

Nos. 20-72788, 20-73375, 21-70113 & 21-70083 (consolidated)

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SOLAR ENERGY INDUSTRIES ASSOCIATION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF
RESPONDENT FEDERAL ENERGY REGULATORY
COMMISSION**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for amicus curiae Chamber of Commerce of the United States of America makes the following disclosure:

The Chamber of Commerce of the United States of America (the “Chamber”) does not have a parent company, and there is no publicly owned corporation that owns 10% or more of the Chamber’s stock.

Dated: November 22, 2021

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RULE 29 STATEMENT

This brief was submitted with a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a)(3). No party or its counsel authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation’s business community.

The Chamber has a particular interest in this case because all commercial activity in this nation is materially affected by the price of electricity. The Chamber supports the efforts of the Federal Energy Regulatory Commission (FERC) to promote competition and enhance efficient energy pricing through long-needed reforms to its regulations under section 210 of the Public Utility Regulatory Policies

Act of 1978 (PURPA), 16 U.S.C. §§ 796(17)-(18), 824a-3, as amended by section 1253 of the Energy Policy Act of 2005 (EPAAct 2005), Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-70 (2005) (adding 16 U.S.C. § 824a-3(m)). This Court should uphold those efforts.

INTRODUCTION

The Commission’s rulemaking orders on review, Order Nos. 872 and 872-A,¹ fulfill the agency’s statutory duty under PURPA section 210(a). That section directs the Commission to “prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity.” 16 U.S.C. § 824a-3(a). The rules here carry out the specific statutory duty to require electric utilities to sell energy to, and purchase energy from, “qualifying cogeneration facilities and qualifying small power production facilities,” *id.*, collectively known as Qualifying Facilities (QFs).

The Chamber regards the Commission’s reforms as necessary and reasonable measures to reflect the profound transformation of our nation’s energy production, transmission, and distribution systems since PURPA was enacted in 1978.

¹ *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041 (2020) (2-SolarER-362), *order on reh’g & clarification*, Order No. 872-A, 173 FERC ¶ 61,158 (2020) (1-SolarER-2).

Petitioners' contrary view of the Commission's PURPA reforms rests on three flawed premises.

First, petitioners and their supporting intervenor, NewSun Energy LLC (NewSun), overstate PURPA's exhortation that the Commission "encourage" the production and sale of energy from Qualifying Facilities to electric utilities. The notion that the statute mandates this goal without attention to the Commission's other core statutory obligations undergirds each contention from the petitioners and NewSun that Order No. 872 unlawfully disadvantages or discriminates against Qualifying Facilities. But that premise is wrong. PURPA's exhortation to "encourage" Qualifying Facilities is not an unbounded duty that supersedes other statutory priorities, such as ensuring just and reasonable rates.

Moreover, that directive and the Commission's other statutory priorities must be understood in light of the dramatic changes in the energy marketplace since PURPA's enactment. In 2005, Congress recognized that a series of significant statutory and regulatory reforms in the decades following PURPA's enactment had transformed the electric industry nationwide into a predominantly competitive model, thereby affording utilities significantly broader opportunities to purchase electricity from a wide variety of suppliers beyond Qualifying Facilities. *See infra* Part I.B. As a result, Congress itself terminated the mandatory purchase requirement

for Qualifying Facilities with non-discriminatory access to competitive power markets by enacting PURPA section 210(m), 16 U.S.C. § 824a-3(m).

Since then, the Commission has continued to pursue reforms that increase competition throughout all FERC-jurisdictional activities, *see infra* Part I.D, allowing utilities new options to lower their avoided costs. Order No. 872 reforms the Commission’s PURPA regulations by continuing to “encourage” Qualifying Facilities while aligning those regulations with current market realities.

Second, petitioners and NewSun attempt to recast PURPA as a statute intended to achieve certain environmental outcomes. They do so to support their assertion that any revisions that do not actively promote the economic interests of Qualifying Facilities undermine environmental protection. Petitioners further argue that any regulatory change affecting Qualifying Facilities necessarily causes adverse environmental impacts that the Commission must evaluate under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* Petitioners’ argument misconstrues the very basis for PURPA.

The Commission correctly concluded that a NEPA analysis of the PURPA reform regulations was not required because the regulations have no reasonably predictable impacts on the quality of the human environment. PURPA itself does not contemplate that any such regulations have foreseeable or predictable environmental impacts; the statute was not enacted to advance environmental

objectives. PURPA was a response to a crippling domestic energy shortage that foreign energy suppliers exploited to cause massive increases in energy prices. *FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982). While PURPA makes various kinds of renewable energy resources eligible to become Qualifying Facilities, the statute is indifferent to the comparative environmental attributes of Qualifying Facilities *writ large*. That aspect of the statute further supports the Commission’s reasonable conclusion that PURPA’s challenged reforms have no predictable environmental impacts that require analysis under NEPA.

