UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Qualifying Facility Rates and Requirements **Implementation Issues Under the Public Utility Regulatory Policies act of 1978**	**Docket Nos. RM19-15** **AD16-16**

REQUEST FOR REHEARING AND/OR CLARIFICATION BY THE SOLAR ENERGY INDUSTRIES ASSOCIATION

Pursuant to Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*, and Rules 212 and 713 of the Federal Energy Regulatory Commission's ("FERC") or ("Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385. 212, 713 (2020), the Solar Energy Industries Association ("SEIA")[1] respectfully submits this Request for Rehearing, and where appropriate, Clarification, of the final rule approving certain revisions to existing regulations implementing Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA") in the above-captioned dockets ("Order No. 872" or "Final Rule").[2]

Through PURPA, Congress has directed this Commission "to promote the development of new generating facilities and to conserve the use of fossil fuels."[3] As the Supreme Court

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

[2] *Qualifying Facility Rates and Requirements*, Order No. 872, 172 FERC ¶ 61,041 (July 16, 2020) ("Order No. 872"). Order No. 872 revises regulations amending the Federal Power Act ("FPA") and is accordingly subject to review under FPA Section 313. *See* Order No. 872 at P 561. *See also* 16 U.S.C. §§ 796(17-18); 824a-3; 18 C.F.R Parts 292 and 375 (2019).

[3] *See New York v. FERC*, 535 U.S. 1, 9 (2002).

explained, "Because the traditional utilities controlled the transmission lines and were reluctant to purchase power from 'nontraditional facilities,' PURPA directed FERC to promulgate rules requiring utilities to purchase electricity from qualifying cogeneration and small power production facilities."[4] Specifically, the statute requires that the Commission issue regulations "to encourage" the development and support of cogeneration and small power production facilities ("Qualifying Facilities" or "QFs")[5] because "Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels."[6] While "the discovery of significant new natural gas reserves"[7] may be a relevant factor in determining "the incremental cost to the electric utility of alternative electric energy (the "Avoided Cost"),[8] the Commission may not depart from the Congressional mandate to encourage such resources as a means to continue to reduce the demand for traditional fossil fuels. In all cases, the Commission's PURPA program must comport with the statutory mandate of encouraging Qualifying Facilities as a means to "reduce the country's dependence on oil and natural gas."[9]

I. Statement of the Issues

As explained below, where the Commission has provided states with the flexibility to apply the Commission's regulations in a manner that will encourage the development of Qualifying Facilities, SEIA does not oppose the Commission's updates. Where the Commission

---

[4] *Id.* (quotations omitted) (citing *FERC v. Mississippi*, 456 U.S. 742, 751 (1982)).

[5] 16 U.S.C. § 824a-3(a).

[6] See FERC v. Mississippi, 456 U.S. at 750 (citations omitted).

[7] Order No. 872 at P 27.

[8] 16 U.S.C. § 824a-3(b).

[9] Order No. 872 at P 47.

has issued regulations that fail to encourage the development of Qualifying Facilities or where the Commission has imposed new regulatory burdens that actively and significantly discourage the development of QFs,[10] SEIA seeks rehearing. In these instances, Order No. 872 is arbitrary, capricious, and not the product of reasoned decisionmaking.

While SEIA appreciates the Commission's deference to state commissions and the offer of flexibility to accommodate unique situations, Congress has mandated that FERC promulgate regulations that encourage the development of these resources in all cases. States are required to abide by this Commission's implementation of PURPA as well as the administration of the programmatic elements within their territories.[11] The Commission does not have discretion to promulgate regulations that provide for anything less.[12] While the statute provides the Commission with the authority to revise its regulations "from time to time," in all cases, the rules and regulations issued by this Commission must "encourage cogeneration and small power production."[13] Where Order No. 872 has promulgated regulations that are inconsistent with the Congressional mandate, SEIA seeks rehearing.

Specifically, Order No. 872 revises and promulgates regulations in a manner that discourages the development of Qualifying Facilities in contravention of the statute's mandate by

---

[10] *Compare* 16 U.S.C. § 824a-3(e) (requiring that the Commission exempt Qualifying Facilities from utility-style regulation, including relieving the burden of regulations "respecting the rates, or respecting the financial or organizational regulation, of electric utilities.").

[11] *See* 16 U.S.C. § 824a-3(f)-(h).

[12] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (explaining that here Congressional intent is clear, an agency must "give effect to the unambiguously expressed intent of Congress.").

[13] 16 U.S.C. § 824a-3(h) (2012)

(1) terminating a Qualifying Facility's right to elect a long-term energy rate when delivering energy under a long-term contract;[14] (2) revising the long-standing regulations providing that a Qualifying Facility is not "at the same site" so long as the facilities are located more than one mile apart; and (3) allowing utilities within the boundaries of an Independent System Operator or Regional Transmission Organization ("ISO/RTO") to seek a waiver of the to purchase from small power production Qualifying Facilities larger than 5 MW despite the fact that few, if any, of such facilities have meaningful access to organized wholesale markets.[15]

II. Specification of Errors

Pursuant to Rule 713(c)(1), SEIA submits the following specifications of error:

- The Commission erred in revoking a Qualifying Facility's long-standing right to elect to be paid a long-term energy rate in contract for long-term energy delivery[16] without citing to any evidence in the record that financing is generally available for projects using as-available energy rates and fixed capacity rates, thus acting in an arbitrary and capricious manner[17] and not in accordance with Commission precedent[18] or PURPA's statutory direction to encourage the development of QFs.[19]

- The Commission erred in concluding that "a fixed capacity rate in a QF contract based on a purchasing electric utility's capacity rates

[14] *See* Order No. 872 at IV.B.7.

[15] Order No. 872 at II.G.

[16] Order No. 872 at P 57

[17] 5 U.S.C. § 706(2); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[18] 18 C.F.R. § 292.304(d)

[19] 16 U.S.C. § 824a-3(a) ("The Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production").

should be typically sufficient to recover the QF's financing costs."[20] This is incorrect, inconsistent with record evidence, and does not represent reasoned decision-making.[21]

- The Commission erred by rescinding the forty-year precedent of an irrebuttable presumption that facilities that are located more than one-mile apart are located on separate sites, and replacing it with a rebuttable presumption that facilities located between one mile apart and ten-miles apart are located on separate sites,[22] based on a desire to solve for a problem of "gaming" without any evidence of gaming in the record.[23] This is arbitrary and capricious and as discussed below, will discourage QF development, contrary to PURPA's statutory directive.[24]

- The Commission erred in allowing utilities operating within ISO/RTO regions to obtain waiver of the obligation to purchase from Qualifying Facilities larger than 5 MW.[25] Purchase obligations remain necessary and essential for the commercial viability of renewable resources under 20 MW in ISO/RTO markets and the Commission has provided no reasonable evidence as the basis for the reduction in the threshold to 5 MW,[26] therefore acting arbitrarily and capriciously.[27]

---

[20] Order No. 872 at P 37

[21] Order No. 872 at P 62

[22] § 706(2); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983) (an action is arbitrary and capricious "if the agency has... offered an explanation for its decision that runs counter to the evidence before the agency".)

[23] Order No. 872 at P 472 (the Commission merely notes the need to mitigate the opportunity for gaming due to development of large numbers of affiliated renewable resource facilities).

[24] § 706(2); § 824a-3(a).

[25] Oder No. 872 at PP 4; 64, 635

[26] As discussed below, the reasons cited in Order No. 872 at PP 631-32 are not applicable in that they deal with different technologies and different statutory objectives.

[27] § 706(2); *Canadian Ass'n of Petroleum Producers v. FERC,* 254 F.3d 289, 299 (D.C. Cir. 2001).

III. Request for Rehearing and/or Clarification

A. As a Whole, the Commission's Revised PURPA Regulations Do Not Continue to Encourage the Development of Qualifying Facilities

The Commission's contention that the revised regulations "continue to encourage the development of QFs consistent with PURPA" is unsupported by the record and clearly erroneous.[28] First, while requiring utilities to interconnect QFs and allow QFs to purchase station power services was revolutionary in 1978, such base rights are now part and parcel of a utility's obligation to provide open access service. Nothing in the "interconnection provisions" nor the "requirements that utilities sell power to QFs that will enable the QFs to continue operation"[29] provide encouragement to Qualifying Facilities *vis-à-vis* any other category of generating resource. Second, while maintaining existing exemptions from the Federal Power Act ("FPA") and associated state and federal regulations[30] may continue to be helpful to QF development, such help will be of no consequence given the severe obstruction to QF development effected by the Commission's changes to its rules. In particular, the Commission's elimination of fixed energy pricing, its revisions to "the same site" determination, and its expanded path to exemptions from the utility must-purchase obligation in organized wholesale markets eviscerate such encouragement as explained *infra*. Other than generic statements that the statute protects Qualifying Facilities from discrimination and support for the principle that

---

[28] *See* Order No. 872 at P 78.

