

FERC's PURPA Reform in Order No. 872 –
Major Revisions to Regulations Under the Only
Federal Law Requiring Electric Utilities to Purchase
Renewable Energy

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PURPA Background

Part 1 – Statutory Requirements

- PURPA = Public Utility Regulatory Policies Act of 1978, P.L. 95-617
- Congress enacted PURPA because it found electric utilities were reluctant to purchase energy from non-traditional facilities, and such facilities faced regulatory burdens
- Section 210 of PURPA Contains the Critical “Must Purchase” Provisions
 - codified at 16 U.S.C. § 824a-3 et seq.
- Section 210(a) & (b) require FERC to promulgate rules that “*encourage* cogeneration and small power production” – facilities known as “Qualifying facilities” or “QFs”
 - QF- Includes co-generation facilities and “small power production” facilities with production capacity of 80 Megawatts or less that use a renewable fuel source, including wind, solar, small hydropower, waste to energy, biomass, etc.
 - FERC’s rules must require electric utilities to buy electric energy from QFs at rates that are:
 - “just and reasonable,” are in the “public interest,” “shall not discriminate against” QFs, and do not exceed the purchasing utility avoided costs, i.e., the amount the utility would otherwise pay for similar energy
- Section 210(f)
 - Requires state utility commissions to “implement” FERC’s PURPA rules for utilities it regulates
 - Nonregulated utilities (e.g. cooperatives) must implement PURPA on their own
- QFs can bring legal challenges against a state or nonregulated utility through state or federal court
 - 16 U.S.C. 824a-3(g), (h)
- Section 210 of PURPA affirmed by *FERC v. Mississippi*, 456 U.S. 742 (1982)

PURPA Background

Part 2 – FERC's 1980 Rules

- FERC promulgated rules in 1980 that have remained largely unchanged on the critical must-purchase provisions
 - FERC Order No. 69, 45 Fed. Reg. 12,214 (Feb. 25, 1980), 18 C.F.R. Part 292.301 et seq.
 - Affirmed by *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983)
- Sets purchase price at the purchasing utility's *full* “avoided costs”
- Required that QFs be offered two pricing options
 - Fixed price for energy and capacity, based on estimates at the time of contracting
 - Critical requirement – FERC found fixed prices “necessary” to provide investors the assurance of likely revenue and return on investment, 45 Fed. Reg. at 12,224
 - Prices that are variable and based on avoided costs at the time of delivery
- How it works – QF developer obtains a long-term power purchase agreement (e.g., 20-year) with fixed prices for sale of output and relies on that to finance construction of QF

