



particular, the NOPR would allow states to remove a qualifying facility's option for a fixed contract without any similar restriction on incumbent utilities that enjoy long-term revenue security. The NOPR also does not appear to explain sufficiently its proposed reduction in the size of qualifying facilities that are eligible for the rebuttable presumption of non-discriminatory access in organized markets. FERC should retain the fixed contract option for qualifying facilities and develop a comprehensive record of the competitive effects of any final actions based on the NOPR's proposed reforms.

## **PURPA Background and the Clean Energy Transition**

PURPA sits at the intersection of competition and regulatory policy in an area of vital and urgent interest.<sup>2</sup> By enacting PURPA, Congress sought to encourage the development of cost-efficient alternative sources of electricity generation, including renewable energy sources, and promote substitution from the traditional power sources to renewable- and cogeneration-based facilities. Indeed, PURPA represents one of the few instances where Congress expressed a preference for specific sources of electricity generation, namely renewable- and cogeneration-based methods of generation.<sup>3</sup> At the time, Congress was concerned about fossil fuel scarcity and cost overruns at incumbent utility facilities.<sup>4</sup>

Today, encouraging clean and renewable methods of generation is even more important. Every year, fossil fuel pollution exacts a toll on communities near fossil extraction or power generation enterprises. Moreover, climate change has already contributed to devastating weather events worldwide and threatens increasing catastrophic damage absent immediate and sustained efforts to halt and reverse greenhouse gas emissions. Despite recent efficiency gains and the development of renewable energy sources, electricity generation remains reliant on fossil fuels and a significant source of greenhouse gas emissions. In 2017, the U.S. electric power sector accounted for roughly 28% of total U.S. greenhouse gas emissions.<sup>5</sup> Fortunately, PURPA reform can help promote competition in electricity markets and, as a result, decrease power sector emissions.

Renewable energy sources have never been more economically viable than they are today, and PURPA reform should further tap their competitive potential.<sup>6</sup> By one estimate,

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<sup>2</sup> See Richard D. Cudahy, *PURPA: The Intersection of Competition and Regulatory Policy*, 16 ENERGY L. J. 419 (1995) (explaining PURPA's interplay with competitive markets).

<sup>3</sup> See Richard Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L. J. 1, 38 (2019).

<sup>4</sup> See *id.*

<sup>5</sup> See United States Environmental Protection Agency, *Sources of Greenhouse Gas Emissions*, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited Nov. 26, 2019); United States Energy Information Administration, *Energy and the Environment Explained*, <https://www.eia.gov/energyexplained/energy-and-the-environment/where-greenhouse-gases-come-from.php> (last visited Nov. 26, 2019).

<sup>6</sup> To be sure, renewable energy sources and battery storage face competitive hurdles, such as intermittency, but any conversation about allocating real-world costs must include the externalized social costs of fossil fuel pollution. See Nader Sobhani, *Renewables Do Not Rely on "Magical Thinking" – They Are Winning on Price*, Niskanen Center, (Sept. 23, 2019), <https://www.niskanencenter.org/renewables-do-not-rely-on-magical-thinking-they-are-winning-on-price/> ("Accounting for the emissions over the entire life cycle of a power plant, 300 million KWh of electricity produced from a \$1 million investment in a natural gas combined cycle plant would produce nearly \$3.5 million in damages at a very modest \$25-per-metric-ton carbon price."); cf. David Coady, Ian Parry, Nghia-Piotr Le, & Baoping Shang, *Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates*, IMF

unsubsidized utility-scale wind- and solar-based energy costs are already in line with and, in some cases, even cheaper than the most efficient fossil fuel-based energy sources in the U.S.<sup>7</sup> With utility-scale energy storage costs projected to decline by roughly 52% by 2030,<sup>8</sup> several analysts predict that renewables will become cheaper than existing fossil fuel generation in most regions of the world within the next decade.<sup>9</sup> Any reform of PURPA should endeavor to harness these vigorous competitive signals to spur our transition to a clean and abundant energy system.

### **Enhancing the Role of Competition in Electricity Markets Through PURPA Reform**

Bidding is an important form of market competition. When conducted transparently and fairly, competitive bidding efficiently allocates resources to the lowest cost suppliers. In wholesale energy markets, competitive bidding may also avoid many of the regulatory resource costs associated with administratively determined prices. In this regard, I applaud the NOPR for inviting comments on competitive bidding criteria that might meet the statutory requirement for terminating PURPA's mandatory purchase obligations and endorsing competitive bidding as a mechanism to determine a utility's avoided cost rate.<sup>10</sup>

However, I implore FERC to go further. In particular, once FERC has developed a thorough record on relevant bidding criteria and other considerations, it should establish competitive bidding guidelines that states and other stakeholders can use to construct and oversee competitive solicitations for both incremental and existing energy needs.<sup>11</sup> These guidelines could form the basis for transitioning many local markets from administratively determined prices to environments of dynamic price discovery in which the rapidly decreasing cost of utility-scale renewable energy can put maximum pressure on both new and pre-existing fossil fuel-based sources of electricity.

