

¹⁵⁵ CAL. IND. SYS. OPERATOR, *supra* note 139, at 14-15 (prevalence of low daytime pricing of wholesale energy in western electricity markets due to surplus production of solar energy in California).

¹⁵⁶ Demand-response programs refer to payments to consumers of energy in order to reduce their consumption during times of heaviest consumption which tax the grid's ability to provide adequate energy to all consumers without equipment failures, brown-outs, and the like. The ability to curtail consumption also reduces the need for utility companies to procure additional energy during these times of peak demand. During such times, wholesale energy prices can be quite high, so demand-response as a form of energy efficiency can be more cost effective for utilities and thus for consumers than buying more energy during peak times. However, the implication of such schemes is that they directly reduce the demand for wholesale energy during peak times, and thus directly impact the prices of wholesale energy during these times, thus directly impacting wholesale energy rates. This is in fact one of their primary purposes, to reduce demand for wholesale energy during times of peak consumption.

¹⁵⁷ 5 U.S.C. § 706(2)(A).

¹⁵⁸ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 839, 843-44 (1984).

¹⁵⁹ *Id.* at 843-844.

interpretation” by the agency.¹⁶⁰ The arbitrary and capricious standard for *Chevron* deference is the same as under APA § 706, which directs the scope of judicial review for actions by administrative agencies.¹⁶¹ In addition, courts do not apply a heightened arbitrary and capricious standard in cases where an agency changes rules after many years.¹⁶² However, there may be exceptional circumstances where “serious reliance interests must be taken into account” in a review of an agency’s allegedly arbitrary and capricious change of rules.¹⁶³

The general intent of PURPA is to “encourage” alternative energy production,¹⁶⁴ and Congress pursued this goal through a grant of authority to FERC to require access to the grid for alternative energy producers. As discussed above, PURPA requires FERC to promulgate rules consistent with providing QFs non-discriminatory access to the electricity grid to sell their energy.¹⁶⁵ But the PURPA statute also subjects this requirement to limiting principles that the rates at which independent energy producers are paid for their electricity are “just and reasonable” to consumers and no greater than the avoided cost to the utility company of sourcing the energy elsewhere.¹⁶⁶ Another limiting principle for independent renewable energy producers within PURPA is that they must use renewable energy, biomass, or waste energy as their primary source and must not exceed 80 MW in capacity to satisfy PURPA’s definition of a qualifying facility.¹⁶⁷ This amounts to a grant of authority to FERC by Congress based on an undefined term (i.e., “non-discriminatory”) and is subject to “just and reasonable” and “avoided cost” limiting principles that are also not clearly defined in statute. Instead of clarifying these ambiguities itself, FERC chose to pass along the ambiguity to state regulatory commissions to define their own PURPA rules, subject to additional guiding factors.¹⁶⁸

When it comes to judicial review, opponents of FERC’s new rules have raised formidable objections that would support a conclusion that the new rules are arbitrary and capricious. Under arbitrary and capricious review, the APA requires FERC to demonstrate that it considered all comments when issuing new rules. The following are the primary arguments submitted in comments to FERC during the notice and comment period for the new PURPA rules and in a dissenting comment by FERC Commissioner Glick.

First, opponents argue that FERC’s new rules would effectively end PURPA, which exceeds its authority and is a debate that should be had in Congress, rather than in the agency. The dispute over whether cheap renewable energy and natural gas obviates the continued need for PURPA’s protections is not something FERC should decide. Congress created these protections, and only Congress can remove them. Congress charged FERC with issuing rules “necessary to encourage” development of QFs, and FERC’s proposed rule changes are “uniformly biased against QF development” and thus would accomplish the opposite.¹⁶⁹

¹⁶⁰ *Id.* at 843.

¹⁶¹ *Braeburn Inc. v. U.S. Food & Drug Admin.*, 389 F.Supp.3d 1, 15 (D.D.C. 2019).

¹⁶² *See Fed. Comm. Comm’n v. Fox TV Stations, Inc.*, 556 U.S. 502, 514-15 (2009).

¹⁶³ *Id.* at 515.

¹⁶⁴ 16 U.S.C. § 824a-3(a).

¹⁶⁵ *Id.* § 824a-3(b).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* § 824a-3(a).

¹⁶⁸ *See id.* § 824a-3(f)(1) (states must implement their own rules consistent with rules FERC promulgates within one year of FERC’s issuance of such rules); *see* 18 C.F.R. §§ 292.304(a), (c) (rates for purchases uses similarly vague language as the statute, thus deferring to states to more clearly define for their own specific circumstances).

¹⁶⁹ Final Rule, 85 Fed. Reg. at 55,736 ¶¶ 2-3 (Glick, Commissioner dissenting in part); HELI Comment, *supra* note 127, at 1.