[29] Id.

[30] *See* 16 U.S.C. § 824a-3(e)(1) (providing for exemption from the FPA, the Public Utility Holding Company act, and from state laws and regulations "respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing").

the purchase rate must equal the purchasing utility's Avoided Cost, there are no changes contained in the Final Rule that encourage QF development. The Commission's unsupported assertion to the contrary is in error.[31]

Section 210 of PURPA directs the Commission to implement "rules as it determines necessary to encourage cogeneration and small power production . . . which rules require electric utilities to (1) sell electric energy to qualifying cogeneration and small power production facilities and (2) purchase electric energy from such facilities."[32] Congress directed the Commission to implement rules to ensure that the rate for purchase are just and reasonable to the consumers of the electric utility and does not discriminate against the QF, while at the same time ensuring that the electric utility was not required to pay "a rate which exceeds the incremental cost to the electric utility of alternative electric energy."[33] To satisfy this statutory requirement the Commission adopted the Avoided Cost standard because it did not discriminate against QFs and it kept customers whole by ensuring they "pay the same rate as they would have paid had the utility not purchased energy and capacity from the qualifying facility."[34] As the Supreme Court explained, while the Avoided Cost standard is implemented, consumers are protected because when utilities purchase from QFs "the rates the utilities charge their customers will not be increased" because "the utilities would have incurred the same costs had they generated the

---

[31] Order No. 872 at P 78.

[32] 16. U.S.C. § 824a-3

[33] *See* 16 U.S.C. § 824a-3(a)-(b); Order No. 872 at PP 67-75.

[34] Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, Order No. 69, FERC, 45 Fed. Reg. 12,215, 12,222 (Feb. 25, 1980) ("Order No. 69").

energy themselves or purchased it from other sources. Moreover, a utility's existing rates will ordinarily have been determined to be 'just and reasonable' by the appropriate state regulatory authority."[35]

In concluding that its revised regulations, when taken as a whole, provide encouragement to QFs the Commission wholly failed to consider the manner in which its regulations will discourage QFs. By eliminating a QF's right to elect a purchase rate based on the purchase utility's forecasted energy rates over a specified term, the Commission is requiring that QFs accept a short-term energy rate while the QF is delivering pursuant to a long-term contract. Allowing a state flexibility to require that a QF accept a short-term rate, for a long-term product, does not encourage QFs.[36] Separately, imposing an overly-burdensome *ex-post* review to determine whether distinct Qualifying Facilities located with a ten-mile radius are located "at the same site" further discourages QFs. Finally, permitting purchasing utilities within ISO/RTO regions to obtain a waiver of the obligation to purchase from QFs larger than 5 MW further discourages development of the category of resources which Congress directed this Commission

[35] See, e.g., American Paper Inst. v. Am. Elec. Power Serv. Corp., 461 U.S. 402 (1983). Nothing in the record indicates that, should electric utilities reduce their wholesale power purchase costs, that they will pass these savings on to their ratepayers. While this may occur in some instances, unless the Commission mandates that wholesale power savings be shared with the retail ratepayers, the consumers of the electric utility may not benefit from the Commission's revised regulations.

[36] There is no evidence that any retail customer's rates would be reduced in the event a purchasing utility paid QFs a short-term rate for a long-term product.

to "encourage." As a whole, the revised regulations discourage rather than encourage QFs and the revisions are inconsistent with the statutory mandate.[37]

B. Terminating a Qualifying Facility's Right to a Long-Term Energy Rate while the Qualifying Facility is Delivering a Long-Term Product is Arbitrary and Capricious

While the statute authorizes the Commission to revise its regulations "from time to time," in all cases, the rules and regulations issued pursuant to the statutory authority must abide by the express Congressional directive to *encourage* development of Qualifying Facilities.[38] While securing financing based on an As-Available Energy rate and a fixed capacity rate may be a rare possibility in a few locations across the country, there is no evidence in the record that financing is generally available in such circumstances and providing a state with "flexibility" to undervalue the energy delivered pursuant to a long-term contract is not just and reasonable and discriminates against QFs.

Long-term contracts are necessary to finance new non-utility generation because capital providers will not finance a project without a reasonable expectation of the revenue the project expects to generate over its useful life.[39] The Commission has acknowledged that there is a risk

---

[37] In reporting on the Commission's decision, one of the industry's leading trade publications described Order No. 872 as "a blow to small solar, a win for states and utilities"[37] and concluded with the observation that "It's hard to say that FERC's rules encourage the development of QFs if they don't enable financing of QFs." *See* Catherine Morehouse, *A blow to small solar, a win for states and utilities? Regulators, analysts assess FERC's PURPA rule* (July 30, 2020) (quoting Ari Peskoe, director of the Electricity Law Initiative at the Harvard Law School Environmental and Energy Law Program), *available at*: https://www.utilitydive.com/news/a-blow-to-small-solar-a-win-for-states-and-utilities-regulators-analysts/582467/

[38] *See* 16 U.S.C. § 824a-3(a), (f).

[39] *See, e.g.,* Graves, Frank, *PURPA: Making the Sequel Better than the Original*, Edison Electric Institute (Dec. 2006) ("A fixed-price, long-term power sale contract with the local utility

that fixed-price contracts could deviate from the utility's actual avoided cost at any one snapshot in time, but if the purchasing utility does not offer the QF a forecasted energy rate over the life of a long-term contract, and the QF is not otherwise able to compete for a long-term contract through a competitive bidding program, then the QF will not be able to obtain financing in the capital markets.[40] The Commission has acted arbitrarily and capriciously in concluding otherwise.

In revoking the long-standing regulations that provide the Qualifying Facility with the right to elect to be paid a long-term energy rate in a contract for long-term energy delivery[41] the Commission is actively discouraging the development of Qualifying Facilities in contravention of the statutory direction to encourage the development of such facilities.[42] This is arbitrary and capricious. The Commission claims that this revocation is necessary to protect the consumers of

---

gave QFs the stable revenue source they needed to obtain project financing."); *See* Caplan, Elise, *Financial Arrangements Behind New Generating Capacity and Implications for Wholesale Market Reform*, American Public Power Association (July 2018), *available at*: https://www.publicpower.org/system/files/documents/Financial_Arrangements_Behind_New_Generating_Capacity_2018_1.pdf ("Caplan Report").

[40] *See* Comments of the Solar Energy Industries Association at Attachment 3, Docket No. RM19-15 (Dec. 3, 2019) (providing the Affidavit of Ray Shem of Pine Gate Renewables) ("Shem Affidavit") ("The availability of long-term, fixed-rate energy contracts contributes materially to a QF's ability to secure capital market financing, and denying such contracts would severely limit future QF development.").

[41] 18 C.F.R. § 292.304(d).

[42] 16 U.S.C. § 824a-3(a) ("The Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production"); *Compare Power Plants are Not Built on Spec*, 2014 update at 1 ("Just 2.4 percent of the new capacity was built for sale into a market, a number that includes new facilities for which no information could be found about the contracts. Moreover, when broken down geographically, only 6 percent of all capacity constructed in 2013 was built within the footprint of the RTOs with mandatory capacity markets.").

the electric utility, but this is inaccurate when any concerns surrounding inaccurate administratively-determined Avoided Costs can be fully mitigated when a state adopts the Commission's new competitive bidding framework.[43] SEIA respectfully requests rehearing of the Commission's modifications to 18 C.F.R. § 292.304(d) because revoking the QF's right to a long-term energy rate in a long-term contract rate is not necessary to ensure the rates to consumers are just and reasonable and such a revision discourages QF development in violation of the statute. Should the Commission not grant rehearing, SEIA respectfully requests that the Commission clarify that such "flexibility" offered by revised Section 292.304(d) is not available to any state unless the purchasing electric utility (1) has separately-stated avoided energy and capacity rates on-file and (2) is complying with the data reporting requirements of 18 C.F.R. § 292.302. As the Commission recognizes, revising the regulations to allow a state to require that a QF accept a short-term "As Available" rate for a long-term energy product "has important consequences for the ability of QF owners to finance their projects,"[44] but the Commission acts arbitrarily in capriciously in failing to analyze the effect of denying electric consumers the benefits of long-term contracts and exposing consumers to the fluctuating real-time prices in wholesale markets.[45]

[43] Graves, Frank, *PURPA: Making the Sequel Better than the Original*, Edison Electric Institute (Dec. 2006) (explaining that by the early 1990s 10 states had implemented competitive bidding programs due to problems with administrative determinations of avoided cost, coupled with the abundance of offered QF supply).

[44] Order No. 872 at P 37.

