

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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*Qualifying Facilities Rates and Requirements:*    ) Docket No. RM19-15  
*Implementation Issues under the Public*        )  
*Utility Regulatory Policies Act of 1978*         )  
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**Comment of the Harvard Electricity Law Initiative<sup>1</sup>**

Repealing the rule guaranteeing Qualifying Facilities (QFs) long-term contracts with fixed rates would flout Congress’s instructions and defy judicial precedent. Section 210 of PURPA is clear — the Commission must issue rules it “determines necessary to encourage” development of QFs. The repeal proposal pays lip service to this directive while it undermines a proven QF financing model. Repeal would contravene the explicit mandate Congress issued to the Commission.

The Commission packages repeal with a set of reforms it claims “rebalance the benefits and obligations” of section 210. These proposals are uniformly biased against QF development. The Commission’s one-sided approach cannot be reconciled with the statute’s unambiguous instruction to encourage QF development. The Commission suggests that in response to industry changes it may divorce the statute from its plain meaning and issue rules that will restrain QF growth. But Congress’s mandate to the Commission is not contingent on industry conditions and does not expire. While the Commission may modernize its rules, it must ensure they continue to achieve Congress’s purpose. The Commission’s unbalanced repeal proposal fails this test.

Repeal is also arbitrary and capricious for numerous reasons. First, the Commission attempts to portray its agenda as consistent with Congressional intent by providing a skewed summary of the legislative history. Second, the Commission’s unsupported statement that its rules will “continue to encourage” QF development ignores the administrative record and fails to account for regulatory changes since PURPA’s enactment. Third, the Commission misreads its own rules in claiming that repeal is necessary to protect consumers. Fourth, the Commission’s proposed finding that fixed-price energy contracts are not necessary to encourage QFs is based on irrelevant data and questionable assumptions that are not grounded in reasoned decision making. Finally, the Commission’s proposed variable-price replacement rule has already been rejected by courts.

The Commission’s proposal to “rebalance the benefits and obligations” of PURPA section 210 deviates from the Commission’s efforts to promote competition in the generation of electric power. As the Commission is aware, in some regions of the country power marketing continues to be dominated by vertically integrated utilities.<sup>2</sup> PURPA has played — and continues to play —

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<sup>1</sup> The Harvard Electricity Law Initiative is an independent organization based at Harvard Law School’s Environmental & Energy Law Program. These comments do not represent the views of Harvard University or Harvard Law School.

<sup>2</sup> See, e.g., *Nevada Power Co., et al.*, 155 FERC ¶ 61,249 (2016) (finding that the Berkshire sellers failed to rebut the presumption of market power in four balancing authority areas); *Idaho Power Co.*, 168 FERC ¶

an important role in providing opportunities for non-utility generators, diversifying generation ownership, and seeding wholesale markets with new entrants. The Commission’s proposal would reduce competition in these regions, reinforce utility dominance, and harm innovation.

The Commission’s proposal also impedes state-level efforts to promote competition. In North Carolina, for example, the legislature obligated the utility to purchase solar energy through competitive procurements and resolved long-standing debates about the state’s PURPA rules.<sup>3</sup> The utility came to the negotiating table in part because failure to compromise would have left in place PURPA rules it deemed unfavorable and pending disputes about their implementation.<sup>4</sup> “Bargaining in the shadow of the law”<sup>5</sup> facilitated a legislative deal that can enhance competition and reduce consumer costs. Parties in Michigan recently achieved a similar outcome.<sup>6</sup> Lowering the federal floor, as the Commission proposes, may undermine the potential for parties in other states to reach similar compromises.

Finally, we urge the Commission’s to clarify proposed § 292.304(b)(8)(ii) so that it explicitly allows for “tiered” rates, as outlined in the Commission’s *CPUC* orders<sup>7</sup> and required by the Ninth Circuit’s recent decision in *CARE v. CPUC*.<sup>8</sup> Proposed § 292.304(b)(8)(ii) states that a “Competitive Solicitation Price” must be based on solicitations open to “all sources.” The Commission explained in *CPUC* that this “all source” requirement refers to all sources eligible to meet procurement mandates under state law.

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61,156 (2019) (concluding that Idaho Power’s failure of the wholesale market share indicative screen provides the basis to institute a section 206 proceeding to determine whether Idaho Power may continue to charge market-based rates in the Idaho Power balancing authority area). *See also* FERC, Energy Primer, <https://www.ferc.gov/market-assessments/guide/energy-primer.pdf> at 66–68 (FERC reports that in the Southeast “volumes [of wholesale trades] remain low, especially in Florida, where merchant power plant development is restricted by a state statute,” and activity in Southern Company’s spot auction “has been sparse.” Under the Supremacy Clause, Florida’s restriction on siting merchant generation cannot prevent QFs development. PURPA is thus the primary vehicle for non-utility power plant development in the state with the third-highest electricity consumption. EIA, State Electricity Profiles, <https://www.eia.gov/electricity/state/>).

<sup>3</sup> HB 589 (2017), <https://www.ncleg.net/Sessions/2017/Bills/House/PDF/H589v5.pdf>.

<sup>4</sup> Lisa Sorg, NC Policy Watch, “What Schoolhouse Rock Didn’t Tell You: How House Bill 589 . . . Was Made,” Aug. 27, 2017, <https://bit.ly/2D0xBE1> (noting that the utility “achieved” its “pressing” PURPA reform goal and summarizing the compromise bill and negotiations that led to its passage).

<sup>5</sup> This term of art refers to reaching a compromise in a way that accounts for what would happen under the law absent a deal. The phrase was coined by Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L. J.* 950 (1979).

<sup>6</sup> Emma Foehringer Merchant, GreenTechMedia, “Michigan PURPA Settlement Set to More Than Triple State’s Solar Capacity,” Sep. 12, 2019, <https://bit.ly/2Qyq1s5> (noting that the utility’s filed comment stated that with PURPA issues resolved it would “focus its full attention” on its “Clean Energy Plan” that will include competitive procurement of renewable energy).

<sup>7</sup> *CPUC*, Order Granting Clarification and Dismissing Rehearing, 133 FERC ¶ 61,059 (2010), *denying reh’g*, 134 FERC ¶ 61,044 (2011).

<sup>8</sup> *CALifornians for Renewable Energy v. CPUC*, 922 F.3d 929 (9th Cir. 2019).

## The Commission’s Proposal to “Rebalance the Benefits and Obligations” of Section 210 Rewrites the Statute

In the NOPR, the Commission proposes to “rebalance the benefits and obligations” of its section 210 regulations in light of industry changes.<sup>9</sup> The statute forbids the Commission from adopting this approach. The Commission may not overwrite Congress’s instruction to issue rules that it “determines necessary to encourage cogeneration and small power production.”<sup>10</sup>

In Title II of PURPA, Congress created a special class of generators and tasked the Commission with issuing rules to encourage their development. Section 210(a) provides the Commission with clear instructions: “Not later than one year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it *determines necessary to encourage*” QFs.<sup>11</sup> The Commission must always “give effect to the unambiguously expressed intent of Congress.”<sup>12</sup> Where, as here, the statute is clear, “neither [a reviewing] court nor the agency is free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress.”<sup>13</sup>

In section 210, Congress requires the Commission to determine that its initial regulations and any subsequent revisions are “necessary to encourage” QF development. The Commission focuses on the phrase “from time to time thereafter revise,” and proposes to find permission to ignore Congress’s clear directions.<sup>14</sup> But this unremarkable phrase does not confer such powers. Many statutes include either identical<sup>15</sup> or similarly worded<sup>16</sup> instructions, providing agencies with explicit permission to update their regulations. Section 210 does not distinguish between the Commission’s initial rules and subsequent revisions. All rules must meet the same standard — the Commission must “determine” that the regulations are “necessary to encourage” QFs.

The Commission does not make any such finding about its proposed repeal. On its face, repeal harms QF development. As the Commission explained in Order No. 69, fixed-price energy contracts provide QF developers with “need[ed] certainty with regard to return on investment.”<sup>17</sup> By depriving QF developers of that certainty, repeal would be contrary to Congress’s clearly expressed intent.<sup>18</sup>

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<sup>9</sup> NOPR at PP 4, 30.

<sup>10</sup> 16 U.S.C. § 824a-3(a).

<sup>11</sup> *Id.* (emphasis added)

<sup>12</sup> *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 326 (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007)); *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

<sup>13</sup> *Alabama v. Costle*, 636 F.2d 323, 365 (D.C. Cir. 1979).

<sup>14</sup> NOPR at PP 4, 29.

<sup>15</sup> Clean Air Act, 42 U.S.C. § 7408; Clean Water Act, 33 U.S.C. §§ 1314, 1317.

<sup>16</sup> Clean Air Act, 42 U.S.C. §§ 7521, 7547, 7552; Endangered Species Act, 16 U.S.C. § 1533; Affordable Care Act, 42 U.S.C. § 1395ww.