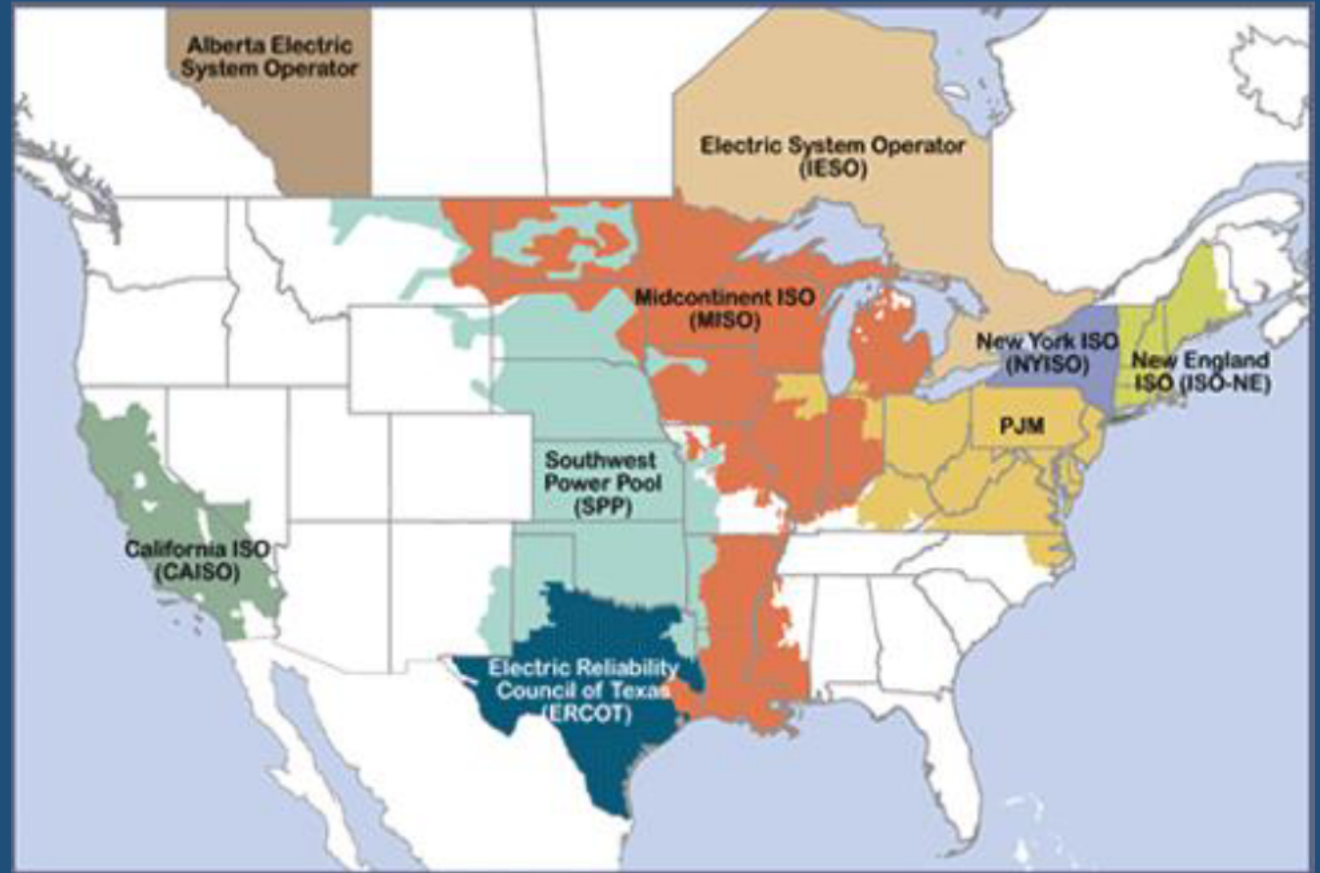
Contract Term Length Controversy

- FERC's 1980 rules required fixed prices but do not state a minimum contract term length
- FERC has ruled contract must be “long enough to allow QFs reasonable opportunities to attract capital from potential investors.”
 - *Windham Solar LLC*, 157 FERC ¶ 61,134, at P 8 (Nov. 22, 2016)
- States have implemented different lengths of fixed prices
 - Idaho PUC
 - Until 2015, 20-year contracts for all QFs
 - Since 2015, two-year contracts for large QFs, including over 100 kW wind and solar, and 10 average MW for other QFs; retains 20-year contract for small QFs
 - Oregon PUC – 15-year fixed-price contract
 - Montana PSC
 - Until 2017, 25-year contracts
 - In 2017, reduced to 15-year contract
 - In 2020, Montana Supreme Court invalidated 15-year decision
 - *Vote Solar v. Montana Dept. of Public Service Regulation*, 401 Mont. 85 (Oct. 6, 2020)

PURPA Background

Part 3 – Energy Policy Act of 2005

- Amends PURPA to include § 210(m)
 - Allows FERC to relieve utilities of the must purchase provision for new QF contracts where QFs have nondiscriminatory access to certain defined markets
 - Assumption is that access to such markets is adequate encouragement of QFs
- FERC Order No. 688, 117 FERC ¶ 61,078 (2006)
 - Exempts must-purchase rules only for QFs larger than 20 MW
 - Limited to utilities in regions with organized wholesale markets, not the Northwest