[45] There is no evidence that any retail customer's rates would be reduced in the event a purchasing utility paid QFs a short-term rate for a long-term product. If market prices rise, as they did during the California Energy Crisis, the opposite would occur since consumers would lose the protection against market volatility and unpredictable market price increases provided by

1. Lack of Evidence to Support Concluding that Fixed Capacity Rates Alone are Sufficient to Attract Capital

While SEIA appreciates the Commission's clarification that its regulations continue to require that Qualifying Facilities be compensated for capacity on a fixed basis,[46] there is no evidence in the record to support a conclusion that fixed capacity rates alone are sufficient to allow a QF the ability to attract capital market financing. The Commission's conclusion that "a fixed capacity rate in a QF contract based on a purchasing electric utility's capacity rates should typically be sufficient to recover the QF's financing costs and should therefore continue to facilitate QF financing"[47] is incorrect, inconsistent with record evidence, and does not constitute reasoned decisionmaking.

a. No Credible Evidence that Merchant Generation Projects are Financed on Variable Energy Rate Contracts

As an initial matter, the Commission's citations to evidence about non-QF generation facilities in operation today which provides no information about the contract structures used to finance and construct these facilities, is not germane to the analysis as to whether the revised regulations continue to encourage the development of QFs as mandated by the statute. Even if such evidence about *non-QF* generation were relevant – which it is not – the Commission completely omits the history over the last ten years where such generators have continually

---

fixed long-term contracts. There are severe consequences when an electric utility relies too heavily on short-term energy, as electric consumers in the West and this Commission are well-aware.

[46] *Id.* at P 234.

[47] *Id.* at P 37.

sought longer term contracts as a means to support capital market financing.[48] For example, in 2009 the Commission considered PJM's proposal for "Multi-Year Pricing Assurance for Qualifying New Entry Projects."[49] In that proceeding, the Commission heard from CPV Maryland and IPA Central, LS Power and Tenaska, among others, who explained that "the single greatest barrier to entry by competitive suppliers is the difficulty of financing new construction"[50] with the largest independent generators in the country explaining that "longer-term revenue streams are needed in the current market environment to encourage investment in new generation resources."[51] The Commission acknowledged that "a longer commitment period may aid the developer in financing a project," but did not approve the measure due to the disparate treatment amongst incumbent and new generating sources.[52] This issue was pursued up to the Supreme Court where the Court upheld the Commission's jurisdiction over wholesale electricity rates. The Commission's claim that "fixed energy rates are not generally required in

[48] If the Commission included in its analysis projects such as the 685 MW Newark Energy Center and the 700 MW Woodbridge Energy Center or the 726 MW CPV St. Charles Energy Center, all of which were financed based on the long-term contracts provided by the states that were invalidated by the Supreme Court after the fact, the Commission has erred. Further, to the extent the Commission included the 110 MW Perryman natural gas plant or the 30 MW Fair Wind project that were constructed by Exelon pursuant to its merger commitments to the state of Maryland, such analysis is in error. *See* Caplan Report at 8.

[49] *See PJM Interconnection, LLC*, 126 FERC ¶ 61,275 (2009).

[50] *Id.* at P 145.

[51] *Id.* at P 146.

[52] The Supreme Court ultimately upheld the Commission's order. *See Hughes v. Talen Energy Mrkt'g*, 136 S.Ct. 1288 (2016).

the electric industry in order for electric generation facilities to be financed" is completely unsupported.[53]

If anything, the natural gas contract structures and similar rate structures relied on by the Commission prove the opposite of what the Commission claims.[54] In the natural gas context, given the low capital costs and high fuel costs, such merchant generators can attract financing because the fixed capacity costs are sufficient to recover the low up-front investment costs. Merchant natural gas generators rely on the fuel products markets to mitigate the risk of variable energy pricing, whereas fuel-less Qualifying Facilities do not have a similar market opportunity. Since Qualifying Facilities do not hold fuel contracts that can be used to mitigate the exposure to real-time energy pricing, Order No. 872 forces Qualifying Facilities to bear the entire risk of volatile market prices. PURPA requires that Qualifying Facilities be placed "on *an essentially equal competitive footing* with competing suppliers."[55]

The Commission's reliance on generic EIA data, when there are many commonly-known industry studies on the ability of merchant plants to obtain financing with a variable energy rate contract is arbitrary and capricious. For example, the widely-distributed reports by the American

---

[53] SEIA observes that the challenges faced by the Commission in its resolution of buyer-side mitigation measures in the ISO/RTO regions occurs because variable energy rates are insufficient to support capital market financing.

[54] *See, e.g.,* Order No. 872 at P 38 (citing *Town of Norwood v. FERC*, 962 F.2d 20 (D.C. Cir. 1992)). The facts of *Town of Norwood* are distinct from those presented in this proceeding, because *Town of Norwood* addresses standard utility rates "designed to recover the [utility's] variable costs." The Commission's revised regulations achieve the opposite for QFs, providing no confidence that the fixed capacity payments will be sufficient to attract financing from the capital markets.

[55] *Environmental Action Inc.*, 939 F.2d 1057, 1062 (D.C. Cir. 1991).

Public Power Association ("APPA"), "Power Plants are Not Built on Spec" have consistently shown that very small portions of new capacity additions have been financed with variable energy rates.[56] In the most recent 2016-2017 analysis, the report documents that there was 11,600 MW of new solar capacity brought online with a long-term contract, and a mere 40 MW brought online with a variable energy rate.[57] This equates to less than .5% of solar projects being financed on a variable energy rate contract during the reference period. The Commission's conclusion that "fixed energy rates are not generally required in the electric industry in order for electric generation facilities to be financed"[58] is completely unsupported and runs contrary to over a decade of analysis showing the exact opposite.

Even if the Commission were correct, and merchant natural gas plants could be financed on variable energy rate, PURPA does not authorize the Commission to discourage the development of Qualifying Facilities.[59] While there may be a rare project that secures financing based on an As-Available Energy rate and a fixed capacity rate, there is no evidence in the record that this structure is sufficient to allow any material number of Qualifying Facilities to attract

---

[56] *Power Plants are Not Built on Spec*, 2014 Update, American Public Power Association, October 2014, *("*As was found in the analysis of 2011 generation, almost all new capacity was constructed under a long-term contract or ownership. Just 2.4 percent of the new capacity was built for sale into a market, a number that includes new facilities for which no information could be found about the contracts."), *available at* https://hepg.hks.harvard.edu/files/hepg/files/94_2014_power_plant_study.pdf?m=1523366757

[57] *See* Caplan Report at Table 2.

[58] Order No. 872 at P 237.

[59] Given that PURPA's express goal was to reduce reliance on natural gas, discussions as to the financing mechanisms that may be available to natural gas plants being developed on a merchant basis is completely irrelevant to the analysis the Commission must undertake in revising its PURPA regulations.

investment from capital markets.[60] As the record reflects, the idea that a Qualifying Facility can attract capital without a long-term energy rate known at the time of contracting "has no foundation in the reality of financing QF projects in most of the country, and particularly in vertically integrated markets."[61]

b. No Evidence that States Offer Fixed Price Capacity Payments to Qualifying Facilities

The Commission has acted arbitrarily and capriciously in failing to consider the fact that many states do not offer QFs a fixed price for capacity that is sufficient to support financing. Where purchasing utilities do not provide for fixed capacity payments over the term of the QF contract, a state should not be provided flexibility to terminate the QF's right to elect a long-term energy rate in a long-term contract. For example, given that Alabama Power does not compensate QFs for capacity,[62] it would be arbitrary and capricious to allow Alabama the flexibility to terminate the QF's right to elect a long-term energy rate because there are no long-term payments for capacity despite Alabama Power's identified capacity needs. Similarly, it would be arbitrary and capricious to allow New Mexico the flexibility to terminate the QF's right to elect a long-term energy rate because PNM does not compensate QF's for capacity despite the

---

[60] *Compare* Caplan Report at 15 (documenting just 9 small solar projects, with 8 of such projects in New Jersey and all such projects under 10 MW, suggesting an enrollment in a state-specific program or selling through a virtual Power Purchase Agreement).

[61] *See* Shem Affidavit at 2.

[62] *See* Alabama Power QF Tariff, *available at* https://www.alabamapower.com/content/dam/alabamapower/Rates/CPE.pdf

fact that PNM has announced it is replacing all of the capacity from its San Juan Generating Station with renewables.[63]

The Commission's conclusion that variable energy rates "still allow QFs to obtain financing"[64] is clear error. SEIA respectfully requests rehearing. Denying the QF the right to be compensated for the long-term value of energy, when delivering pursuant to a long-term contract, discriminates against QFs.