<sup>17</sup> Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980).

<sup>18</sup> *Chevron*, 467 U.S. at 843 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”).

## **The Commission’s Duty to Prescribe Rules It Determines Necessary to Encourage QFs is Not Dependent on Circumstances**

Congress’s mandate to the Commission that it issue rules that it *determines necessary to encourage* QFs is not contingent on any findings by the Commission and does not terminate. Nonetheless, the Commission finds that three recent energy industry changes are relevant to its section 210 rules. First, the Commission highlights increases in domestic natural gas production,<sup>19</sup> and concludes that “there no longer is the same need to provide incentives [through PURPA] to address shortages of natural gas”<sup>20</sup> that had plagued the nation. Second, the Commission finds that development of renewable technologies has “changed equally dramatically”<sup>21</sup> and observes that “some of the small power producer generation technologies originally encouraged by PURPA are now being developed independent of PURPA.”<sup>22</sup> Third, the Commission cites statistics about non-utility power generation, and notes that regulatory developments in the 1990s and 2000s have “significantly reduced the barriers to entry that faced QFs when PURPA was enacted.”<sup>23</sup>

The statute does not instruct the Commission to consider whether its section 210 rules are necessary to conserve natural gas or whether non-QF renewable energy facilities are being developed. Had Congress intended for the Commission to make such determinations, it would have so stated.<sup>24</sup> Other sections in Title II do require the Commission to make specific findings about energy conservation or efficiency prior to issuing an order.<sup>25</sup> “[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is presumed that Congress acts intentionally and purposely.”<sup>26</sup> Section 210 gives the Commission a simpler task: issue rules it determines necessary to encourage QFs. That mandate is not contingent on findings about natural gas production, renewable energy deployment, or market access. The Commission must “resist reading words or elements into a statute that do not appear on its face.”<sup>27</sup>

In its initial rulemaking proceedings, the Commission followed this cardinal rule of statutory interpretation and understood that it had no authority to consider fuel savings in QF certification proceedings. In Order No. 70, the Commission rejected comments arguing that it should not

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<sup>19</sup> NOPR at P 19.

<sup>20</sup> NOPR at P 3.

<sup>21</sup> NOPR at P 20.

<sup>22</sup> NOPR at P 31.

<sup>23</sup> NOPR at P 25.

<sup>24</sup> *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”).

<sup>25</sup> PURPA sec. 202(c)(2) (codified at 16 U.S.C. § 824i) (“No order may be issued . . . unless the Commission determines that such order . . . would encourage overall conservation of energy or capital, optimize the efficiency of use of facilities and resources . . .”);

sec. 203(a)(2) (codified at 16 U.S.C. § 824j, subsequently amended) (“the Commission may issue such order if it finds that such order . . . would conserve a significant amount of energy, significantly promote the efficient use of facilities or resources . . .”);

sec. 205(a) (codified at 16 U.S.C. § 824–1) (“if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities or resources”).

<sup>26</sup> *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

<sup>27</sup> *Bates v. U.S.*, 522 U.S. 23, 29 (1997).

certify QFs powered by oil and natural gas because doing so would impede efforts to reduce oil and gas demand.<sup>28</sup> The Commission pointed to provisions in the concurrently passed Fuel Use Act that provide authority to the Secretary of Energy to restrict oil and gas use by cogenerators and concluded that it is not “necessary or appropriate to require an additional layer of fuel use regulation on technologies which the Commission is charged with encouraging. . . .”<sup>29</sup> That understanding applies here. In proposing to consider natural gas and renewable energy production, the Commission would add “an additional layer” of regulation that thwarts Congress’s clearly stated policy goal.

In the NOPR, the Commission reverses this plain reading of the National Energy Act that it adopted in Order No. 70 and imagines that its duty to encourage cogeneration is conditioned on the salience of 1970s fuel-savings goals. “It is well established that the prestige of a statutory construction by an agency depends crucially upon whether it was promulgated contemporaneously with enactment of the statute and has been adhered to consistently over time.”<sup>30</sup> The Commission’s discovery, forty years after PURPA’s passage, of authority to consider fuel supplies or fuel savings cannot be squared with the statute’s text or the Commission’s understanding of the law in Order No. 70. Congress’s subsequent repeal of the Fuel Use Act does not provide the Commission with authority to consider fuel availability in its section 210 rules.

With regard to market access, Congress amended section 210 in 2005 in response to “the development of the[] organized competitive markets.”<sup>31</sup> In the Energy Policy Act, Congress effectively told the Commission that it no longer needs to encourage development of QFs that can access certain RTO/ISO markets or markets of “comparable competitive quality.”<sup>32</sup> The amendment, according to the then-President of the Edison Electric Institute (EEI), “represent[ed] a delicate compromise that [was] the result of long, difficult negotiations among the major PURPA stakeholders.”<sup>33</sup> Rather than repeal the must-purchase obligation entirely, as members of

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<sup>28</sup> Order No. 70, 45 Fed. Reg. 17959, 17963 (Mar. 20, 1980). Industry and stakeholders understood at the time that the Commission’s duty to encourage cogeneration was not contingent on findings about fuel savings. After hosting five conferences on cogeneration, the Associate Director of the National Regulatory Research Institute (NRRI) commented in 1981 that the issue of fuel savings was raised *repeatedly* by state regulators and industry. He wrote that “FERC rules (as opposed to [DOE] rules) are designed to implement the intent of Congress to promote cogeneration, not primarily to save oil and natural gas.” He observed that all utilities, regardless of their generation portfolio, faced the same requirements under section 201, and that it was therefore plausible that Commission rules would result in greater use of oil and gas by utilities that relied primarily on hydro and nuclear power. Kevin A. Kelly, “The Fuel Use Act: The State Electric Regulatory Issues,” 49 KANSAS L. REV. 405, 415 (1981). A utility executive similarly understood that Commission rules would not necessarily save oil and gas. He urged Congress in 1981 to add a fuel savings test to section 210 to “prevent cogenerators from increasing our Nation’s dependence on foreign oil.” Hearings before the Subcommittee on Energy Conservation and Power, Serial No. 97-56, Apr. 27 and Jun. 3, 1981, pg. 363.

<sup>29</sup> *Id.*

<sup>30</sup> *Barnett v. Weinberger*, 818 F.2d 953, 960 (D.C. Cir. 1987) (citations omitted); *see also* *Wisconsin Central Ltd. v. U.S.*, 138 S.Ct. 2067, 2078 (2018) (J. Breyer, dissenting) (noting that agency interpretation is more persuasive when made contemporaneously with enactment of the statute).

<sup>31</sup> NOPR at P 26.

<sup>32</sup> 16 U.S.C. § 824a-3(m)(1).

<sup>33</sup> Hearings before the Subcommittee on Energy and Air Quality, Serial 109-1, Feb. 10 and 16, 2005 at 135; *id.* at 5 (Rep. Boucher commenting that “during the last Congress, we were able to reach a

Congress proposed in 2003,<sup>34</sup> Congress chose to maintain the Commission's duty to encourage the development of QFs that do not have "nondiscriminatory access"<sup>35</sup> to competitive markets. In proposing to "rebalance" section 210, in-part due to expanded market access, the Commission threatens to upend Congress's "carefully crafted" compromise.<sup>36</sup>

### **Even if the Commission May "Rebalance" Section 210, Its Justification for Doing So Is Arbitrary and Capricious**

The Commission proposes to find that in light of changes in the energy industry since PURPA's enactment it should "rebalance" its section 210 rules.<sup>37</sup> Neither the text of the statute nor the legislative history of section 210 suggest that industry changes are relevant to the Commission's section 210 duty to encourage QF development. But even if "hidden legislative intentions" allow the Commission to "muddy such [a] plainly expressed statutory directive[],"<sup>38</sup> the Commission's claim that section 210 is aimed only at "address[ing] the consequences of shortages of oil and natural gas" is arbitrary and capricious.<sup>39</sup> While mitigating the 1970s energy crisis was the driving force behind the National Energy Act, particular provisions of the various component laws served numerous purposes. Legislative history does not support the Commission's conclusion that in section 210 Congress intended only to "reduc[e] the country's demand for traditional fossil fuels."<sup>40</sup> The Commission ignores Congress's explicit legislative findings in PURPA, the full Congressional record, and the pro-competition purpose underlying section 210.

"The best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."<sup>41</sup> Because the text itself does not support the Commission's agenda, the Commission relies primarily on two Supreme Court decisions to justify rolling back forty-year old rules.<sup>42</sup> The Commission cites to portions of these decisions that broadly characterize the "nationwide energy crisis" and that link PURPA to conservation of oil and gas by electric utilities, but it fails to put these excerpts in context. Section 210 reached the Supreme Court following a lower court decision finding that the section regulated utilities' "intrastate activities" and was therefore beyond Congress's authority under the Commerce

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compromise regarding the application of PURPA"); *id.* at 149 (American Public Power Association (APPA) President testifying that PURPA provisions have been "carefully crafted"). See Appendix for excerpts from the Congressional record.