Organizations like NARUC and SEIA have demonstrated a willingness to help FERC encourage fair, non-discriminatory competitive bidding.<sup>12</sup> Working with these and other stakeholders, FERC should focus its resources on building the foundation for competitive wholesale markets consistent with the aims of PURPA and its amendments. Absent a fair, non-

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Working Paper (May 2019) (projecting global fossil fuel subsidies at \$5.2 trillion in 2017). I applaud efforts by New York's Independent Service Operator to advance a program to internalize the social cost of fossil fuel pollution. See Analysis Group, *Clean Energy in New York State: The Role and Economic Impacts of a Carbon Price in NYISO's Wholesale Electricity Markets* (Oct. 3, 2019).

<sup>7</sup> See Sobhani, *supra* note 6; Lazard, *Levelized Cost of Energy Analysis*, Ver. 12.0 (Nov. 2018).

<sup>8</sup> See BloombergNEF, *Energy Storage is a \$620 Billion Investment Opportunity to 2040* (Nov. 6, 2018), <https://about.bnef.com/blog/energy-storage-620-billion-investment-opportunity-2040/>.

<sup>9</sup> See McKinsey Energy Insights, *Global Energy Perspective 2019: Reference Case*, at 15 (Jan. 2019); BloombergNEF, *New Energy Outlook* (2019).

<sup>10</sup> As wholesale electricity markets matured following PURPA's enactment, Congress intervened again via the 2005 Energy Policy Act to provide for relief from the mandatory purchase obligation in areas where independent power producers had non-discriminatory access to sell their power in wholesale markets.

<sup>11</sup> Such guidelines should guarantee fair and equitable bidding practices by applying familiar FERC principles, including transparency, standardized and well-defined criteria, neutrality, and vigilant oversight. See *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082, at P 18 (2004); *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382 (1991).

<sup>12</sup> See Supp. Cmt. of the National Association of Regulatory Utility Commissioners (NARUC), Docket No. AD16-16 (Oct. 17, 2018); Supp. Cmt. of the Solar Energy Industries Association (SEIA), Docket No. AD16-16 (Aug. 28, 2019).

discriminatory, and comprehensive effort to promote competitive bidding, FERC should at minimum approach PURPA reforms with caution and avoid measures that would tip the competitive scales against renewable-based independent power producers.

### **The NOPR Threatens to Erode Competition From Independent Power Producers**

Non-discriminatory market access is an important element to ensure robust competition in wholesale electricity markets.<sup>13</sup> But much of the progress on non-discriminatory access, like the progress of renewable energy generally, has been geographically uneven. In some areas, conditions have improved markedly, whereas other areas may still present barriers to independent renewable energy-based power producers.<sup>14</sup> This widespread geographic differentiation is an important signal that PURPA reforms should be predicated on a robust record of the market conditions prevailing in localities subject to the reform.

However, I am concerned that several of the reforms proposed in the NOPR would alter the competitive balance in favor of incumbent utilities in many local markets. First, the NOPR proposes to remove the option for qualifying facilities to enter into fixed, long-term contracts that help facilitate financing for renewable energy-based developments. In place of long-term contracts, the NOPR would allow states to set energy prices at the short-term rates prevailing at the time the energy is delivered. This reform would extend to all wholesale electricity markets nationwide, regardless of their local conditions. In many of these local markets, vertically integrated utilities often benefit from effective long-term revenue guarantees on their generation investments and are shielded from price volatility and risk.<sup>15</sup> By removing the fixed, long-term contract option for independent power producers, the NOPR threatens to hamper the competitiveness of renewable-based energy firms challenging vertically integrated utilities in many localities across the country.

Second, the NOPR proposes to reduce the net power generation capacity threshold from 20MW to 1MW, below which a small power producer is presumed not to have non-discriminatory market access in competitive markets (or regional transmission organizations and independent service operators). The NOPR reasons that developments in all such markets have rendered the rebuttable presumption unnecessary because small power producers in these markets can obtain non-discriminatory access. However, the NOPR does not appear to provide adequate support for this proposition and it may be at odds with market conditions in at least some organized markets.<sup>16</sup>

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<sup>13</sup> See Fed. Trade Comm'n Staff Report, *Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform: Focus on Retail Competition*, at iii (“Independent and nondiscriminatory, open access to the transmission grid is essential for effective wholesale competition.”).

<sup>14</sup> See, e.g., *Northern States Power Co.*, 151 FERC ¶ 61,110, at P 34-36 (2015).

<sup>15</sup> See Cmt. of Travis Kavulla, Docket No. AD16-16 (June 29, 2016) (“In the Western Interconnection, it is typical for regulated utilities to ‘rate-base’ their generating assets, with rates established to permit the capital investment in those plants to be returned through depreciation expense, an annual return on the undepreciated balance of investment, and operating costs. These rates provide a long-term revenue guarantee—or something close to it—to the utility, irrespective of whether the plant, in the long run, will have been an above-market or below-market investment.”).

<sup>16</sup> See *Northern States Power Co.*, 151 FERC ¶ 61,110, at P 34-36 (2015).

At a minimum, I urge FERC to develop a record that addresses how the NOPR's proposed reforms will alter the competitive balance in affected regions. FERC should also retain the long-term contract option for qualifying facilities unless, in cases where states impose short-term rates on such facilities, their incumbent utility rivals agree to be bound by the same short-term rates.

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