

# Developing Renewable Power Projects

## And the continued relevance of PURPA

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Less than 10 years ago, the Public Utility Regulatory Policies Act of 1978 (known as PURPA or the “1978 Act”) was thought of as a relic of the pre-competitive era, headed for the scrap heap of history. Yet, PURPA remains a viable and important development tool for renewable power and cogeneration projects, especially in states that have yet to develop wholesale competitive markets. PURPA’s resilience underscores the enduring effectiveness of the original law, and the significant growing pains that the wholesale capacity markets have experienced.

### Original PURPA statute

The 1978 Act\* required electric utilities to purchase energy from qualifying cogeneration facilities and qualifying small power production facilities (QFs) at either the utility’s avoided cost or at a negotiated rate (the “mandatory purchase” provision). Generally, a small power production facility refers to a facility of not greater than 80 megawatts (MW) of production capacity, which uses biomass, waste, or renewable energy sources, such as wind, solar, or water, to produce electric power.

### PURPA Section 210(m): A presumption of non-discriminatory access

The Energy Policy Act of 2005 added Section 210(m) to PURPA, providing for termination of the “mandatory purchase” requirement if, upon application by a utility, FERC determined that a QF would have non-discriminatory access to competitive markets.

FERC’s regulations under Section 210(m) created a rebuttable presumption that most of the FERC-approved regional transmission organizations and independent system operators (RTOs/ISOs) qualify as competitive markets. As a result, many utilities within those markets have sought and received relief from the mandatory purchase provisions of PURPA, pursuant to Section 210(m).

To date, FERC has found that the markets administered by the following organizations or operators are competitive markets: Midwest Independent Transmission System Operator, Inc. (which was subsequently renamed Midcontinent Independent System Operator, Inc. or MISO); PJM Interconnection, LLC (PJM); ISO New England, Inc. (ISO-NE); New York Independent System Operator, Inc. (NYISO); and the Electric Reliability Council of Texas, Inc. (ERCOT). FERC also found the markets administered by the Southwest Power Pool, Inc. (SPP) and California Independent System Operator (CAISO) satisfy some of the requirements under Section 210(m), such that a member utility of CAISO and SPP may also be exempted from the “mandatory purchase” obligation, with some additional showings.

Accordingly, many utilities within these markets have sought and received exemptions under Section 210(m). Moreover, QFs larger than 20 MW, which are interconnected with these exempted electric utilities, are now presumed to have non-discriminatory market access, and cannot invoke the mandatory purchase provisions.

### Recent developments in state PURPA implementation

Although many RTO/ISO member utilities have been relieved from their PURPA mandatory purchase obligations, not one utility has been able to secure an exemption from its mandatory purchase obligation outside of the FERC-regulated RTOs/ISOs. Put simply, PURPA implementation has effectively been balkanized since passage of the 2005 Energy Policy Act—a mix of regions where the mandatory purchase requirement (rebuttably) no longer applies; and a critical mass of states where the 1978 Act continues to apply as it did 30 years ago. Clearly, a lot has been happening in some of these states as shown by the following examples.

- **California.** In 2007, California enacted the Waste Heat and Carbon Emissions Reduction Act (AB 1613), requiring the state’s investor-owned utilities to offer to purchase and deliver to the grid electricity generated by certain combined heat and power (CHP) generators. Implementing AB 1613, the California Public Utilities Commission (CPUC) mandated that the state’s investor-owned utilities offer a specified price to CHP generating facilities of 20 MW or less for purchase of electricity.

The CPUC also sought a declaratory order from FERC that implementation of AB 1613 wasn’t pre-empted by federal law. FERC granted the petition in part, determining that with regard to CHP facilities, which qualified as QFs, AB 1613 wasn’t pre-empted by the Federal Power Act so long as the CPUC rate didn’t exceed avoided cost.