<sup>34</sup> S.888, 108th Congress (2003) (terminating section 210 purchase obligation for all utilities); H.R. 1341, 108th Congress (2003) (terminating section 210 purchase obligation for all utilities).

<sup>35</sup> 16 U.S.C. § 824a-3(m)(1).

<sup>36</sup> *Supra* note 33.

<sup>37</sup> NOPR at PP 19–29.

<sup>38</sup> *Kisor v. Wilkie*, 139 S.Ct. 2400, 2435 (2019) (Gorsuch, concurring) ("Normally, this Court does not allow hidden legislative intentions to 'muddy' such plainly expressed statutory directives." (citing *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011))).

<sup>39</sup> NOPR at P 15.

<sup>40</sup> NOPR at P 16.

<sup>41</sup> *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 98 (1991); *U.S. v. American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

<sup>42</sup> NOPR at PP 15–16.

Clause. The Commission’s legal defense required it to connect interstate commerce and Congress’s directions in section 210.

The Commission responded in its Supreme Court brief by arguing that section 210 addressed a national problem. Highlighting a straightforward connection between section 210 and the energy crisis, the brief points to Congressional testimony that industrial cogeneration could account for seven to ten percent of total U.S. generation capacity and save 200,000 barrels of oil per day.<sup>43</sup> The Supreme Court’s decision repeats the latter projection from the Commission’s brief and finds that Congress reasonably concluded that QFs would “conserve energy”<sup>44</sup> and “reduce demand for traditional fossil fuels.”<sup>45</sup> The Court repeats these conclusions in a subsequent case about the Commission’s section 210 rules.<sup>46</sup> The Commission’s legal strategy proved effective — the Court ruled in its favor in both cases, holding that section 210 does not violate the Commerce Clause and that the Commission’s section 210 rules are consistent with the statute.

To be clear, the Commission did not invent the connection between reducing electric utilities’ demand for scarce fuels and section 210. Addressing shortages of oil and natural gas animated the entire National Energy Act, and encouraging QFs was consistent with this overarching purpose of the five-statute Act. But the Commission’s 1981 brief — parroted by the Court<sup>47</sup> — isolates the connection between section 210 and fuel savings for strategic legal reasons and does not aim to provide a comprehensive analysis of Congress’s deliberations or its goals.

A thorough review of the Congressional record reveals numerous purposes behind section 210 and does not support the Commission’s focus in the NOPR on addressing fossil fuel shortages. In elevating this purpose, the Commission fails to honor the statute’s text, which may be intentionally ambiguous about the purposes behind Congress’s instruction to the Commission to encourage QFs. This ambiguity “might reflect a compromise between parties who wanted to

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<sup>43</sup> Brief for Appellants, Docket No. 80-1749, Aug. 27, 1981, p. 22 (citing Senate Subcommittee on Energy Conservation and Regulation, Publication No. 95-120, July 27, 28 and Sep. 7, 1977, at 236, testimony of David J. Bardin, Deputy Administrator, Federal Energy Administration).

<sup>44</sup> FERC v. Mississippi, 456 U.S. 742, 757 (1982).

<sup>45</sup> *Id.* at 750.

<sup>46</sup> American Paper Institute v. American Electric Power Corp., 461 U.S. 402, 405.

<sup>47</sup> The Court’s decision copies from other parts of the Commission’s brief. Compare FERC v. Mississippi, 456 U.S. 742, 745–46 (1982) and Brief for Appellants, Docket No. 80-1749, Aug. 27, 1981, p. 1:

The Public Utility Regulatory Policies Act of 1978, was enacted by Congress as part of a package of legislation designed to combat the nationwide energy crisis. At the time, the generation of electrical energy consumed more than one-fourth of all energy resources used in the United States. [citation omitted] Approximately one-third of all electricity in this country was generated by oil and natural gas, and electricity generation was one of the fastest growing segments of the nation’s economy. [citations omitted] Furthermore, electric utilities were plagued with skyrocketing fuel costs and decreasing efficiency in the use of their generating capacity; both of these factors had an adverse effect on rates to consumers and on the economy. [citations omitted] Accordingly, Congress determined that conservation by electric utilities of oil and natural gas was essential to the success of any effort to lessen the nation’s dependence on foreign oil, to avoid a repetition of the shortage of natural gas that the nation had experienced in the winter of 1977, and to control consumer costs.

pursue a particular goal to different extents.”<sup>48</sup> The Commission’s claim that it has discovered the true purpose of section 210 comes “at the expense of the statute itself [and] takes no account of the processes of compromise and, in the end, prevents the effectuation of Congressional intent.”<sup>49</sup> In light of the full legislative history, the Commission’s choice to “rebalance” its section 210 rules because the fuel crisis is over is arbitrary and capricious.

Before delving into that legislative history, it is worth reiterating that “arguments as to the general intent or mind set of Congress cannot overturn the clear language of a specific provision.”<sup>50</sup> “Given the straightforward statutory command [in section 210], there is no reason to resort to legislative history.”<sup>51</sup> Nonetheless, because the Commission roots its supposed authority to “rebalance” section 210 rules in PURPA’s legislative history, we provide a more searching review than the NOPR (see Appendix for excerpts from the Congressional record). When presented with arguments based on a court’s understanding of legislative history, the Commission itself has not accepted the court’s characterization at face value and instead reviewed the record itself.<sup>52</sup> We adopt this approach and examine several plausible purposes behind section 210.

Any investigation of Congress’s purposes should begin with Congress’s legislative findings enumerated in the statute. Courts typically afford equal weight to Congress’s explicit findings in a statute and legislative history.<sup>53</sup> PURPA section 102 states:

The Congress finds that the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require—

- (1) a program providing for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers,
- (2) a program to improve the wholesale distribution of electric energy, the reliability of electric service, the procedures concerning consideration of wholesale rate applications before the Federal Energy Regulatory Commission, the participation of the public in matters before the Commission, and to provide other measures with respect to the regulation of the wholesale sale of electric energy,
- (3) a program to provide for the expeditious development of hydroelectric potential at existing small dams to provide needed hydroelectric power,
- (4) a program for the conservation of natural gas while insuring that rates to natural gas consumers are equitable,
- (5) a program to encourage the development of crude oil transportation systems, and
- (6) the establishment of certain other authorities as provided in title VI of this Act.<sup>54</sup>

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<sup>48</sup> *Wyeth v. Levine*, 555 U.S. 555, 601 (2009) (J. Thomas, concurring).

<sup>49</sup> *Bd. of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986).

<sup>50</sup> *Am. Fed’n of Labor & Cong. of Indus. Organizations v. Donovan*, 757 F.2d 330, 344 (D.C. Cir. 1985).

<sup>51</sup> *U.S. v. Gonzalez*, 520 U.S. 1, 6 (1997). *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 236 n. 3 (2010) (“reliance on legislative history is unnecessary in light of the statute’s unambiguous language”).

<sup>52</sup> See Order No. 1000, 136 FERC ¶ 61,051 at P 104–105 (rejecting arguments based on dicta in *Central Iowa Power Co-op v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979) and explaining how an excerpt from the Senate Report supports its understanding of section 202).

<sup>53</sup> Jacob Shobe, “Enacted Legislative Findings and Purposes,” 86 U. OF CHICAGO L. REV. 669 (2019).

<sup>54</sup> PURPA, 92 Stat. 3137, 3138 (codified at 16 U.S.C. § 2601).



Congress's findings in PURPA say nothing about dwindling domestic natural gas and oil supplies. This omission is particularly striking given that Congress made findings on this issue in other National Energy Act laws passed contemporaneously. For example, in the National Energy Conservation Policy Act (NECPA), Congress found that the nation "faces an energy shortage arising from increasing demand for . . . oil and natural gas and insufficient domestic supplies of oil and natural gas."<sup>55</sup> NECPA's "purposes" include "conserve nonrenewable energy resources."<sup>56</sup> The Fuel Use Act includes similar findings and purposes.<sup>57</sup> Congress's explicit statements about oil and natural gas in contemporaneously passed laws militate against inventing an overriding connection between section 210 and the 1970s fuel crisis.

The six "programs" described by Congress in PURPA after its high-level findings obviously correspond to that statute's six titles.<sup>58</sup> It is noteworthy that Congress ties "conservation of electric energy" and "increased efficiency" to Title I and connects "conservation of natural gas" to Title III. In its description of Title II, Congress highlights various provisions about FERC-jurisdictional matters but does not connect any of them to fuel use. Again, the absence of any explicit connection between Title II and fuel use or conservation is noteworthy because Congress clearly linked Titles I and III to conservation, efficiency, and natural gas.