Second, Congress intended that rates consider a longer time horizon than just instantaneous cost savings and that rates consider the full cost across a wide range of factors. The changes to allow calculations of avoided costs based on projections of market hub prices would defy congressional intent because they would focus exclusively on marginal cost savings at the exclusion of other important factors.¹⁷⁰ Although the final rule amended this provision to be a rebuttable presumption that market prices constitute avoided costs, rather than a per se rule, the burden of proof still remains with the QFs.¹⁷¹ Placing the burden with QFs does not encourage their development, and thus is contrary to PURPA's overall purpose.

Third, there is also no evidence that the use of market prices as measures of "avoided cost" would be non-discriminatory for QFs throughout the entire country. Even if QFs would have equitable access to wholesale markets in many parts of the country, there may be (and surely are) parts of the country where they do not have such access to market hub pricing. To base avoided cost rates on those prices would discriminate against them based on their disparate access to wholesale markets.¹⁷² FERC's own past findings support the proposition that PURPA plays an important and even essential role in providing market and grid access to QFs in a number of regions of the country.¹⁷³

Fourth, allowing states to opt out of the standard contract option for energy would deny many QFs the ability to obtain financing, which would be discriminatory.¹⁷⁴ Further, the new rule is based on irrelevant data and illogical assumptions and reasoning.¹⁷⁵

Fifth, the NOPR did not cite any evidence in the record to support its proposal to shift the size threshold for providing QFs must-purchase protections when contracting with utilities from 20 MW to 1 MW.¹⁷⁶ Even though the final rule adjusted the new threshold to 5 MW instead of 1 MW,¹⁷⁷ the shift is still unsupported by the record.¹⁷⁸ Shifting the threshold without adequate support in the record amounts to an arbitrary and capricious decision.

Sixth, FERC's assertion that the new rule will continue to encourage QF development fails to account for regulatory changes since PURPA's enactment.¹⁷⁹

Seventh, contracts that allow variable "avoided cost" rates have already been rejected by courts.¹⁸⁰

Finally, FERC's proposed rule and its justifications did not acknowledge the role PURPA has played in places like North Carolina and Michigan. In those states PURPA incentivized incumbent regulated utility companies to come to the negotiating table to broker deals to increase renewable energy development. Without PURPA's must-take contract requirements for QFs of

¹⁷⁰ Final Rule, 85 Fed. Reg. at 55,736, 55,737, ¶¶ 5, 10 (Glick, Commissioner, dissenting in part).

¹⁷¹ *Id.* at 55,739, ¶ 18.

¹⁷² *Id.* at 55,736-37, 55,737-38, ¶¶ 5-6, 10-13.

¹⁷³ HELI Comment, *supra* note 127, at 2 n. 2 (noting several FERC findings and reports substantiating this relevance and importance of PURPA in multiple regions of the U.S.).

¹⁷⁴ Final Rule, 85 Fed. Reg. at 55,737, ¶ 9 (Glick, Commissioner, dissenting in part).

¹⁷⁵ HELI Comment, *supra* note 127, at 2.

¹⁷⁶ Final Rule, 85 Fed. Reg. at 55,738-39, ¶ 16 (Glick, Commissioner, dissenting in part).

¹⁷⁷ Final Rule, 85 Fed. Reg. at 54,649, ¶ 64.

¹⁷⁸ *Id.* at 54,739-40, ¶¶ 20-24.

¹⁷⁹ HELI Comment, *supra* note 127, at 1-2.

¹⁸⁰ *Id.* at 2.

utility-scale capacity, the utilities in these states would have had little motivation to enter negotiations. The rule would undermine the potential for such multi-stakeholder negotiating processes because incumbent utilities would have greatly reduced incentives to come to the table.¹⁸¹

Collectively, these criticisms cut to the heart of both FERC's statutory interpretations and its justifications for the new rule. Armed with these types of arguments, opponents of the new rule will have a range of approaches to address both prongs of the *Chevron* Doctrine toward a conclusion that FERC is not due deference by the courts. FERC's new PURPA rule will therefore face strong arguments when opponents claim arbitrary and capricious decision-making by FERC in federal courts.

Conclusions

The above review of states that amended their PURPA policies between 2014-2019 shows three types of changes. Most states reduced minimum contract term lengths and reduced maximum sizes of qualifying facilities, thus restricting the number of renewable energy projects that can apply for PURPA-based access to the grid. Some of these states also amended rules for the calculation of avoided costs, which has reduced the rates at which qualifying facilities can be paid by utility companies for their energy. The net effect in these states is a suppression of independent renewable energy development under PURPA and, in most cases, an overall reduction in renewable energy development.