PURPA in Action

Grand View PV Solar II, Grand View, Idaho, 80 MW QF, Online 2016

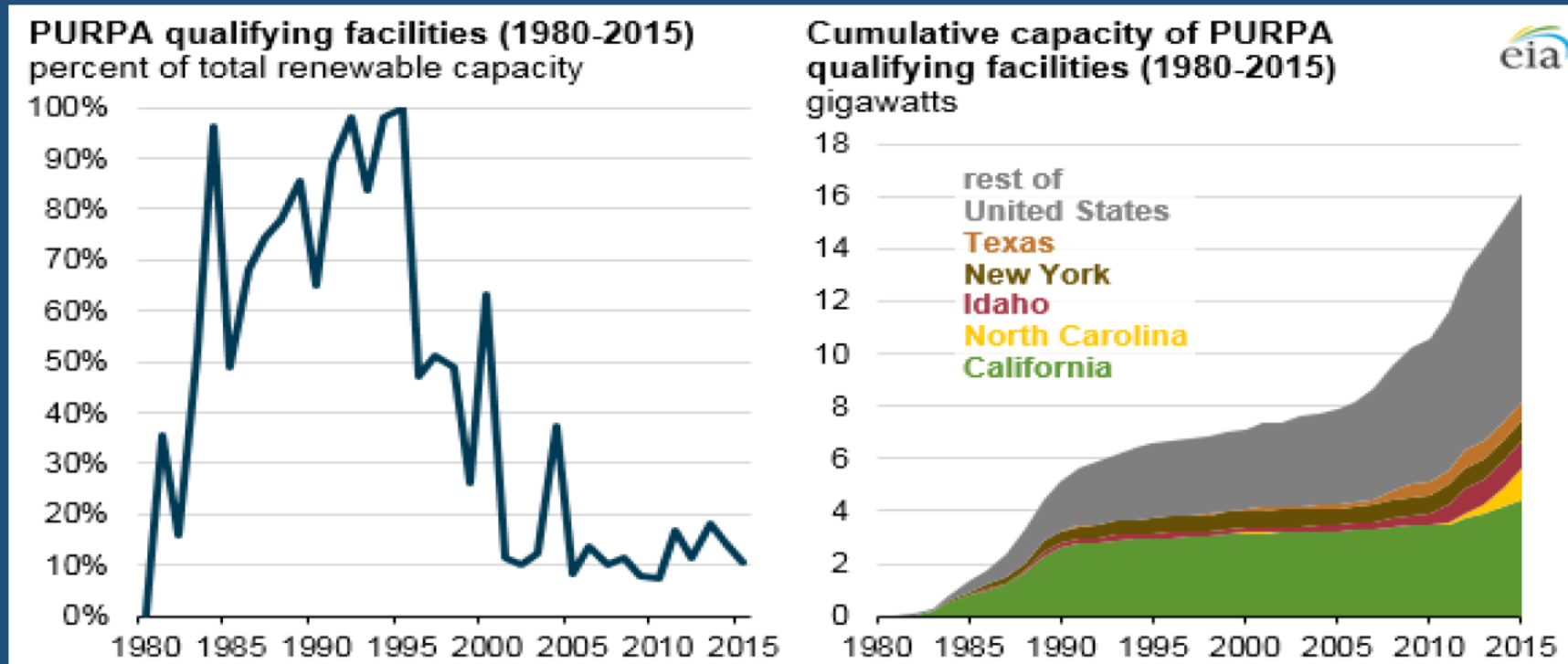


Middle Fork Irrigation District In-Conduit Hydro QF, Oregon, 3.4 MW, Online 1986



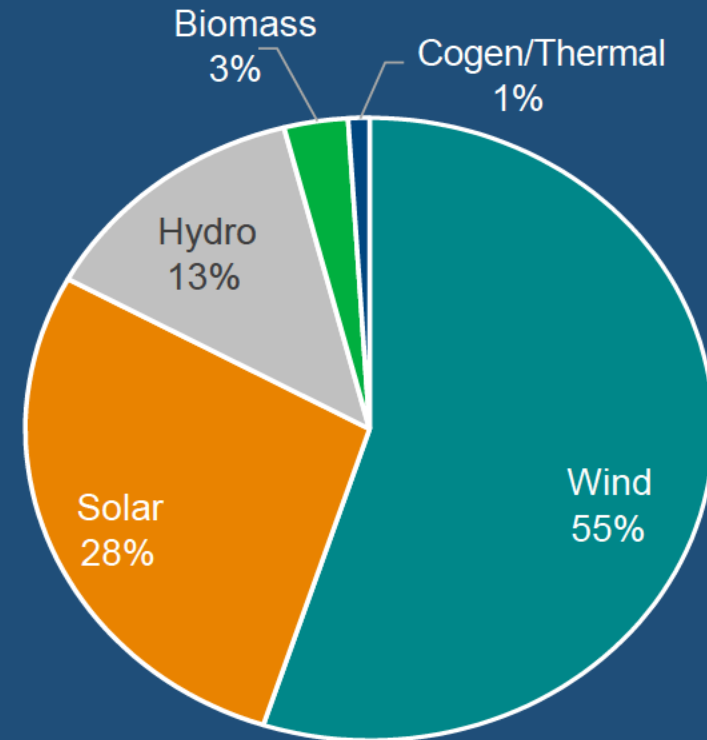
PURPA Nationally

- Historically the primary means of renewable energy development
- Since 1978, 29 states have enacted renewable portfolio standards