The Congressional record reveals several plausible purposes behind section 210 that are unrelated to fuel use. The Chairman of the Federal Power Commission testified before the House Subcommittee on Energy and Power that the package of reforms that would later be enacted in Title II would address resource adequacy concerns. Cogeneration, according to Chairman Dunham, was a "method of meeting the need for reliable power supply."<sup>59</sup> Other witnesses also connected cogeneration to resource adequacy.<sup>60</sup>

The EPA Administrator testified that the law's cogeneration provisions would "encourage better load management."<sup>61</sup> Other witnesses elaborated on this purpose. The Federal Energy

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<sup>55</sup> National Energy Conservation Policy Act, sec. 102(a), 92 Stat. 3206, 3208 (Nov. 9, 1978).

<sup>56</sup> *Id.* at sec. 102(b), 92 Stat. 3209.

<sup>57</sup> Fuel Use Act, sec. 102(a), 92 stat. 3291 (Nov. 9, 1978) (finding that "the purposes" of the Act are "furthered" when coal is used by power plants and industrial sources "in lieu of natural gas or petroleum"); *id.* at sec. 102(b) (including in its "Statement of Purposes" to "conserve natural gas and petroleum," "prohibit or, as appropriate, minimize the use of natural gas or petroleum," and "conserve such gas and petroleum for the benefit of present and future generations").

<sup>58</sup> Congress flipped (3) and (4). PURPA's six Titles are labeled in the statute's Table of Contents as follows: I – Retail Regulatory Policies for Electric Utilities; II – Certain FERC and Department of Energy Authorities; III – Retail Policies for Natural Gas Utilities; IV – Small Hydroelectric Projects; V – Crude Oil Transportation Systems; and VI – Miscellaneous Provisions.

<sup>59</sup> Hearings before the House Subcommittee on Energy and Power, Serial No. 95-24a, May 19–20, 23–24, 1977, pgs. 128–130; *id.* at 137 (cogeneration and other Title II reforms "will be helpful in assuring effective use of resources on a regional and inter-regional basis") (hereinafter *1977 House Hearings*);

<sup>60</sup> *Id.* at 336 (Gerald Decker of Dow Chemical testifying that industrial cogeneration could "free up some electric utility generating capacity to help meet increasing utility loads and postpone or eliminate impending generating capacity shortages"); *id.* at 343 (Robert H. Williams of Princeton University testifying that "cogeneration could become the major source of new electric generating capacity during the last 15 years of this century").

<sup>61</sup> *Id.* at 114; *id.* at 340 (Gerald Decker of Dow Chemical testifying that "industrial cogeneration might

Administration (FEA) Deputy Administrator explained that to meet increasing summer peak demands, utilities had to run expensive oil- and gas-fired peakers.<sup>62</sup> He emphasized that the Title I rate provisions would directly address peak loads. At the same hearing, the Acting Administrator of the Energy Research and Development Administration testified that the cogeneration provisions will complement the Title I rate reforms, and the combination of increased cogeneration and efficient retail rate structures will “serve to reduce the future growth rate of electricity.”<sup>63</sup>

The FEA Deputy Administrator and other witnesses also anticipated that cogeneration could displace utility capital spending.<sup>64</sup> For decades, the industry had captured economies of scale in generation, constructing ever larger and more efficient plants.<sup>65</sup> As a utility generated more energy, it reduced its per-unit costs. Under those economics, utilities could rationalize promotional rates that encouraged consumers to use more electricity. Such low rates incentivized industrial customers to switch from self-generation to utility-generated power, and cogeneration’s share of electric generation fell from fifteen percent to four percent.<sup>66</sup>

The Deputy Administrator explained that utility expenditures on new baseload plants doubled in the 1970s, and utilities could no longer lower overall costs by building large, new power plants.<sup>67</sup> Title I addressed anachronistic promotional rate structures directly, while Titles I and II in combination would signal to utilities and regulators that they must “make better use of our electric utility plant.”<sup>68</sup> According to projections in the Congressional record, cogeneration could displace the equivalent of ten to fourteen new nuclear plants.<sup>69</sup>

Of course, Congressional testimony also touts the fuel-savings benefits of cogeneration.<sup>70</sup> There is no doubt that encouraging cogeneration was part of Congress’s multi-faceted, multi-statute plan

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result in a slightly lower load factor for a utility”).

<sup>62</sup> *Id.* at 86–87.

<sup>63</sup> *Id.* at 109.

<sup>64</sup> 1977 House Hearings, *supra* note 59, at 114–115 (EPA Administrator testifying that cogeneration and other PURPA reforms “would lead to less demand for new generating capacity” and reduce environmental impacts associated with plant siting); *id.* at 346 (George Hatsopolous, President of Thermo Electron Corporation, testifying that capital costs of cogeneration are 60 percent of utility power stations and projecting that cogeneration could provide up to 70 GW of capacity within ten years); Executive Office of the President, *The National Energy Plan*, p. 45 (1977) (“Cogeneration would reduce the capital requirements of electric utilities.”).

<sup>65</sup> 1977 House Hearings, *supra* note 59, at 69–70.

<sup>66</sup> *Id.* at 93.

<sup>67</sup> *Id.* at 70.

<sup>68</sup> *Id.* at 72–73.

<sup>69</sup> Hearings Before the Senate Subcommittee on Energy Conservation and Regulation, Publication No. 95-120, July 27, 28 and Sep. 7, 1977, 126 (testimony of Senator Hart quoting Library of Congress projections); *id.* at 128 (quoting similar Congressional Research Service projections) (hereinafter *1977 Senate Hearings*).

<sup>70</sup> *See, e.g.*, 1977 House Hearings, *supra* note 59, at 343 (Robert H. Williams of Princeton University testifying that “cogeneration is a very efficient use of oil and gas . . .”); *id.* at 114–115 (EPA Administrator Costle testifying that more efficient load management due to cogeneration and other PURPA reforms “will lead to fewer peaking units that burn oil or natural gas”); *id.* at 169 (President of Edison Electric Institute testifying that cogeneration “could result in more efficient use of fuel”).

to conserve oil and natural gas supplies. But individual sections of the National Energy Act, including section 210, served other purposes as well. Neither Congress's explicit findings in National Energy Act laws nor the Congressional record provide any basis to conclude, as the Commission does in the NOPR, that saving fuel was Congress's *only* purpose in section 210.

The Commission's NOPR also ignores that the underlying purpose of section 210 was to foster alternatives to utility-owned generation. As one witness explained to Congress in 1977, "the declining use of cogeneration by industry in this country can be traced directly to the antagonism of the electric utility companies," which "have virtually strangled cogeneration by offering artificially low discount rates to large industrial users of electricity, by charging discriminatory backup rates to customers who cogenerate, and by either refusing to buy excess electricity from cogenerators or offering an unfairly low rate."<sup>71</sup> The Congressional record is replete with testimony mentioning various regulatory, institutional, and economic barriers to cogeneration.<sup>72</sup> Congress's clear mandate to the Commission that it must prescribe rules that it "determines necessary to encourage" QF development is consistent with this testimony. All of the goals described above — using fuels efficiently, reducing utility spending, improving load management, and achieving resource adequacy — follow from achieving that clear mandate.

The Commission's attempt to justify its proposal to "rebalance" section 210 by pointing to "changes in circumstances"<sup>73</sup> since PURPA's enactment fails. Even if the Commission can manufacture implicit delegation from Congress in section 210 to consider industry developments, the Commission's focus on domestic natural gas production and renewable energy deployment ignores numerous other purposes behind section 210, including Congress's underlying purpose of removing barriers to development of non-utility owned generation. Finally, the NOPR's data on non-utility generation cannot justify the Commission's proposed rebalancing because Congress addressed this development in 2005 and chose to maintain the Commission's mission to encourage development of QFs that do not have non-discriminatory access to particular competitive markets (see previous section).<sup>74</sup>

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<sup>71</sup> 1977 House Hearings, *supra* note 59, at 354–355 (testimony of Garry DeLoss, Public Interest Research Group).

<sup>72</sup> See, e.g., *id.* at 74 (FEA Deputy Administrator testifying that "cogeneration has been hindered by economic, institutional, regulatory barriers" that would be overcome by the proposed law; *id.* at 94 (FPC Chair testifying that proposed law would "remov[e] regulatory barriers"); *id.* at 346–347 (George Hatsopolous, President of Thermo Electron Corporation testifying about utilities' economic advantages over industrial cogenerators due to regulatory "distortions"); *id.* at 334–337, 340 (Gerald Decker, manager at Dow Chemical, testifying about "institutional and legal barriers"); 1977 Senate Hearings, *supra* note 69, at 126–127 (Senator Hart testifying that his proposed bill and the Administration's proposed bill "attempt to remove the economic and institutional barriers to cogeneration" but noting that his bill offers utilities incentives rather than mandates); *id.* at 232, 236 (FEA document discussing cogeneration, including "institutional and legal barriers"); *id.* at 432 (Paul Levy, Deputy Director of Massachusetts Energy Office supporting cogeneration provisions that "will help to remove some of the institutional barriers").

<sup>73</sup> NOPR at P 19.