A limited number of states fit into a category of generally supporting QFs over utility interests—either deciding against reductions in PURPA supports for QFs or deciding to expand them. No state in this category has exceeded that of Arizona, which required its three largest utility companies to offer standard contract term lengths of 18 years with no individual project size limit. This is the most generous PURPA policy in the country but will soon become much more restrictive once the new FERC rule goes into effect. Arizona will now be forced to abandon its current lack of size limit for QFs and instead must now impose a capacity limit of 5 MW for QFs to qualify for standard contracts. Even if the Arizona Corporation Commission opts to retain fixed-rates and 18-year long-term standard contracts under its PURPA rules, rather than adopting the variable rate structures that FERC's new rule enables, the number of eligible projects will be dramatically curtailed due to the new 5 MW size limitation.

The third category of states includes Michigan and North Carolina. These two states held unconventional stakeholder engagement processes which resulted in compromises that ultimately increased renewable energy procurement by utility companies but at the expense of more restrictive PURPA rules for QFs. As a result, QF developers would be able to bid in RFPs for renewable energy by utility companies as the utilities act pursuant to these compromises. These creative solutions demonstrate what is possible from multi-stakeholder engagement processes that seek outside-the-box solutions to traditionally adversarial regulatory debates. This third category therefore stands for the proposition that all types of stakeholders can benefit from reforms to policy-making processes through state utility regulatory commissions that can yield creative stakeholder compromises to contentious policy debates.

FERC's new rule will greatly reduce the scope and relevance of PURPA in state regulation of incumbent utilities. The new rule will be consistent with changes many states have made to their own PURPA rules to restrict both standard contract lengths and maximum eligible size limits

¹⁸¹ *Id.* at 2-3.

for QFs, which have then seen an attendant precipitous drop in QFs in those states. When the new FERC rule goes into effect, it is likely that PURPA will cease to have any substantial impact on the adoption of renewable energy in states without well-developed wholesale market organizations such as RTOs or ISOs—primarily throughout the Southeast and most of the West.

Opponents of the proposed rules have raised a number of arguments regarding statutory interpretation of PURPA and arbitrary and capricious decision-making by FERC in its new rulemaking. These arguments could have substantial traction in courts depending on the courts' inclinations regarding *Chevron* Doctrine. Uncertainties remain regarding whether recent Supreme Court decisions in *EPSCA* and *Hughes* afford federal authority preemption over state authority in the realm of PURPA, but it seems likely courts would support preemption because *EPSCA* established the rule that federal rules preempt state decisions when an activity has any "direct effect" on wholesale rates.

After years of uncertainty, the path forward for PURPA is becoming clearer but is still clouded given the likely legal challenges to FERC's new rule. Further, these PURPA controversies may serve to further politicize the role of FERC, especially as the politics regarding renewable energy continue to escalate in an era of increasing public attention to climate change impacts. As renewable energy growth also ramps up through new economies of scale in developments, pressure on FERC rules and decisions will only continue to escalate. Changes in federal leadership could create opportunities for a future FERC to consider additional PURPA rule changes that might cut against the newly promulgated rule. Of course, Congress could also comprehensively update PURPA as well which could nullify existing FERC rules and require new rulemaking.

Some critics argue that integrated resource planning by regulated utilities is a more cost-effective way to incorporate more renewable energy than PURPA's must-take provisions. This author agrees that a combination of aggressive state renewable energy goals, integrated resource planning aligned with those goals, and RFP processes to procure these energy resources would present a powerful and compelling combination that would allow independent developers to compete on an equal playing field with established players and incumbent utilities. However, most states are not yet prepared to implement the regulatory reforms to achieve this vision. Given the role PURPA played in Michigan and North Carolina to bring reluctant utility companies to the negotiating table, it would be a shame to lose PURPA as a valuable incentive to for such innovative multi-stakeholder compromises.

These compromises hold great promise for creative breakthroughs in grid transition challenges throughout the states. Indeed, the flexibility of states to customize rules to meet their needs while still complying with congressional intent has been a core characteristic of PURPA from the beginning. This characteristic has allowed the states to serve as laboratories for creative solutions, especially in the last five years. In a time of transformation in the function and governance of the electricity sector, the role of states as laboratories should be encouraged rather than diminished. FERC's new PURPA rule will now largely remove PURPA as a policy backstop throughout the U.S. where it had recently shown influence in generating creative outcomes for renewable energy development in Michigan and North Carolina. FERC should focus its attention on learning from innovation in states like Michigan and North Carolina and developing regulatory reforms designed to enable such creative solutions throughout the U.S. toward a clean energy transition.