PURPA in Idaho

- Idaho has no Renewable Portfolio Standard law and no organized wholesale market
- PURPA has been the primary means of renewable energy development
- Idaho Power Example
 - 1,148 MW of PURPA QF Contracts
 - Annually serves ~19.3% of Idaho Power's load
 - 133 individual small hydro, cogeneration, biomass, wind, and solar QFs



Idaho Power's QFs by Resource Type (MW)

FERC's PURPA Reform – Order No. 872

- FERC issued a proposed rule on Sept. 19, 2019
- Proposed to drastically change the rules in effect since 1980
- 161 separate organizations filed comments
 - Opponents to the rule – renewable energy and industrial cogeneration advocates, environmental non-profit organizations
 - Supporters of the rule – electric utilities and state utility commissions (with some exceptions)
- Final Rule Adopted: Order No. 872, 72 FERC ¶ 61,041 (July 16, 2020)
- Order No. 872 made several changes, including three very significant changes
 - Makes offering fixed energy prices optional for states
 - Lowers Section 210(m)'s exemption from PURPA from 20 MW to 5 MW
 - Redefines how to measure a single QF's size of 80 MW

Order No. 872 – Repeal of Requirement for Fixed Energy Prices

- Removes the requirement that states offer each QF a fixed energy price
- States may elect to require only variable energy prices
- Retains the requirement that fixed capacity prices be offered
 - But capacity price is often zero in early years of contract
 - Without adequate contract length, QFs may not even have certainty of fixed price for capacity
- FERC's Reasoning:
 - Relies on allegations that long-term contracts have resulted in prices that exceed actual avoided costs over time, thus exceeding the statutory avoided cost cap
 - Rejects arguments that long-term fixed prices are needed for financing and to encourage QFs, as required by the statute and FERC precedent
- Does Not Impact Existing Contracts

Order No. 872 – Dissent of Commissioner Richard Glick on Fixed Prices

- Decision ignores need for certainty for financing
 - “Prior to this proceeding, the Commission recognized time and again that fixed-price contracts play an essential role in the financing of QF facilities, making them a necessary element of any effort to encourage QF development, at least in certain regions of the country.”
- Decision relies on speculative “allegations” of overestimates of avoided cost
 - “[T]he Commission fails to explain why allegations of QF rates exceeding a utility’s actual avoided cost requires us to abandon the Commission’s long-held principles regarding certainty and financing.”
- New rule fails to “encourage” development of QFs
 - It is hard “to understand how the Commission can, with a straight face, claim to be encouraging QF development while at the same time eliminating the conditions necessary to develop QFs in the regions where they are being built.”

Order No. 872 – Exemption from PURPA Under Section 210(m)

- Recall that Energy Policy Act of 2005 exempts utilities of PURPA for QFs over 20 MW in regions with organized markets
- Order No. 872
 - Lowers the threshold for exemption from 20 MW to 5 MW for renewable QFs
 - Leaves the threshold at 20 MW for all cogeneration QFs
 - Allows for certain renewable QFs up to 20 MW to sell under PURPA if they prove they lack access and marketing ability to sell power in organized markets
- Impact in the Northwest?
 - None at this time because NW has no organized wholesale markets
- Commissioner Glick Dissent – “the reduced 5 MW threshold is unsupported by the record and inadequately justified in today’s Final Rule”

Order No. 872 – Change to Definition of a Single QF

- PURPA contains 80 MW size limit for a small power production QF
 - 16 U.S.C. 796(17)(A) - “a power production capacity which, together with any other facilities located *at the same site* (as determined by the Commission), is not greater than 80 MW.”
- Since 1980, FERC’s rules used a bright line one-mile separation rule to determine the “same site”
 - Order No. 70, 45 Fed. Reg. 17,959, 17,965 (March 20, 1980)
- Order No. 872
 - Allows for rebutting the presumption of separate site for other QFs within 10 miles
 - Factors to consider include physical and ownership factors
 - Separated by less than one mile = same site
 - Separate by one mile to 10 miles = rebuttable presumption not the same site
 - Separated by 10 miles or more = separate site
 - Retroactive effect – applies to existing facilities that make any *substantive* changes to their certification, including change in ownership

Legal Challenges

- Rehearing
 - Prerequisite for appeal under Federal Power Act
 - Numerous parties filed petitions for rehearing
- Appeal
 - Administrative Procedural Act Review
 - Potential National Environmental Policy Act (NEPA) challenge
 - Solar Energy Industries Association filed petition for review in Ninth Circuit