<sup>74</sup> See *supra* notes 31 to 36 and accompanying text.

## **The Commission’s Insistence that Its Rules “Will Continue to Encourage” QFs is Unsupported and Arbitrary and Capricious**

The Commission repeatedly claims that its updated section 210 rules will “continue to encourage” QF development.<sup>75</sup> The Commission provides no analysis to support this assertion. Instead, it merely notes that it is leaving intact section 210 rules addressing interconnections, exemptions from state and federal laws, and rates for backup power,<sup>76</sup> and claims that these three components of its rules combined with its revised avoided cost rules will be sufficient to encourage QF development. This unsupported claim ignores the record and fails to account for changes in the Commission’s regulations since PURPA’s enactment.

In Order No. 69, the Commission found three “major obstacles” to the development of QFs: utilities were not required to purchase energy from QFs at “appropriate” rates, utilities charged high rates for back-up power, and QFs risked being regulated under state and federal laws as public utilities.<sup>77</sup> Congress addressed each of these obstacles explicitly in section 210.<sup>78</sup> With regard to interconnection, the Commission concluded that although Congress did not direct the Commission to issue interconnection rules, the “general mandate for the Commission to prescribe rules necessary to encourage” QFs provides “sufficient authority” to require utilities to interconnect with QFs.<sup>79</sup>

In the NOPR, the Commission insists that despite changing the rules — for the first time — that outline how states may set “appropriate” rates, maintaining the remaining three components of its section 210 rules (backup power, regulatory exemptions, interconnection) will fulfill its statutory duty to encourage QF development. The Commission’s bald assertion that its regulations will continue to encourage QFs does not constitute “reasoned decisionmaking”<sup>80</sup> and cannot justify the Commission’s policy changes about QF rates.<sup>81</sup>

As a threshold matter, the Commission did not invite comments on these three components of its section 210 rules. The Commission’s March 4, 2016 supplemental notice states that its June technical conference will “focus on two issues: the mandatory purchase obligation under PURPA and the determination of avoided costs for those purchases.”<sup>82</sup> Following the technical conference, the Commission invited comments on two matters: the one-mile rule and “minimum standards for PURPA-purchase contracts,” and provided specific questions on each matter.<sup>83</sup>

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<sup>75</sup> NOPR at PP 4, 13, 31, 155.

<sup>76</sup> NOPR at P 31 n. 56.

<sup>77</sup> Order No. 69, 45 Fed. Reg. 12214, 12215 (Feb. 25, 1980).

<sup>78</sup> See 16 U.S.C. §§ 824a–3(a), (b), (c), and (e).

<sup>79</sup> Order No. 69, 45 Fed. Reg. at 12221 (further stating that a “basic purpose of section 210 of PURPA is to provide a market for the electricity generated by” QFs, and that “accomplishment of this purpose would be greatly hindered” if QFs had to utilize interconnection procedures provided by other sections of the FPA).

<sup>80</sup> *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (recognizing that the APA “establishes a scheme of ‘reasoned decisionmaking’” (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983))).

<sup>81</sup> *FCC v. Fox Television Stations*, 556 U.S. 502, 513 (2009) (establishing standards for agency policy changes).

<sup>82</sup> Supplemental Notice Concerning Technical Conference, Docket No. AD16-16, Mar. 4, 2016; Supplemental Notice of Technical Conference, Docket No. AD16-16, May 9, 2016 (stating the same).

<sup>83</sup> Notice Inviting Post-Technical Conference Comments, Docket No. AD16-16, Sep. 6, 2016.

None of those questions are about interconnection, rates for backup purchases, or exemptions from federal and state rules.

Nonetheless, the Commission's conclusion that these three components of its rules will continue to encourage QF development is contrary to the record. Participants at the technical conference and commenters describe how utility interconnection procedures stymie QF development. A representative of industrial cogenerators stated that "existing rules fail to reflect the unique operational characteristics of QFs that are integrated into an industrial process" and urged FERC to develop a "streamlined interconnection process for CHPs and waste heat recovery QFs."<sup>84</sup> In post-conference comments, industrial cogenerators reiterated that the interconnection process for large cogenerators "is far too costly, administratively burdensome and time consuming."<sup>85</sup>

Representatives of small power producers added that "utilities are also getting more and more difficult to deal with, especially if you're a QF attempting to interconnect on the distribution grid" and observed "very difficult and discriminatory interconnection processes" for such QFs.<sup>86</sup> A solar industry representative further claimed that utilities make unsupported assertions about power quality problems as a pretext for refusing QF interconnection.<sup>87</sup> Small power producers also provided evidence of a "difficult and discriminatory" interconnection process, which included additional studies and high fees.<sup>88</sup> A waste-to-energy developer commented that the "ISO/RTO interconnection and membership process is [ ]onerous [ ] for small" QFs, and provided several examples of "interconnection hurdles."<sup>89</sup> The Commission ignores this evidence.

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<sup>84</sup> Technical Conference Transcript, Docket No. AD16-16, 39:14–20 (Irene Kowalczyk on behalf of Industrial Energy Consumers of America); *see also id.* at 72:20–23 (Jerry Bloom on behalf of the California Cogeneration Council testifying that FERC should "look at interconnection and ease of interconnection").

<sup>85</sup> Comment of Industrial Energy Consumers of America, Docket No. AD16-16, Sep. 14, 2016, at 3.

<sup>86</sup> Technical Conference Transcript, Docket No. AD16-16, at 28:8–16 (Todd Glass on behalf of SEIA); *see also id.* at 69: 22–24 (Allison Clements of Natural Resources Defense Council calling for "fair [and] consistent interconnection processes, including for very small QFs"); *id.* at 71:6–22 (Todd Glass claiming that "a lot of utilities in the country would simply prefer not to interconnect QFs on the distribution grid . . . we see it manifested in how we're being treated in interconnection processes").

<sup>87</sup> Technical Conference Transcript, Docket No. AD16-16, at 111:25–112:1 (Todd Glass on behalf of SEIA testifying that "there have been various assertions that there are power quality issues . . . let's get down to the reality of the situation, rather than just using it as a reason not to interconnect").

<sup>88</sup> Comment of North Carolina Clean Energy Business Alliance and North Carolina Sustainable Energy Association, Docket No. AD16-16, Nov. 7, 2016, at 4–5; Technical Conference Transcript, Docket No. AD16-16, at 111:6–14 (Todd Glass on behalf of SEIA testifying about interconnection agreement fees); Comment of the Solar Energy Industries Association, Docket No. AD16-16, Nov. 7, 2016, at 25 (describing requirements imposed by Duke and PacifiCorp and claiming that SEIA members have "observed a surprising degree of coordination between the interconnection department and the purchasing department at multiple utilities").

<sup>89</sup> Comment of Covanta, Docket No. AD16-16, Nov. 7, 2016, at 19–20 (claiming that RTO/ISOs "often": 1) "confuse the type of interconnection agreement required"; 2) "inappropriately treat an interconnection request from small WTE QFs akin to a request from a new large facility (in terms of the amount of data requested and the complexity of the process), [which] fails to acknowledge that WTE QFs do not present significant interconnection issues and, in many cases, have already been connected and synchronized to the grid for 25 or 30 years"; 3) "unfairly require new metering and telemetry system while the former purchasing utility often refuses to continue to transfer plant status/real-time data to the relevant ISO/RTO, despite the fact that the utility continues to receive such data from the generator; 4) "require burdensome

The Commission also overlooks its own FPA regulations. It cannot claim its QF interconnection rules encourage QF development if non-QF generators are entitled to equivalent or better interconnection service under the FPA. The Commission's open-access rules<sup>90</sup> and related generator interconnection rules<sup>91</sup> issued after PURPA's enactment aim to ensure that all generators receive interconnection service on comparable terms.<sup>92</sup> The Commission has provided no evidence that its QF interconnection rules provide better terms than those that utilities must offer under the FPA. In fact, a comment filed in this docket suggests that the Commission's FPA interconnection rules are more favorable to generators than PURPA processes.<sup>93</sup> The Commission cannot fulfill its duty to encourage QFs by offering QFs interconnection rules that are inferior to the interconnection service all utilities must offer to non-QFs.

Similarly, the Commission ignores the repeal of the Public Utility Holding Company Act (PUHCA) and creation of market-based rates and does not analyze whether its regulatory exemptions under section 210 continue to provide QFs with any advantages in light of these developments. Many of the section 210 regulatory exemptions have been largely overtaken by subsequent Congressional and Commission action. In 1992 and 2005 Congress amended and then repealed the PUHCA to facilitate non-utility investment in the industry,<sup>94</sup> removing "the risk of [a QF] being considered an electric utility"<sup>95</sup> and regulated as such under federal law. Similarly, market-based rate authority, invented by the Commission a decade after PURPA's enactment,<sup>96</sup> diminishes the burdens of being regulated under FPA sections 205 and 206 and reduces any advantages QFs might have had over generators subject to rate regulation in 1978.