2. Lack of Evidence to Support Concluding that Variable Energy Rates are Sufficient to Attract Financing

Allowing a state to limit a QF to a short-term rate, while the QF is delivering a long-term product, is discriminatory and does not provide QFs with "reasonable opportunities to attract capital from potential investors."[65] QFs have not requested that the Commission provide "guaranteed financing."[66] Rather, SEIA requests that the commission grant rehearing because the right to obtain a long-term energy contract is necessary to provide QFs a "reasonable opportunities to attract capital from potential investors."[67] As the sworn affidavit of Mr. Ray

---

[63] *Compare* PNM QF Tariff, *available at* https://www.pnm.com/documents/396023/396197/schedule_12.pdf/58d6fc76-3024-42a3-8717-1a493cd4e2de?t=1584564563812 *with* Catherine Morehouse, *New Mexico Approves 100% renewables + storage replacement for San Juan coal capacity* available at https://www.utilitydive.com/news/new-mexico-approves-100-renewable-replacement-for-san-juan-coal-capacity/582557/ (explain that PNM will bring on 650 MW of solar as part of such transition).

[64] Order No. 872 at PP 335-36

[65] *Windham Solar LLC and Allco Finance Limited*, 157 F.E.R.C. ¶ 61,134, P 8. (2016) ("Windham Solar").

[66] Order No. 872 at PP 308, 335.

[67] Windham Solar at P 8.

Shem explains, when North Carolina allowed QFs to sell pursuant to long-term contracts with fixed prices for energy and capacity "developers were able to secure capital readily for new project development;" yet, in Florida where the state provides for variable energy pricing, the "short-term contracted cash flows are not sufficient to attract capital market financing."[68] Said another way, the same capital market providers are comfortable financing QF contracts in North Carolina because such contracts contain a fixed capacity and fixed energy value but <u>will not</u> finance QF contracts in Florida where the state does not provide a fixed energy pricing structure.

Order No. 872's reliance on the prospects for QFs' ability to leverage the use of financial products (a "hedge") when offered a variable energy rate contract is without any factual basis.[69] The evidence of hedge products discussed by the Commission is limited to those secondary financial products available in ISO/RTO regions and there certainly is no evidence that such a hedging approach to resolve financing issues is possible in the Northwest or Southeast, among other regions. Furthermore, even where hedges are made available, "many hedge providers decline to work with small projects because they are not cost effective and have higher risk profiles."[70] This is rational given that the "[d]ue diligence and transaction expenses that would be incurred to implement small hedge contracts, including attorney, independent engineer, and insurance advisor fees, often exceed the hedge provider's anticipated revenue from a small hedge contract, while operating risks are perceived to be higher because the impact of any equipment

---

[68] Shem Affidavit at 3.

[69] *Compare* Order No. 872 at P 345 *with* Caplan Report at Table 3a (showing that only 3.6% of the new capacity with contracts utilized a hedge, with all such uses limited to wind projects).

[70] NIPPC-CREA-REC-OSEIA Comments, at Attachment 2, Declaration of Carol Loughlin, at ¶ 9.

failure would have a much greater impact on a small project's revenue than it would on a larger project's revenue."[71] The Commission's speculation that a hedge may cure the problem for "at least some QFs" – in addition to being speculative and incorrect – arbitrarily leaves all other QFs without any prospects to overcome the disincentives of a variable energy price.[72]

As the record reflects, requiring that a Qualifying Facility accept a short-term "As Available" energy rate for a long-term energy product discriminates against the QF and is in contravention of the statute's direction to encourage QFs. By limiting a QF to a variable energy rate contract, a state then removes the QF's ability to provide a measure of visibility around future revenue streams to its investors so that the investors are able to underwrite their investment, consistent with standard infrastructure investment guidelines.[73] FERC's finding otherwise is arbitrary, capricious, and not consistent with reasoned-decisionmaking.[74]

3. Lack of Evidence to Conclude Protecting Electric Consumers Warrants Terminating the QF's Right to Elect Long-Term Energy Rate

In Order No. 872, the Commission errs in its conclusion that electric consumers are harmed because under some "overestimations" and "underestimations" of Avoided Cost have not balanced out. Even if such a conclusion were correct, allowing a state the flexibility to terminate

[71] NIPPC-CREA-REC-OSEIA Comments, at Attachment 2, Declaration of Carol Loughlin, at ¶ 9.

[72] Order No. 872 at P 345.

[73] Shem Affidavit at 3.

[74] *See, e.g., Power Plants are Not Built on Spec*, 2014 Update ("As was found in the analysis of 2011 generation, almost all new capacity was constructed under a long-term contract or ownership. Just 2.4 percent of the new capacity was built for sale into a market, a number that includes new facilities for which no information could be found about the contracts.")

a QF's right to a long-term energy rate is not the proper solution to the identified problem. Allowing a state to terminate the QF's right to elect a fixed-price energy and capacity contract will discourage QF development in contravention to the express statutory direction. Providing the states with flexibility to adopt a competitive bidding program is sufficient to protect the electric consumers of any purchasing utility.[75] As the Commission explained in Order No. 69, the Qualifying Facility's right to elect to be paid based on forecasted energy rates should be respected "so long as the total payment over the duration of the contract term does not exceed the estimated avoided costs."[76]

The Commission explains that the purpose of Order No. 872's revision to 292.304(d) is to provide states a mechanism to "ensure that the avoided cost rate will be closer to the actual rate the purchase electric utility and its customers would have paid if the purchase electric utility had generated this electric energy itself or purchased such electric energy from another source."[77] There is no indication in the record that any retail rates paid by electric consumers fluctuate based on the purchasing utility's obligation to purchase from QFs, and for utilities with stated retail rates, there is no evidence to suggest that these rates will be reduced in any manner in the event the state adopts utilizes the "flexibility" provided by revised Section 292.304(d) unless the Commission mandates otherwise. Providing states with the option to terminate a QF's right to a

---

[75] *Compare* Graves, Frank, *PURPA: Making the Sequel Better than the Original*, Edison Electric Institute (Dec. 2006) (explaining that by the early 1990s 10 states had implemented competitive bidding programs due to problems with administrative determinations of avoided cost, coupled with the abundance of offered QF supply).

[76] Order No. 69 at 12224.

[77] Order No. 872 P 38.

long-term energy rate, particularly when there is no evidence that any savings in wholesale power costs will be credited to electric consumers, is an abuse of discretion.

The record in this proceeding is limited to allegations that avoided costs have on some occasions been overestimated.[78] Even if the Commission is correct that methodologies employed in some states did not result in a balancing of the "overestimations" and "underestimations" of Avoided Cost, the fault for this problem lies in the methodologies deployed by these states and utilities, not with the QF operating as a price-taker.[79] For example, the Commission relies heavily on Alliant Energy's comments that make unsupported claims about prices over a five-month window in 2016. Alliant describes that "wind prices in the Iowa region of MISO" during this small time period were allegedly "approximately 25% lower" than the prices included in the PURPA contracts.[80] Without citation, it is impossible to prove the veracity of this statement given that Alliant did not identify a specific LMP associated with the "wind prices in the Iowa region of MISO" and further did not publicly identify the energy rate or term of the purported PURPA contract. Notably, a five-month period in pricing[81] is not indicative as to whether the "overestimations" and "underestimations" would balance out over

[78] *See* Order No. 872 (Glick, Comm'r, dissenting at P 16). *See also,* Order No. 872 at P 293 ("[W]e emphasize that we have not relied on that [Concentric] report to support the variable energy avoided cost provision adopted in the final rule.").

[79] *Compare* Graves, Frank, *PURPA: Making the Sequel Better than the Original*, Edison Electric Institute (Dec. 2006) (reviewing the methods used in the past by state regulators to determine a utility's avoided costs and identifying the conceptual and practical problems associated with some of these method).

[80] *See* Order No. 872 at P 233 (citing Alliant Energy Comments, Docket No. AD16-16-000, at 5 (Nov. 7, 2016)).

[81] *Id.* (comparing prices from June 2016 with those in November 2016).

the duration of the long-term contract. Similarly, EEI asserts – without evidence or verification – that an unidentified "contract" at the Mid-Columbia trading hub on August 1, 2014 was priced at $45.87/MWh and that "the same contract" was priced at $30.22/MWh on June 30, 2016. The "contract" EEI discusses is not a purchase contract between a QF and an electric utility; but rather appears to be a futures contract traded on the Intercontinental Exchange ("ICE") that is not a comparable product to a PURPA contract. In North Carolina, any overestimations are attributable to Duke's failure to implement an avoided cost methodology that "mirrored the utilities' declining incremental costs to generate electricity or to purchase alternative power."[82] The Commission's conclusion that the primary factor in Duke's "overpayment" was a fixed energy rate contract is arbitrary, capricious, and not consistent with reasoned decisionmaking.[83] The price comparison's offered by the Idaho Commission, which the Commission found to hold value, compare PURPA contract prices (energy + capacity over a 15-20 year term) with economy-energy prices at the Mid-C hub. In ignoring this disparity and finding that the Idaho Commission presented a valid comparison between QF contract prices and the costs of long-term utility commitments, the Commission as acted inconsistent with reasoned decisionmaking.[84] It should be beyond debate that different electricity products have different market values. The

[82] Duke Comments at 6. There is no basis in the record to conclude that Duke has ever been prevented from using its declining incremental costs to generate electricity as the avoided-energy rate.