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• **Idaho.** Following a request from Idaho Power Company, Avista Corporation, and PacifiCorp d/b/a Rocky Mountain Power, the Idaho Public Utilities Commission (IPUC) opened an investigation, and, in 2011, reduced the QF eligibility criteria for published avoided cost rates from 10 average megawatts to 100 kilowatts (kW), effective retroactively to December 14th, 2010. The IPUC then rejected a number of QF agreements, which contained rates in excess of those permitted under and in effect pursuant to the new avoided cost rate eligibility criteria (because they weren't fully executed until after December 14th). QF developers disputed IPUC's findings regarding the agreements' effective date, petitioning FERC to initiate an enforcement action against the IPUC.

FERC found that IPUC's determination of the agreements' effective date was contrary to PURPA and FERC's implementing regulations because the IPUC failed to recognize that, under PURPA, a legally enforceable obligation could arise prior to the date of a contract's formal execution—even if the contract never was to be fully executed. Upon presentation with a third instance of the IPUC violation, FERC announced its intent to act and, accordingly, initiated an action against the IPUC. This matter is currently pending in the United States District Court, District of Idaho. The proceeding marks the first time where FERC has exercised its enforcement authority against a state agency since PURPA's enactment.

### Future developments

The 1978 Act is fully in effect with regard to utilities that aren't members of RTOs/ISOs, as evidenced by FERC's recent enforcement action against the IPUC. QF developers in those states may continue to utilize PURPA's mandatory purchase provisions to develop qualified projects. (Invoking the mandatory purchase requirement, of course, isn't dispositive, since the developer must also demonstrate that its costs are at or below the purchasing utility's avoided cost.)

However, PURPA is by no means forever obsolete, even in the RTO/ISO organized markets. Although QFs are now presumed to have non-discriminatory access to these markets, and many utilities within these regions presently aren't subject to PURPA's mandatory purchase obligation, this presumption is rebuttable. It is by no means obvious why non-discriminatory access to transmission should be equated with non-discriminatory access to markets—the latter being the governing standard for exemption under Section 210(m).

In its order implementing Section 210(m), FERC determined that factors such as “operational characteristics and transmission limitations are not susceptible to a clear demarcation for purposes of establishing a rebuttable presumption,” choosing instead not to make any final determinations “as to whether any such factor, standing alone, is sufficient to rebut the presumption of market access.” Nonetheless, FERC still “agreed with commenters that

these [and other] factors are relevant to the question of whether the purchase obligation should be terminated and, upon an appropriate evidentiary showing, may be sufficient to rebut that presumption.”

Specifically, FERC listed the following examples:

- “The QF has certain operational characteristics that effectively prevent its participation in a market [such as]: (a) highly variable thermal and electrical demand (from the QF host) on a daily basis, such that the QF cannot participate in a market; or (b) highly variable and unpredictable wholesale sales on a daily basis.”
- “The QF has no access to a mechanism to schedule transmission service or make sales in advance on a consistent basis, either because of the variability of the QF's electric energy production or because of market rules that prevent the QF from scheduling transmission service or participating in organized markets. Such operational characteristics might include, but are not limited to, dispatchability or some other characteristic.”
- The QF is “located in an area where persistent transmission constraints in effect cause the QF not to have access to markets outside a persistently congested area to sell the QF output or capacity [in which case] the Commission will consider [among other things] the opportunity for QFs, on a non-discriminatory basis, to obtain transmission upgrades to relieve constraints and whether the structure of the relevant market provides for the opportunity for the QF to sell notwithstanding the constraint.”

In short, FERC has recognized that numerous characteristics might prevent QF participation in a market, ranging from the variability of a QF's energy production, to the existence of a given market rule that prevents the QF from scheduling transmission service, or otherwise from fairly participating in the market in general.

Accordingly, even as to RTOs/ISOs, if a QF can show that it's unduly disadvantaged with respect to market entry in a given organized market, it should be able to make a strong case for rebutting FERC's market access presumption, and for reviving PURPA's “mandatory purchase” requirements in such areas.

\* *References and case citations for this article available upon request.*