These regulatory changes since PURPA's enactment either reduce or eliminate the relative advantage provided by the Commission's section 210 rules to QFs. Congress created QFs as a special class of generators and required the Commission to issue rules to encourage their development. The Commission has not demonstrated that its interconnection and regulatory exemption rules under section 210 offer QFs any additional benefits above and beyond the Commission's FPA regulations. The Commission's assertion that its new section 210 rules will

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ISO/RTO and Certified System Operator training including recertification every three years" and 5) "require unduly expensive communications systems via a Market Operating Control Center, which is often beyond the financial resources of WTE QFs.").

<sup>90</sup> Order No. 888.

<sup>91</sup> Order No. 2003, 104 FERC ¶ 61,103 at P 12 (2003) ("Interconnection is a critical component of open access transmission service, and standard interconnection procedures and a standard agreement applicable to Large Generators will serve several important functions: they will (1) limit opportunities for Transmission Providers to favor their own generation, (2) facilitate market entry for generation competitors by reducing interconnection costs and time, and (3) encourage needed investment in generator and transmission infrastructure.); Order No. 2006, 70 Fed.Reg. 34,100 (Jun. 13, 2005).

<sup>92</sup> Order No. 2003-A, 106 FERC ¶ 61,220 at P 3 (2004).

<sup>93</sup> Comment of the Solar Energy Industries Association, Docket No. AD16-16, Nov. 7, 2016, at 23, n.6 and 25 ("If the Commission issues a NOPR, SEIA respectfully requests that the Commission reconsider this jurisdictional divide and consider incorporating all QFs into the small generator interconnection processes administered under the Commission's jurisdiction.").

<sup>94</sup> Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 2905 (§ 711); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 974 (§ 1263).

<sup>95</sup> Order No. 69, 45 Fed. Reg. at 12215.

<sup>96</sup> See *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

continue to encourage QF development cannot withstand scrutiny. It is unsupported by any evidence, contrary to the record, and ignores the evolution of the Commission's FPA regulations and the repeal of the PUHCA.

### **Repealing the Fixed-Price PPA Requirement Is Unnecessary, Is Premised on Irrelevant Data and Questionable Assumptions, and Ignores the Record**

In the NOPR, the Commission offers two rationales for repealing the rule that utilities must provide QFs with the option of a long-term contract with energy rates set at the time the legally enforceable obligation is incurred.<sup>97</sup> First, the Commission reverses its assertion in Order No. 69 that overestimations and underestimations of avoided costs will balance out and claims repeal will protect consumers.<sup>98</sup> Evidence about past PURPA contracts is irrelevant because neither the Commission nor states may reset existing PURPA contracts, and no rule currently prevents states from setting declining avoided costs. Second, the Commission attempts to show that QF development no longer relies on contracts with fixed energy rates by providing a hodgepodge of information about non-QF capacity. All it can actually conclude from this loosely connected array of facts, data, and speculation is that *some* non-QF generators are developed with variable-rate energy contracts. That unremarkable conclusion has no bearing on whether repeal will discourage QF development by “materially affect[ing] the ability of QFs to obtain financing.”<sup>99</sup>

In Order No. 69, the Commission “recognized the possibility” that rates fixed in long-term QF contracts might depart from a utility's actual avoided costs. Such a departure, the Commission believed, was not inconsistent with section 210 because Congress did not “require a minute-by-minute evaluation of costs which would be checked against rates established in long-term contracts.”<sup>100</sup> In establishing that QFs have the option of fixed-price contracts, the Commission sided with commenters who “stressed the need for certainty with regard to return on investment” for investors in QFs.<sup>101</sup> Although consumers might pay rates higher than utility avoided costs due to incorrect projections of long-run avoided costs, the Commission “believed that in the long-run overestimations and underestimations of avoided costs will balance out.”<sup>102</sup>

In the NOPR, the Commission proposes to reverse its determination that over- and under-estimations will balance out. In support, the Commission points to evidence in the record about QF contracts that include rates fixed when the contract was formed and that ultimately departed

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<sup>97</sup> 18 CFR 292.304(d)(ii); Order No. 69, 45 Fed. Reg. at 12224 (Feb. 25, 1980):

Many commenters noted the same problems for establishing rates for purchase under subparagraph (2) as in subparagraph (1). The Commission intends that rates for purchases be based at the option of the qualifying facility, on either the avoided costs at the time of delivery or the avoided costs calculated at the time the obligation is incurred. This change enables a qualifying facility to establish a fixed contract price for its energy and capacity at the outset of its obligation or to receive the avoided costs determined at the time of delivery.

<sup>98</sup> NOPR at PP 30, 40.

<sup>99</sup> NOPR at P 69.

<sup>100</sup> Order No. 69, 45 Fed. Reg. at 12224; 18 CFR 292.304(b)(5)

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

from the utility's actual costs during the contract's term.<sup>103</sup> The Commission also demonstrates that prices at one hub in the West have fallen significantly in recent years, suggesting that additional contracts may have rates that do not align with real-time avoided costs. The Commission further contends that this trend may continue due in part to "the continuing general decline in the cost of both wind and solar generation."<sup>104</sup>

Repealing the fixed-price rule does not remedy past mistakes by state commissions and utilities.<sup>105</sup> The Commission may not authorize state regulators to change rates in existing contracts.<sup>106</sup> Moreover, the repeal is not necessary to protect consumers from rates in future contracts. The Commission seems to suggest that rates in long-term contracts *must* escalate, but the Commission's rules contain no such requirement. Order No. 69 explicitly condones contracts with declining rates.<sup>107</sup> The Commission's rules do not require an annual matching between avoided costs and rates, and do not prevent states from setting declining avoided costs. The proposed repeal does not solve any problem.

The Commission's examples of contract rates that exceed avoided costs calculated years prior illustrate the general proposition that "energy forecasts have a manifest record of failure."<sup>108</sup> Many energy industry players failed to anticipate recent changes in domestic natural gas production and renewable energy deployment costs.<sup>109</sup> The costs of these failures infect retail rates in numerous ways.<sup>110</sup> The Commission that issued Order No. 69 recognized that the

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<sup>103</sup> NOPR at P 64 n. 101.

<sup>104</sup> NOPR at P 68; *id.* at P 30.

<sup>105</sup> *FLS Energy, et al.*, 157 FERC 61,211 at P 20 n. 33 (2016) ("When a state commission believes that a previously-determined avoided cost rate is no longer an accurate measure of a utility's avoided costs, the appropriate response is not to establish a standard for a legally enforceable obligation that is inconsistent with PURPA and the Commission's regulations under PURPA, but instead to determine a new avoided cost rate that better reflects the utility's avoided costs consistent with the requirements and procedures identified in the Commission's regulations under PURPA.").

<sup>106</sup> *Amer. Paper Inst. v. AEP*, 461 U.S. 402, 414 ("Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities."); *Public Utility Comm'n of Texas v. Gulf States Utilities Co.*, 809 S.W.2d 201, 208 (Tex. 1991) ("federal regulations do not authorize the Commission to alter the terms of a purchased power contract between a utility and a QF").

<sup>107</sup> Order No. 69, 45 Fed. Reg. at 12224 (approving an arrangement where "a facility which enters into a long-term contract to provide energy or capacity to a utility may wish to receive a greater percentage of the total purchase price during the beginning of the obligation").

<sup>108</sup> Vaclav Smil, *ENERGY AT THE CROSSROADS: GLOBAL PERSPECTIVES AND UNCERTAINTIES* 121 (2003); *id.* at 145–149 (highlighting numerous forecasts from the 1970s about the U.S. power sector that proved to be grossly inaccurate, in a chapter entitled "against forecasting"); Technical Conference Transcript, Docket No. AD16-16, 150:11–14 (representative of American Forest and Paper testifying that "the question is . . . do PURPA contracts, *in particular*, pose any special risk that's different than the risk if the utility faces in doing anything else.") (emphasis added).

<sup>109</sup> *See, e.g.*, Adam Reed, et al., "Interrogating Uncertainty in Energy Forecasts: The Case of the Shale Gas Boom," *ENERGY TRANSITIONS* (Sept. 2019) <https://link.springer.com/content/pdf/10.1007%2Fs41825-019-00015-9.pdf> (documenting numerous natural gas production forecasts); Mark Dyson and Alex Engel, Rocky Mountain Institute, "A Low-Cost Future for Western Cooperatives," Aug. 2018, [http://rmi.org/wp-content/uploads/2018/08/RMI\\_Low\\_Cost\\_Energy\\_Future\\_for\\_Western\\_Cooperatives\\_2018.pdf](http://rmi.org/wp-content/uploads/2018/08/RMI_Low_Cost_Energy_Future_for_Western_Cooperatives_2018.pdf) (showing that solar costs have deviated from historic forecasts since 2010).