[83] Order No. 872 at P 265.

[84] *See* Order No. 872 at P 254 & n. 403; NIPPC-CREA-REC-OSEIA Comments at 31-32, Attachment 1, Expert Report of Dr. Don Reading. Similarly, QF contracts (which include a capacity value) are compared to the "net power costs" of Idaho Power. The record evidence from expert energy economists demonstrates that the proper comparison is between the all-in costs of QFs versus the all-in costs of the utility generation. *Id.*

evidence relied on by the Commission that overestimations and underestimations of long-run Avoided Costs do not balance out over time does not support the conclusion.

What the Commission clearly recognizes, but does not explicitly state, is that existing methodologies in some states have produced inaccurate forecasts of long-run Avoided Costs. Yet, rather than directing states to update and modernize their methodologies to accurately forecast avoided long-term energy costs, the Commission is allowing states to simply abandon the exercise and mandate that QFs accept a short-term As Available rate for a long-term product. The solution for avoided cost methodologies that do not "balance out" is better methodologies – not an abandonment of long-run marginal costs.

Contracts whereby a utility agrees to buy energy over a fixed-term are not unique to PURPA and denying QFs a long-term energy rate in a long-term energy contract discriminates against QFs in direct violation of PURPA. For example, at the end of December 2019 the Idaho Commission approved a 20 year PPA between where Idaho Power agreed to purchase a 120 MW solar project at $21.75/MWh, with the price to increase 1.5% each year for the 20-year term of the PPA.[85] The Idaho Commission approved the PPA "after a lengthy review that included economic analyses, information from Idaho Power's integrated resource plan and evaluating if the purchase agreement would economically benefit the company's customers, among other

---

[85] *Commission approves agreement allowing Idaho Power to buy energy from Jackpot Solar*, TIMES-NEWS, Dec. 27, 2019, https://magicvalley.com/business/commission-approves-agreement-allowing-idaho-power-to-buy-energy-from/article_5b06a7da-a94d-5373-9d68-a5e8f80dcbe9.html. The agreement included the potential for Idaho Power to buy the facility, as well as obtain energy from a proposed expansion at a slightly higher price. *See* Press Release, Idaho Power, Idaho Power invests in clean, affordable solar energy (March 26, 2019), https://www.idahopower.com/news/idaho-power-invests-in-clean-affordable-solar-energy/

factors."[86] This not only demonstrates that fixed long-term contracts are necessary to finance generation projects, but also demonstrates the absurdity of the Idaho Commission's rule limiting solar and wind QFs to two-year contracts.[87] There is no justification for discriminating against Qualifying Facilities by denying them the exact same treatment. On the contrary, PURPA bars such discrimination against QFs.

Revising 292.304(d) to allow a state to terminate the QF's right to elect a forecasted avoided cost rate while the QF is delivering over a known term discriminates against QFs, discourages QF development, and is arbitrary and capricious.[88]

4. Request for Reconsideration

The Commission has erred by revising its regulations without record evidence to support such revisions and has acted arbitrarily and capriciously in a manner inconsistent with express statutory mandate. SEIA requests that the Commission rescind the revisions to 292.304(d) and

[86] *Commission approves agreement allowing Idaho Power to buy energy from Jackpot Solar*, TIMES-NEWS, Dec. 27, 2019, https://magicvalley.com/business/commission-approves-agreement-allowing-idaho-power-to-buy-energy-from/article_5b06a7da-a94d-5373-9d68-a5e8f80dcbe9.html.

[87] Idaho's two-year contract limitation effectively eliminated all QF development in the state. *See* Idaho PUC Case Dockets, containing no contract approval cases for wind or solar QFs since issuance of Idaho PUC Order No. 33357 on August 20, 2015, which reduced contract terms to two years for all wind and solar QFs over 100 kW in capacity, *available at*: https://puc.idaho.gov/electric/electric.htm.

[88] SEIA proposed an alternative approach for protecting ratepayers while simultaneously fulfilling the Commission's statutory obligation to encourage QF development, and the Commission adopted this Competitive Solicitation option in large part into its regulations. *See* Order No. 872 at Part IV.B.8. Where states are concerned that administratively determined Avoided Costs may not "balance out" over the life of a long-term contract, then states can utilize the Competitive Solicitation option to ensure electric consumers are protected. *Id.* at P 411 ("This level playing field ensures that any QF's capacity rates that result from the competitive solicitation are just and reasonable and non-discriminatory avoided cost rates.").

reinstate a Qualifying Facility's right to elect to receive the purchasing utility's forecasted energy rate calculated at the time the obligation to sell is incurred. As the Commission recognized, as-available energy rates determined at the time of delivery "represent only short-run spot prices that do not reflect the electric utilities' long-run costs that QFs can displace."[89] SEIA respectfully requests that the Commission rehear its determination in Order No. 872 and restore the QF's right to elect a purchase energy rate based on the forecast of the energy costs avoided over the term of the contract.

If the Commission does not grant rehearing, SEIA respectfully requests that the Commission clarify that a state's ability to utilize the flexibility provided by 292.304(d) is not unlimited and explicitly provide that a state may not terminate a QF's right to a long-term energy rate unless (1) the purchasing utility has separately stated avoided energy and avoided capacity rates on-file and (2) the purchasing utility is in compliance with the data reporting requirements set forth at 292.302.

IV. The Commission's Revisions to the One Mile Rule Are Unlawful

Congress passed PURPA to encourage fuel diversity via the development of QFs, which Congress envisioned would enhance national security and contribute to the resilience of the system and Congress instructed FERC to encourage the development of these resources. In rescinding the irrebuttable presumption that facilities that are located more than one-mile apart are located on separate sites and thus can each qualify as QFs ("One Mile Rule"), and replacing it with a rebuttable presumption that facilities located between one mile apart and ten-miles apart are located on separate sites ("Ten Mile Rule") the Commission has acted inconsistent with

[89] Order No. 872 at P 117.

the Congressional mandate. The revisions to the One Mile Rule are unlawful. By authorizing the Commission to determine when facilities are considered to be located at "the same site" Congress did not intend for the Commission to promulgate regulations that would stymie the development of QFs by discouraging potential financiers, investors, and owners from backing such resources.

A. Congress Intended Same Site Definition to be Based on Geographical Limits

In Order No. 872 the Commission has exceeded the statutory grant of authority and imposed new factors into the analysis that is limited to determining whether a *facility* is located "at the same site" as any other *facilities*. As the Commission has previously-recognized, "[t]he critical test under PURPA relates to whether the facilities are located at one site rather than whether they are integrated as a project."[90] By going beyond this limitation, the Commission is discouraging the development of these resources. While the Commission claims that the revised regulations are necessary to mitigate "the opportunity for gaming," the record is devoid of any evidence of gaming. The Commission recognizes this fact, but nonetheless revises the One Mile Rule because it concluded that there is a "sufficient possibility" the so-called gaming may occur. The Commission has acted arbitrarily and capriciously.

It is essential to recognize that facilities that are sited more than one mile apart have not "gamed" the One Mile Rule; rather, they have complied with the One Mile Rule. In expanding the radius from one to ten miles the Commission is seeking to reduce the number of Qualifying Facilities that can be constructed in any one territory. As commenters explained, this

[90] *El Dorado Cty. Water Agency*, 24 FERC ¶ 61,280, at 61,578 (1983)

expands the "exclusion zone" around a QF from the current 3 square miles to a now 300 square mile radius.[91] This is in direct contravention to the statutory mandate to encourage the development of Qualifying Facilities. For more than forty years the Commission's rules have provided that a QF which locates *more than one mile* away from an affiliated facility is not "at the same site." Yet, simply because of "the development of large numbers of affiliated renewable resource facilities"[92] the Commission has revised its rules to limit the QF development in a region. Congress did not provide FERC with such authority.

The Commission has stepped beyond the statutory bounds in providing that the "same site" determination may be based on factors that have nothing to do with physical commonality. As the Commission recognized, Congress limited the Commission's authority to determining whether facilities are at "the same site" and did not authorize the Commission to determine whether facilities that are not at the same site constitute "separate projects." In revising terminology to make this correction, but retaining and adopting all of the substance of the separate facilities analysis, the Commission has imposed a *separate facilities* analysis when the statute only provides the Commission authority to issue a same site determination. This is arbitrary, capricious, and not consistent with reasoned decisionmaking. SEIA respectfully requests that the Commission rehear its determination in Paragraph 508 and rescind regulations allowing for review, evaluation, or consideration of physical and operational characteristics that are not germane to whether a facility "together with any other facilities located at the same site" have a power production capacity greater than 80 MW.

---

[91] Order No. 872 at P 483 (citing the comments of Terna Energy).

[92] *Id.* at P 472.

B. Additional Regulatory Burdens of the Ten Mile Rule Discourage QF Development

There has always been a process by which any interested party can challenge a QF's certification filing. The Commission's rules allow anyone who wants to challenge a self-certificate to submit a petition for declaratory order and pay the associated filing fee. Payment of the associated filing fee was intended to limit challenges to interested persons, given the Congressional direction to remove regulatory burdens for QFs, but the Commission has an established process to waive the declaratory order filing fee if necessary.[93] The current filing fee is $30,000, which is substantial, but it is not nearly as substantial as the increased legal fees that QFs will now have to bear in seeking and defending certification.

The proposed Ten Mile Rule adds unnecessary regulatory burdens on QFs, including those that do not sell pursuant to the Section 210 mandatory purchase obligation. The self-certification process was designed to avoid the "complexity, delays, and uncertainties created by a case-by-case qualification procedure" that "would act as an economic disincentive to owners of smaller facilities."[94] Yet, in adopting a rebuttable presumption that affiliated facilities with the same generation source could be consolidated into a single facility 'at the same site' the Commission has departed from this well-reasoned conclusion. The Ten Mile Rule will have a chilling effect on the development of Qualifying Facilities, running directly counter to PURPA's mandate to encourage the QF development.

[93] 18 C.F.R. § 381.106(a).

[94] Order 671 at P 83.

1. Expanding the Radius to Ten Miles Fails to Comport with PURPA's Directives

The Commission has not offered any justification as to how it settled on a ten-fold increase to the forty-year old precedent providing that facilities located more than one mile apart would not be considered to be at the same site. As the Commission explained when it first considered application of newly-implemented Section 292.204(a), it intended to "carry out the statutory mandate in a conscientious manner" and recognized that Congress did not intend the Commission to undertake a rigid application of the rule "when a common sense conclusion would reach the opposite result."[95] Applying a ten-mile radius is not a common sense conclusion.

There are no allegations in this proceeding that any solar facilities have "gamed" the One Mile Rule and in SEIA's experience, the one-mile radius strikes the proper balance between encouraging competition and preventing gamesmanship. The Ten Mile Rule will increase the "exclusion zone" around a QF's electrical generating equipment from approximately 3 square miles (3.1415 square miles, the circle around the QF's electrical generating equipment, assuming a point generating source) to over 300 square miles, a massive 100-times increase in the "exclusion area" for a single QF. This, without question, discourages and dampens the development of Qualifying Facilities. Failing to grant rehearing of the ten-mile radius will create administrative, legal, and economic burdens for QFs that far outweigh any problem that the rule is intended to solve.

[95] *See Windfarms, Ltd.*, 13 FERC ¶ 61,017 at 61,032 (1980)

2. Allowing for Analysis of Factors Not Germane to Same Site Analysis is Not Just and Reasonable or Consistent with Reasoned Decisionmaking

As the Commission recognized, Congress limited the Commission's authority to determining whether facilities are at "the same site" and did not authorize the Commission to determine whether facilities that are not at the same site constitute "separate projects."[96] Yet, in revising terminology to make this correction, but retaining and adopting all of the substance of the separate facilities analysis previously-proposed, the Commission has acted arbitrarily and capriciously and inconsistent with reasoned decisionmaking. In adopting the physical and ownership characteristics as proposed in the NOPR, the Commission has stepped beyond the statutory bounds. Congress did not authorize the Commission to analyze non-physical factors unrelated to the facility's electric generating equipment as part of the same site determination. The Commission offers no authority for the expansion of its authority from that granted by Congress and no justification for departure from precedent that the same site analysis is limited to determining whether "the area where the facility is located is in some manner distinct from the surrounding area."[97]

---

[96] Order No. 872 at PP 4; 508 (we clarify terminology used in the NOPR "relating to the determination of whether small power production facilities are separate facilities to focus not on whether they are separate facilities, but rather to mirror the statutory language and thus focus on whether they are at "the same site").

[97] *See Windfarms, Ltd.*, 13 FERC ¶ 61,017 at 61,032 (1980); *see also Coso Energy Developers*, 45 FERC ¶ 61,003 (1988) (explaining that transmission facilities "need not be considered in determining whether the one-mile rule has been violated since it is not 'electric generating equipment.') (internal citations omitted).

The Commission erred in concluding that ownership and other characteristics are germane to the "same site" determination. Congress instructed the Commission to determine whether a *facility* is at the same site as another *facility*.[98] Factors that have nothing to do with the facility or the surrounding geographical terrain are not germane to determine whether facilities are located at the same site.[99] The employment of common contractors, such as grading and electrical contractors, has nothing to do with whether two otherwise distinct generation facilities are located at the "same site," and much more to do with the availability of experienced, qualified contractors in a given region. Many QFs are developed in rural regions where here are often a limited number of qualified maintenance providers and a commonality of such engagement should not be a factor in the Commission's "same site" analysis. Similarly, the fact that two facilities are constructed by the same entity within a period of twelve months is also irrelevant for a "same site" determination given that there are a limited number of qualified construction firms within each region. Likewise, portfolios of QFs in multiple states (and thus are unquestionably at separate sites) are frequently financed – and re-financed – as part of a common investment portfolio for passive investment vehicles that do not exercise day-to-day control over the QF and should not be indicative or determinative as to whether two facilities with separate ownership structures should not be consolidated for purposes of the 80 MW size limitation.

SEIA respectfully requests that the Commission rehear its determination in Paragraph 508 and rescind its dicta and associated regulations allowing for review, evaluation, or

---

[98] *See* FPA Section 3(17)(A).

[99] *See Coso Energy Developers*, 45 FERC ¶ 61,003 (1988).

consideration of physical and operational characteristics that are not germane to whether a *facility* is located at the same site as any other *facility*. Allowing the consideration of characteristics that are not germane to the same site analysis is an inappropriate expansion of the statutory authority. The Commission should clarify that the "relevant indicia" set forth in the Final Rule will not be permitted to be considered in any proceeding to determine whether a *facility* is located at the same site as another *facility*.[100] If the Commission does not grant rehearing and/or reconsideration, allowing extensive litigation about certification due to inclusion of factors unrelated to the same site determination will discourage independent generators from taking advantage of economies of scale, will harm local business interests that service QFs within geographic regions, and will ultimately discourage investment in Qualifying Facilities and independent generation.

---

[100] *See* Order No. 872 at P 509 where the Commission identifies relevant indicia:

(1) physical characteristics, including such common characteristics as: infrastructure, property ownership, property leases, control facilities, access and easements, interconnection agreements, interconnection facilities up to the point of interconnection to the distribution or transmission system, collector systems or facilities, points of interconnection, motive force or fuel source, off-take arrangements, connections to the electrical grid, evidence of shared control systems, common permitting and land leasing, and shared step-up transformers; and

(2) ownership/other characteristics, including such characteristics as whether the facilities in question are: owned or controlled by the same person(s) or affiliated persons(s), operated and maintained by the same or affiliated entity(ies), selling to the same electric utility, using common debt or equity financing, constructed by the same entity within 12 months, managing a power sales agreement executed within 12 months of a similar and affiliated small power production qualifying facility in the same location, placed into service within 12 months of an affiliated small power production QF project's commercial operation date as specified in the power sales agreement, or sharing engineering or procurement contracts.

SEIA requests that the Commission clarify that none of these factors are indicative as to whether a facility is located at the same site as another facility.

3. Rebuttable Presumption Discourages QF Development

A rebuttable presumption process and procedure will discourage investment in Qualifying Facilities because it brings a substantially increased litigation risk in each certification and recertification. As Commissioner Danley explained when he testified before the House Committee on Energy and Commerce, Subcommittee on Energy "Changing the one-mile rule from a rule to a rebuttable presumption could greatly increase the amount of litigation at the Commission."[101] That observation is correct and increased litigation risk will discourage private capital investment. Congress did not give the Commission authority to undertake a detailed case-specific review to examine the plethora of project-related agreements bespoke to each project to determine if the facility meets the maximum size requirements set forth in the statute. By adopting the rebuttable presumption framework the Commission has injected a litigation risk into each certification and re-certification submission, discouraging QF development in contravention of the statutory mandate.

Regulatory burdens are not conducive to attracting investment which is why Congress directed that the Commission *shall* exempt Qualifying Facilities from burdensome regulation where it is necessary to encourage QF generation.[102] As the Commission explained in Order No. 732, the self-certification process has always been intended to be "quick and not unduly burdensome."[103] The revised *ex-post* process that the Commission sets forth in Order No. 872,

[101] https://docs.house.gov/meetings/IF/IF03/20180119/106788/HHRG-115-IF03-Wstate-DanlyJ-20180119-SD002.pdf

[102] Section 201(e)(1).