<sup>110</sup> To take just one example, in 2009 the Georgia Public Service Commission approved construction of and a cost recovery mechanism for the Vogtle nuclear reactors, finding that the units "are likely to be cost-



industry changes are difficult to forecast,<sup>111</sup> but nonetheless concluded in Order No. 69 that the possibility that consumers would be harmed by high rates was outweighed by the Commission's duty to encourage QFs. In the NOPR, the Commission arbitrarily reverses this determination.

The Commission's only defense of this reversal is its assertion that repeal of the fixed-rate requirement will not "materially affect the ability of QFs to obtain financing."<sup>112</sup> This claim overturns the Commission's longstanding position about fixed-price, long-term contracts and is arbitrary and capricious. The anecdotes and data the Commission marshals to support its reversal in NOPR paragraphs 70 to 76 are largely irrelevant to QFs. At best, these paragraphs support the Commission's broader claim that "fixed energy rates are not generally required in the electric industry in order for electric generation facilities to be financed."<sup>113</sup> But this conclusion does not address the relevant issue — whether QFs can obtain financing without a fixed energy price. The Commission makes five claims in paragraphs 70 to 76. None support repeal.

First, the Commission notes that RTO/ISO capacity auctions have supported gigawatts of new generation that (presumably) do not have fixed-price contracts.<sup>114</sup> But the Commission does not claim that a single QF has been financed through an RTO/ISO capacity auction. It cites data about PJM, which has informed the Commission that its capacity auction largely finances natural gas fired non-QF capacity.<sup>115</sup> As the Commission's Chief Economic Adviser has explained in an academic paper, capacity markets are implicitly biased in favor of resources with low capital costs, such as natural gas plants, and may be "ill-suited to finance" renewable resources with high-fixed costs and near-zero operating costs.<sup>116</sup> Meanwhile, the Commission is currently considering barriers to capacity market participation that might prevent many QFs from clearing the market because they sell renewable energy credits.<sup>117</sup> But even if QFs could obtain financing by clearing an organized capacity auction, evidence about RTO/ISO capacity markets cannot be relevant to the Commission's duty to encourage QFs in non-RTO/ISO regions.

Second, the Commission cites the technical conference transcript to support its statement that "non-QF independent power projects located outside of RTOs enter into contracts with fixed capacity and variable energy prices."<sup>118</sup> The Commission does not explain the connection between technical conference comments about financing non-utility owned natural gas combined

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effective due to the volatility of natural gas and CO2 costs" and relying on expert testimony about the "potential for high natural gas prices." Georgia Public Service Commission, Docket No. 27800, Order on Remand, Jun. 17, 2010.

<sup>111</sup> After all, in the 1970s few accurately projected fossil fuel prices, interest rates, demand growth, and other factors that transformed the industry. *See also* 1977 House Hearings, *supra* note 59, at 69–71 (FEA Deputy Administrator testifying about industry changes).

<sup>112</sup> NOPR at P 69.

<sup>113</sup> NOPR at P 70.

<sup>114</sup> NOPR at P 70.

<sup>115</sup> PJM Transmittal Letter, Docket No. ER18-1314, Apr 9, 2018, pgs. 9–10.

<sup>116</sup> Mays, Jacob; Morton, David; and O'Neill, Richard P., Asymmetric Risk and Fuel Neutrality in Capacity Markets, NATURE ENERGY, doi:10.1038/s41560-019-0476-1, Oct. 28, 2019, <https://www.nature.com/articles/s41560-019-0476-1.pdf>.

<sup>117</sup> *Calpine v. PJM Interconnection*, 163 FERC ¶ 61,236 (2018).

<sup>118</sup> NOPR at P 70.

cycle capacity through a variable-rate contract and encouraging development of QFs.<sup>119</sup> Wind and solar QFs, for example, have higher capital costs, lower operating costs, and provide energy intermittently, characteristics that may present different financing challenges as compared to non-QF natural gas fired capacity. The Commission fails to grapple with these distinctions and does not explain how two isolated statements in the transcript about the existence of variable-rate contracts for non-QF generators support repealing its longstanding fixed-price requirement.

Third, the Commission speculates that “some may prefer basing variable QF contract energy rates on transparent competitive market prices” and assumes that “such estimates [of future prices] may provide some support for financing purposes.” Next, the Commission mentions that “financial products . . . allow generation owners to hedge their exposure to fluctuating energy prices.”<sup>120</sup> Again, the Commission fails to connect any of this to QFs. That some generators *might* be able to obtain hedging products, and some energy buyers *might* prefer contracts based on market indices does not suggest that a single QF has been developed through financial products or variable-rate contracts.

Fourth, the Commission claims that data about non-QF development “is highly relevant” to whether QFs need contracts with fixed energy rates. The Commission states that less than twenty percent of all renewable capacity registered as QFs and asserts that this statistic “demonstrat[es] that most renewable resources no longer need to rely on PURPA.”<sup>121</sup> This tautology says nothing about how non-QF renewable capacity is financed. It is possible that all of this non-QF renewable capacity is under long-term fixed-price energy contracts. Perhaps these contracts are mandated by state law or provided by utilities that must purchase renewable energy credits to meet RPS requirements. We can only speculate. Data about the existence of non-QF renewable capacity does not demonstrate that QFs can obtain financing without fixed energy rates.

Fifth, the Commission provides data about non-QF natural gas powered capacity, and then concedes that this evidence does not “support[] the conclusion that substantial non-QF capacity is being financed and constructed without any form of fixed revenue to support financing.”<sup>122</sup> Instead, the Commission claims that the evidence “demonstrates that the existing PURPA avoided cost rate provisions are not necessary *for some* independent power generators to put in place contractual arrangements, including fixed revenue streams, that are sufficient to obtain financing.”<sup>123</sup> But the Commission fails to provide any information on those financing arrangements or connect any evidence to QFs.

The Commission’s repeated insistence that non-QFs do not need fixed energy rates cannot substitute for reasoned decision making. When the irrelevant information in NOPR paragraphs 70 to 76 is stripped away, all that’s left is a quote from the solar energy trade group’s filing that “developers need rates for such sales of energy *and/or* capacity to be fixed.”<sup>124</sup> The Commission’s entire case for repealing the fixed energy rate rests on the possibility that utilities might

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<sup>119</sup> NOPR at P 70 n. 114.

<sup>120</sup> NOPR at PP 71–72.

<sup>121</sup> NOPR at P 74.

<sup>122</sup> NOPR at P 76.

<sup>123</sup> *Id.* (emphasis added)

<sup>124</sup> NOPR at P 70, n. 115 (citing SEIA’s filed comment).

voluntarily offer QFs fixed capacity rates.<sup>125</sup> The Commission cannot fulfill its duty to prescribe rules it “determines necessary to encourage” QFs by allowing utilities to act as gatekeepers. Placing utilities in this role erects the sort of institutional and regulatory obstacle that Congress sought to eliminate by enacting section 210.<sup>126</sup>

The Commission also overlooks evidence in the record — which it includes elsewhere in the NOPR — that demonstrates the importance of long-term contracts with fixed energy rates. In discussing legally enforceable obligations, the Commission observes that “QF developers argue generally that they need the certainty of a LEO to obtain the financing to build their facilities in the first place, as QFs do not have the same ability that the electric utilities have to ‘rate base’ their facilities and, thereby, guarantee capital recovery.”<sup>127</sup> The NOPR points to comments filed by the Renewable Energy Coalition (REC) and the Northwest and Intermountain Power Producers Coalition (NIPPC) that highlight the critical importance of long-term fixed-price contracts.<sup>128</sup> The REC comment is particularly relevant. The group documents regulatory proceedings in western states and concludes that the duration of long-term fixed price contracts is the key variable that explains the differences in QF development between PacifiCorp’s similar Oregon and Washington service territories.<sup>129</sup> Both groups emphasize that long-term contracts with fixed rates are critically important for encouraging QF development.<sup>130</sup>

### **Proposed § 292.304(d)(2) that would allow long-term contracts to include variable rates has been rejected by courts as contrary to PURPA**

The Commission proposes to add § 292.304(d)(2), which would provide states and unregulated utilities with permission to set energy rates that “vary through the life of the obligation, and to be set at the as-available energy price applicable to the purchasing electric utility determined at the time of delivery.” Courts have held that similar rules are inconsistent with the statute because they impose public-utility type regulation. The rule would also impose regulatory burdens on QFs that are inconsistent with Congress’s instruction to encourage QF development.

In 1993, the Oklahoma Supreme Court held that a utility commission rule requiring that PURPA contracts include a provision stating that state regulators might reconsider the contract rate is preempted by PURPA.<sup>131</sup> The court concluded that “reconsideration of long-term contracts with established estimated avoided costs imposes utility-type regulation over QFs.” According to the court, such utility-type regulation “thwarts the objective of Congress”<sup>132</sup> to encourage QFs. The court based its conclusion “primarily upon the plain language of PURPA,” as well as FERC’s

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<sup>125</sup> The Commission has held that utilities may set capacity rates at zero where the utility determines it does not need the QF capacity. NOPR at n. 58.