[103] Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility, 130 FERC P 61,214, P 8 (March 19, 2010) (("Order No. No. 732").

which would allow challenges to be raised after the consummation of transfers of ownership or acquisitions of new projects, will repel a number of capital market providers that are not willing to undertake the risk that their transaction could be unwound after closing due to an adverse regulatory determination. Unlike the Commission's review in the context of FPA Section 203, the Commission's self-certification procedure was never intended to stall or staunch the flow of private investment funds. Yet, this is what the Commission's rebuttable presumption process will do. Developers of qualifying facilities will face increased diligence from their financing parties, incur substantial additional expense in papering transactions, and will find some parties unwilling to continue investment patterns because of the *ex-post* litigation risk. If the Commission does not grant reconsideration, a QF could be subject to challenge throughout the facility's entire useful life based on overly broad factors that are not related to preventing a QF from "gaming" the same-site determination and development of other QFs long after a QF is starts operation. Allowing such a regulation to stand, when the statute instructs the Commission to expressly encourage QFs and relieve these facilities of regulatory burdens, is arbitrary and capricious, unwinding the reforms the Commission achieved through Order No. 732. If the Commission does not reconsider the rebuttable presumption framework, the self-certification process will no longer be quick and it will become unduly burdensome for all parties, including the Commission and its staff.

4. Existing Facilities Should be Grandfathered

If the Commission does not grant rehearing of the Ten Mile Rule, then the Commission must establish a grandfathering provision for facilities that are already installed. By increasing the exclusion zone around a QF from 3 square miles (under the One Mile Rule) to 300 square

miles (under the Ten Mile Rule), then "nearly all of the currently online utility scale solar sites in North Carolina to overlap with other facilities. In some cases, these overlap with multiple other facilities."[104] Where any one of these facilities files a recertification that does not prevail against a challenge, there is potential cascading effect that would lead to the decertification of separately-owned facilities under the Commission's revised test. There is no reason to revoke the Qualifying Facility or exemption status of a facility that is already operating. The Commission should clarify that all existing facilities will retain their Qualifying Facility status unless a recertification filing is made that changes the maximum net output or qualifying technologies of the Qualifying Facility. Unless there is a change in the output of the facilities or another change in circumstance that has economic consequences to the utility-purchaser,[105] then the facility's status should be beyond challenge. Failing to offer grandfathering to existing facilities is arbitrary, capricious, inconsistent with Commission precedent that preserves contractual expectations between parties in the event of regulatory change, and does not encourage Qualifying Facilities as the statute requires.

If the Commission does not grant rehearing, and does not grandfather existing facilities, then SEIA seeks clarification that challenges to recertification filings can only be brought "in circumstance that has economic consequences to the utility-purchaser and its ratepayers."[106] Such a clarification is consistent with the Commission's explanation that subsequent challenges

---

[104] *See* Comments of the Southern Environmental Law Center, Docket No. RM19-5 (Dec. 3, 2019).

[105] Zond-PanAero Windsystem Partners I, 76 FERC 61,137 (1996), accord Geysers Power Company, LLC, 88 FERC P 61,275 (1999).

[106] *Id.*

are prevented unless there is a change of circumstances that "call into question the continued validity of the earlier certification."[107] By limiting challenges to existing facilities to situations where there is a change in output of the facilities or other change in circumstances that has economic consequences to the utility-purchaser and its ratepayers more closely aligns with the direction of the statute.

C. The Commission Erred in Allowing Utilities Operating Within ISO/RTO Regions to Obtain Waiver of the Obligation to Purchase from Qualifying Facilities larger than 5 MW

SEIA does not disagree with the Commission's assertion in the Final Rule that in many regions of the country, wholesale markets are "accommodating resources with smaller capacities," and in general, the presence of distributed resource is increasing across the country. These entrance points should be lauded, and encouraged, but the existence of small measure of opportunities should not be used to foreclose the PURPA purchase obligation which remains necessary and essential for the commercial viability of renewable resources under 20 MW. The Commission has erred, acting arbitrarily and capriciously and abusing its discretion, in revising the presumption in the regulations and providing that the Commission will presume that QFs larger than 5 MW have non-discriminatory access to the ISO/RTO markets.

Section 210(m) provides for termination of the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from a QF after the Commission makes a determination that the QF has access to:

[107] Order No. 872 at P 469.

- (A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or
- (B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected.[108]

The Commission established that MISO, PJM, ISO-NE, and NYISO would qualify as markets under Section 210(m)(1)(A) because interconnected Qualifying Facilities would be provided nondiscriminatory access to the "Day 2" wholesale markets and concluded that 210(m)(1)(B) was intended to capture the "Day 1" ISO/RTO markets, including CAISO and SPP.[109] In order to rebut the 20 MW presumption, an electric utility has the full burden to show that small QFs have nondiscriminatory access to the market of which the electric utility is a member.[110] In Order No. 688, the Commission explained that a "reasonable and administratively workable definition of 'small' is 20 MW."[111]

---

[108] EPAct § 1253.

[109] 16 U.S.C. § 824a-d(m)(1).

[110] *Id.* at P 78.

[111] Order 688 at P 72.

SEIA requests rehearing of the Commission's determination to revise the workable definition of "small" to 5 MW, which is an arbitrary and capricious demarcation. As SEIA explained in its Comments, the Commission lacked record evidence to lower the threshold of the purchase obligation to 1 MW and the Commission's conclusion in the final rule to institute a 5 MW demarcation is equally arbitrary.

There is no reasonable or supportable basis for departure from the 20 MW threshold for determination as to Small QFs. The Commission fully addressed this issue in Order No. 688 in response to the passage of the Energy Policy Act of 2005, and no circumstances have changed that warrant revisiting the Commission's well-reasoned standard. SEIA is not aware of an influx of market participants within any of the ISO/RTO markets in the 5-20 MW range that would justify reducing the 20 MW threshold. The Commission's decision to reduce the threshold for relief from the mandatory purchase obligation with respect to Qualifying Facilities 5 MW and larger does not constitute reasoned decisionmaking.

Just as the Commission's selection of 1 MW threshold was arbitrary and capricious, so is the selection of a 5 MW threshold. Presumably realizing the deficiency in its proposal, the Commission has sought to justify the 5 MW demarcation based on the "availability of a Fast-Track interconnection process for projects up to 5 MW."[112] The existence of a long-established fast-track procedure does not support the Commission's decision to reduce the 20 MW threshold established in Order No. 688. The Commission did not examine whether QFs under between 5-20 MW have the same access to scheduling transmission service or making sales in advance on a

[112] *See* Order No. 872 at 630 ("That the Commission chose a 5 MW cut-off for eligibility for the fast-track procedures represents and implicit judgement by the Commission that facilities larger than 5 MW do not need such procedures to be able to interconnect to the grid").

consistent basis. Further, the Commission did not examine whether ISO/RTO regions currently include resources between 5-20 MW in its models in the energy management or market information system and failed to address that many facilities under 20 MW are connected to the distribution system and face barriers including rate-pancaking and lack of open-access transmission service and non-discriminatory interconnection procedures.

The Commission acted arbitrarily and capriciously in failing to consider the record evidence that QFs of many sizes, but particularly those of small size between 1 MW and 20 MW, lack non-discriminatory access to wholesale markets and lack meaningful opportunities to engage in long-term sales of energy and capacity.[113] While the Commission points to two reasons to support its arbitrary 5 MW demarcation – "availability of a Fast-Track interconnection process for projects up to 5 MW"[114] and the fact that ISO/RTOs offer participation models for small scale storage resources with a minimum size requirement not exceeding 100 kW[115] – neither support the conclusion that all entities larger than 5 MW have nondiscriminatory access to RTO/ISO markets with a meaningful opportunity to engage in short and long term sales of energy and capacity.

As the Commission explained in Order No. 792, the threshold for Fast-Track interconnection process was raised from 2 MW to 5 MW for certain projects as an attempt to

[113] 16 U.S.C. 824a-3(b) ("Section 210(m)")

[114] *See* Order No. 872 at 630 ("That the Commission chose a 5 MW cut-off for eligibility for the fast-track procedures represents and implicit judgement by the Commission that facilities larger than 5 MW do not need such procedures to be able to interconnect to the grid").

[115] *See* Order No. 872 at P 632. ("Requiring markets to accommodate storage resources to as low as 100 kW also supports that resources small than 20 MW have nondiscriminatory access to those RTO/ISO markets").

balance the goal of increasing access to such processes with the goals of ensuring safety and reliability.[116] Projects under 5 MW rarely impose the same safety and reliability threats on the grid as larger projects. The fact that a 5 MW threshold was chosen for interconnection procedures demonstrates the threshold at which the desire to increase interconnection came up against safety concerns. Just because some projects smaller than 5 MW connected at the transmission level can elect to utilize an expedited interconnection procedure, this is not evidence that all projects larger than 5 MW have ready access to the RTO and ISO markets. While SEIA appreciates the Commission's actions in Order No. 841 and recognize and value the growing participation of storage resources in these markets, it is inappropriate to use such technology-specific policies as evidence of ISO/RTO market access for all small production QF facilities over 5 MW.

PURPA mandates that FERC encourage the development of QFs. The Commission notes in its decision, however, that "5 MW represents a reasonable new threshold that accounts for the change of circumstances indicating that 20 MW no longer is appropriate but also accommodates commenters' concerns that a 1 MW threshold would be too low."[117] As discussed above, the Commission has not reasonably demonstrated that 20 MW is no longer appropriate, and further, the desire to compromise between competing commenter claims is an insufficient justification for choosing a particular threshold. As demonstrated here and in multiple comments by SEIA

[116] The aims of Order No. 792 were centered on striking a balance between "allowing larger projects to use the Fast Track Process while ensuring safety and reliability." *See Small Generator Interconnection Agreements and Procedures*, Order No. 792, 145 FERC ¶ 61,159, P 103 (November 22, 2013) ("Order No. 792").

[117] Order No. 872 at P 635.

and other entities in this proceeding,[118] QFs smaller than 20 MW do not have non-discriminatory access to ISO/RTO markets and moreover, these small facilities often have access to fewer resources to effectively challenge utility requests for waiver and demonstrate discrimination. In implementing Section 210(m) of PURPA, the Commission adopted a rebuttable presumption that QFs 20 MW and below, creating an opportunity for QFs and other interested parties to protest utility applications, yet in reality, the presumption has rarely been overcome when the Commission has conducted factual examinations on the record.[119]

There is no evidence in the record to justify the Commission's conclusion that all projects greater than 5 MW have nondiscriminatory access to the markets. Throughout this proceeding, however, there has also been ample evidence presented that small QFs have and will continue to experience discrimination in these regions. Considering these facts, and the fact that PURPA's statutory requirements have not changed since EPAct 2005 and Order Nos. 688 and 688-A, there is no reasonable justification for a reduction in the waiver threshold from 20 MW to 5 MW.

---

[118] See Comments of Allco Renewable Energy Limited, Allco Finance Limited, Winding Creek Solar LLC, Windham Solar LLC and Thomas Melone, 17-19, Docket No. RM 19-15 (Dec. 3, 2019); Comments of Advanced Energy Economy, 10-11, Docket No. RM 19-15; Comments of Environmental Law and Policy Center, Natural Resources Defense Council, Sierra Club, Southern Environmental Law Center, Sustainable FERC Project, Vote Solar, North Carolina Sustainable Energy Association, and Montana Environmental Information Center in Opposition to the Commission's Notice of Proposed Rulemaking Under PURPA, 77-90, Docket No. RM 19-15.

[119] *Northern States Power Co.*, 151 FERC ¶ 61,110, at PP 31-36 (2015): *PPL Elec. Utils. Corp.*, 145 FERC ¶ 61,053 at P24 (2015); *Pub. Serv. Co. of New Mexico*, 140 FERC ¶ 61,191 (2012); *Exelon Wind 1*, 140 FERC ¶ 61,152 at P 52 (2012); *see also Cloverland Elec. Coop.*, 164 FERC ¶ 61,016 (2018) (QFs operating in ISO/RTO regions are not presumed to have access to organized markets if the interconnect with utilities that are not members of the ISO or RTO).

In concluding that utilities within ISO/RTO regions can obtain waiver of the obligation to purchase from Qualifying Facilities larger than 5 MW, the Commission acted arbitrarily and capriciously and inconsistent with reasoned decisionmaking.

V. Request for Clarification

In issuing the revised regulations, the Commission discussed the themes of the Final Rule and has explained that its goal was to modernize the regulations in a way that meets the statutory obligations of PURPA, protects consumers, and preserves competition. SEIA is hopeful that with the flexibility provided, states will utilize such offerings like the Commission's new competitive bidding program, to deliver broad benefits to the residents of their states. SEIA is committed to fair and open competition but is concerned that some could misinterpret the explanatory statements and dicta from Order No. 872 in a manner that would support a "pick and choose" approach that ultimately discriminates against Qualifying Facilities and favors the construction of utility-owned generation. Accordingly, SEIA respectfully requests that the Commission clarify its discussion of certain themes of the Final Rule.

First, while competition and competitive markets have expanded in some parts of the country since PURPA was passed into law, in large portions of the country electric service continues to be provided by vertically-integrated monopolies that exercise exclusive control over generation planning and acquisitions. SEIA requests that the Commission clarify that where QFs do not have nondiscriminatory access to buyers other than the host utility, the circumstances remain largely the same as when the Commission first implemented its PURPA regulations in 1980.

Second, in any proceedings implementing PURPA or applying the Commission's regulations, states must ensure comparability of rates, terms, and conditions. For example, where a utility computes its forecasted avoided cost energy rate based on a twenty-year depreciation schedule of an avoided unit, it is therefore appropriate to offer a QF a twenty-year contract term so that the forecasted energy values are consistent. Utilizing a twenty-year depreciation schedule for an avoided unit to compute a long-run marginal cost rate, and then offering a QF a two-year purchase contract, would not ensure comparability. SEIA respectfully requests that the Commission clarify it supports a comparability in Avoided Cost calculations and the rates, terms, and conditions presented in the QF contract.

Third, SEIA requests that the Commission express support for the enforcement procedures set forth in PURPA, particularly renewing its commitment to pursue enforcement actions where states discriminate against Qualifying Facilities. The Commission has consistently expressed its commitment to ensuring that wholesale electricity prices remain free from the influence of market power, including affiliate abuse, and it is more than appropriate for the Commission to ensure that electric utilities are not utilizing their single buyer market power to force Qualifying Facilities to accept rates for purchase that are substantially less than the true Avoided Cost. As a business partner and service provider to the purchasing utility, Qualifying Facilities are often prevented – by culture or contract – from litigating against the purchasing utility. Therefore, it is essential that the Commission express its commitment to remain the fair and neutral arbiter of any disputes concerning PURPA implementation and commit to aggressively pursue enforcement where a state or purchasing electric utility is discriminating

against Qualifying Facilities or otherwise using its market power to influence wholesale power prices.

VI. Conclusion

For the foregoing reasons, SEIA respectfully requests rehearing and/or clarification. The Commission has issued regulations that fail to encourage the development of Qualifying Facilities and that impose new regulatory burdens that discourage the development of QFs. In these instances, Order No. 872 is arbitrary, capricious, and not the product of reasoned decisionmaking, as set forth above.

While SEIA appreciates the Commission's deference to state commissions and the offer of flexibility to accommodate unique situations, Congress has mandated that FERC promulgate regulations that encourage the development of these resources in all cases. States are required to abide by this Commission's implementation of PURPA as well as the administration of the programmatic elements within their territories.[120] The Commission does not have discretion to promulgate regulations that provide for anything less.[121] While the statute provides the Commission with the authority to revise its regulations "from time to time," in all cases, the rules and regulations issued by this Commission must "encourage cogeneration and small power production."[122] Where Order No. 872 has promulgated regulations that are inconsistent with the Congressional mandate, SEIA seeks rehearing.

---

[120] *See* 16 U.S.C. § 824a-3(f)-(h).

[121] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (explaining that here Congressional intent is clear, an agency must "give effect to the unambiguously expressed intent of Congress.").

[122] 16 U.S.C. § 824a-3(h) (2012)

Specifically, Order No. 872 is arbitrary and capricious and not the product of reasoned decisionmaking because it revises and promulgates regulations in a manner that discourages the development of Qualifying Facilities in contravention of the statute's mandate by (1) terminating a Qualifying Facility's right to elect a long-term energy rate;[123] (2) revising the long-standing regulations providing that a Qualifying Facility is not "at the same site" so long as the facilities are located more than one mile apart; and (3) allowing utilities within the boundaries of an ISO/RTO to seek a waiver of the to purchase from small power production Qualifying Facilities larger than 5 MW.[124]

Respectfully submitted,

<u>/s/ Todd Glass</u>
Todd Glass
Heather Curlee
Wilson Sonsini Goodrich & Rosati, PC
701 Fifth Ave, Suite 5100
Seattle, WA 98104
tglass@wsgr.com
hcurlee@wsgr.com

Counsel to the Solar Energy Industries Association

[123] *See* Order No. 872 at IV.B.7.

[124] Order No. 872 at II.G.

CERTIFICATE OF SERVICE

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

Dated this 17th day of August, 2020 in Seattle, WA.

/s/ Heather Curlee