<sup>126</sup> See *supra* note 72.

<sup>127</sup> NOPR at P 138.

<sup>128</sup> NOPR at P 138, n. 180.

<sup>129</sup> Comments of Renewable Energy Coalition, Docket No. AD16-16, Nov. 7, 2016, at 9.

<sup>130</sup> *Id.* at 11; Comments of Northwest and Intermountain Power Producers Coalition, Docket No. AD16-16, Nov. 7, 2016, at 5–6.

<sup>131</sup> *Smith Cogeneration Mgt. v. Corp. Comm’n.*, 863 P.2d 1227 (1993).

<sup>132</sup> *Id.* at 1241

existing regulations.<sup>133</sup> In addition, the court found that the legislative history “confirms that Congress did not intend to impose traditional utility-type ratemaking concepts on sales by qualifying facilities to utilities.”<sup>134</sup>

Two years later, the Third Circuit preempted a state utility commission order that directed a QF and the purchasing utility to renegotiate their contract. Although the facts of the case were somewhat different from the matter before the Oklahoma court, the federal appeals court found the Oklahoma Supreme Court’s decision persuasive. The panel added that it “cannot disregard the impact on cogeneration financing if a purchase power agreement is at any time in the future subject to the arbitrary reconsideration by a state utility regulatory body.”<sup>135</sup>

Applying the Third Circuit and Oklahoma decisions to the Commission’s proposed rule is straightforward. The Commission’s proposed rule would impose forbidden utility-type regulation on QFs. The legislative history clearly distinguishes the Commission’s duty in section 210(b) to ensure that rates paid to QFs are just and reasonable from the just and reasonable standard in the FPA.<sup>136</sup> Congress recognized that while utilities face burdensome regulation they also benefit from rate-of-return regulation. QFs do not receive such benefits and must therefore not be burdened with utility-type rate regulation.

Re-opening contract terms also imposes administrative burdens on QFs. A Pennsylvania court explained that “given the federal and state policy of encouraging the development of cogeneration and small power production, in part by minimizing the burdens involved in the examination of rates of purchases of power by utilities from QFs,” the state commission was required to devise procedures for reviewing rates that were “as expeditious and minimally burdensome” as possible.<sup>137</sup> As applied to the Commission’s proposal, a state rule that

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (citing *Amer. Paper Inst. v. Amer. Electric Power*, 461 U.S. 402, 414 (1983) (quoting from the Congressional record)).

<sup>135</sup> *Freehold Cogeneration Associates v. Board of Regulatory Comm’rs. of N.J.*, 44 F.3d 1178, 1193 (3d Cir. 1995).

<sup>136</sup> *Amer. Paper Inst. v. Amer. Electric Power*, 461 U.S. 402, 414 (1983) (quoting House Conference Report No. 95-1750):

It is not the intention of the conferees that cogenerators and small power producers become subject . . . to the type of examination which is traditionally given to electric utility rate applications to determine what is the just and reasonable rate that they should receive for their electric power. The conferees recognize that cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis-a-vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable.

<sup>137</sup> *Barasch v. Pennsylvania Public Utility Comm’n.*, 119 Pa. Cmwlth. 81, 105; *see also Amer. Paper Inst. v. Amer. Electric Power*, 461 U.S. 402, 414 (1983) (quoting House Conference Report No. 95-1750):

[C]ogeneration is to be encouraged under this section and therefore the examination of the level of rates which should apply to the purchase by the utility of the cogenerator’s or small power producer’s power should not be burdened by the same examination as are utility rate applications, but rather in a less burdensome manner. The establishment of

periodically resets the rate in a QF contract will necessarily include procedures for establishing the new rate. Under due process standards, the QF will have a right to participate in those proceedings.<sup>138</sup> The result of the Commission's proposed rule will be to effectively impose burdensome ratemaking proceedings that are plainly inconsistent with section 210.<sup>139</sup>

### **Proposed § 292.304(b)(8)(ii) Ignores the Commission's CPUC orders and the Ninth Circuit Decision in CARE v. CPUC**

In the NOPR, the Commission proposes to “permit a state the flexibility to set avoided energy and/or capacity rates using competitive solicitations (i.e., RFPs), conducted pursuant to appropriate procedures.”<sup>140</sup> In proposed § 292.304(b)(8), the Commission establishes four criteria for competitive solicitations, including “(ii): solicitations should be open to *all sources*, to satisfy that purchasing electric utility's capacity needs, taking into account the required operating characteristics of the needed capacity” (emphasis added). If the Commission finalizes section 292.304(b)(8), it should clarify that provision (ii) does not overturn the Commission's orders in the CPUC proceeding and is consistent with the Ninth Circuit's recent decision in *CARE v. CPUC*.

In NOPR footnote 136, the Commission expands on provision (ii) by pointing to 18 CFR § 292.304(e) and its decision in *Windham Solar*.<sup>141</sup> The regulation lists factors about a QF that a state may consider when it sets rates. The cited paragraphs in *Windham Solar* point to § 292.304(e) and highlight the provision that allows state regulators to establish lower rates for purchases from intermittent QFs.<sup>142</sup> The NOPR does not explicitly state that the factors in § 292.304(e) are exhaustive. In a final rule, the Commission should clarify that a utility's “capacity needs” may account for state procurement mandates.

In the CPUC proceeding, the Commission explained that setting avoided cost rates based on “all sources” able to sell to the utility “means that where a state requires a utility to procure a certain percentage of energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement.”<sup>143</sup> As a result, the Commission found that states may establish “tiered” avoided cost rates based on state procurement mandates.<sup>144</sup> Tiered rates would “reflect a state requirement that utilities purchase their energy needs from, for example, renewable resources.”<sup>145</sup>

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utility type regulation over them would act as a significant disincentive to firms interested in cogeneration and small power production.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> NOPR at P 82.

<sup>141</sup> 157 FERC ¶ 61,134 at PP 5-6 (2016).

<sup>142</sup> *Id.* at P 6.

<sup>143</sup> CPUC, Order Granting Clarification and Dismissing Rehearing, 133 FERC ¶ 61,059 at P 29 (2010).

<sup>144</sup> *Id.* at P 26 (2010) (“We find that the concept of a multi-tiered avoided cost rate structure can be consistent with the avoided cost rate requirements set forth in PURPA and our regulations.”).

<sup>145</sup> CPUC, Order Denying Rehearing, 134 FERC ¶ 61,044 at P 30 (2011).

In April 2019, the Ninth Circuit held that under the *CPUC* orders “where a state has [a renewable portfolio standard, or] an RPS and the utility is using a QF’s energy to meet the RPS, the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS.”<sup>146</sup> The court explained that this reading “comports with PURPA’s goal to put QFs on an equal footing with other energy providers. Where a utility uses energy from a QF to meet the utility’s RPS obligations, the relevant comparable energy sources are other renewable energy providers, not all energy sources that the utility might technically be capable of buying energy from.”<sup>147</sup>

The requirement in NOPR § 292.304(b)(8)(ii) that solicitations must be open to “all sources” could be read as inconsistent with the Commission’s *CPUC* orders.<sup>148</sup> The Commission should clarify that its rule allowing states to set QF rates based on competitive solicitations also incorporates the Commission’s *CPUC* orders and the recent Ninth Circuit decision interpreting those orders. If the Commission amends its avoided cost rules to allow states to set avoided cost rates based on competitive solicitations, it should clarify that states may set tiered rates, as the Commission allows under the *CPUC* orders and the Ninth Circuit requires under *CARE v. CPUC*.

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<sup>146</sup> *Californians for Renewable Energy v. CPUC*, 922 F.3d 929, 937 (9th Cir. 2019).

<sup>147</sup> *Id.*

<sup>148</sup> *CPUC*, Order Granting Clarification and Dismissing Rehearing, 133 FERC ¶ 61,059 at PP 29–30: We recognize that our decision herein could be read as inconsistent with the instances in *SoCal Edison* where the Commission used “all sources” but did not include the phrase “able to sell to the utility.” To the extent that our decision in this order (finding that the concept of a multi-tiered avoided cost rate structure can be consistent with the avoided cost rate requirements set forth in PURPA and our regulations) can be read as inconsistent with the discussion in *SoCal Edison*, we are overruling *SoCal Edison*’s broader language on this issue.

## Conclusion

The Commission should not finalize the proposed repeal. Section 210 requires the Commission to issue rules that it determines are necessary to encourage QF development. Repealing the rule guaranteeing QFs long-term contracts with fixed rates is not necessary to encourage QF development. The Commission's proposal to "rebalance the benefits and obligations" that Congress has allocated does not withstand scrutiny. Repeal is contrary to the statute's text and forty years of Commission practice. The Commission's attempts to justify repeal are not rooted in reasoned decision making and are arbitrary and capricious.

Respectfully Submitted,

/s/ Ari Peskoe

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