Third, petitioners and New Sun contend that the Commission’s PURPA reforms are uniquely hindering the development of renewable Qualifying Facilities, suggesting that the Commission must affirmatively “encourage” renewable Qualifying Facilities—without reasonable constraint—to enable the development of new renewable resources and the displacement of fossil generation. These claims are incorrect. The Commission continues to receive large numbers of new Qualifying Facility applications each month. *See infra* note 9. Substantial amounts of new renewable energy resources—including Qualifying Facilities—are rapidly entering commercial operation to meet state renewable portfolio standards, and market results show that these new resources are displacing significant quantities of thermal resources. *See infra* note 11. Indeed, this transition is occurring so swiftly that the Commission recently initiated a new rulemaking to determine how to plan

for and fund the transmission expansions necessary to facilitate it. *See Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Advanced Notice of Proposed Rulemaking, RM21-17-000, 176 FERC ¶ 61,024 (2021) (Transmission ANOPR).

ARGUMENT

I. The Commission’s Implementation of Long-Needed Revisions to Its PURPA Regulations to Reflect Modern Energy Market Conditions Does Not Violate the Commission’s Duty to “Encourage” Qualifying Facilities

The central premise of the petitioners’ case is that Order No. 872 disadvantages or discriminates against Qualifying Facilities, contrary to the Commission’s charge to “encourage” Qualifying Facilities under PURPA section 210(a). 16 U.S.C. § 824a-3(a). That premise is false. PURPA has never required the Commission to elevate the commercial interests of Qualifying Facilities above its statutory obligation to ensure just and reasonable wholesale electricity rates. *See id.* §§ 824d, 824e. The plain text and structure of PURPA dispel any notion that this exhortation takes precedence over the Commission’s core statutory priorities.

A. The Commission’s Charge to “Encourage” Qualifying Facilities Has Always Been Limited By Express Price and Quantity Controls to Prevent Abuse of the Mandatory Purchase Requirement

The defining characteristic of PURPA section 210 is its unique requirement that electric utilities must offer to sell energy to, and buy energy from, Qualifying Facilities. *See id.* § 824a-3(a)(1)-(2). That is the only tool through which the Commission was authorized to “encourage” Qualifying Facilities. *Id.* To prevent

abuse of that requirement, PURPA has always included express limits on the quantity and price of those transactions. Specifically, PURPA limits qualifying small power production to “not more than 80 megawatts capacity” and prohibits the Commission from authorizing any Qualifying Facility rate that “exceeds the incremental cost to the electric utility” for energy that the utility can “generate or purchase from another source.” *Id.* § 824a-3(a), (b), (d). This price limitation is also described in the Commission’s regulations as a utility’s “avoided costs.” 18 C.F.R. § 292.101(b)(6); *see Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 406 (1983) (explaining that the regulatory term “avoided costs” is a substitute for the more cumbersome formulation in PURPA section 210(d)).

PURPA’s mandatory purchase requirement was particularly unusual because the electric industry was dominated by vertically integrated utilities when PURPA was enacted, and independent power generators were essentially non-existent at that time. *See, e.g., New York v. FERC*, 535 U.S. 1, 5 (2002); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363-64 (D.C. Cir. 2004). The mandatory purchase requirement was also unique insofar as the prices were set based on the avoided costs of the buyer, rather than the production cost of the seller. *See Am. Paper Inst.*, 461 U.S. at 414; *cf., e.g., Ala. Elec. Coop. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) (describing traditional cost-based rate regulation).

Beyond those express limits, the Commission has always had broad discretion to prescribe and revise “*such rules as it determines necessary* to encourage” Qualifying Facilities, *id.* § 824a-3(a) (emphasis added), and to define the characteristics of Qualifying Facilities, “including requirements respecting fuel use, fuel efficiency, and reliability” that “the Commission may, by rule, prescribe.” *Id.* §§ 796(17)(C) & (18)(B); *see Am. Paper Inst.*, 461 U.S. at 416-17 (emphasizing the Commission’s broad “statutory mandate to set a rate that is ‘in the public interest,’” and to revise its regulations “as it obtains experience with the effects” of its rules).

B. Since PURPA’s Enactment, the Commission has Implemented a Series of Market-Based Reforms that have Fundamentally Transformed the Electric Industry to the Benefit of Smaller Generation Resources

Two decades after PURPA was enacted, the Commission embarked on a series of regulatory reforms that fundamentally transformed the electric industry. The Commission increased its reliance on competitive forces to make the industry more efficient and to lower consumer prices. The key components of this transition included (i) functionally unbundling electric generation from electric transmission, (ii) requiring open access to transmission facilities, (iii) replacing cost-based rates with market-based rates; and (iv) the establishment of independent transmission organizations to operate the transmission system and administer real-time

competitive energy markets. The key orders in the process were Order No. 888,² issued in 1996, and Order No. 2000,³ issued in 1999.

In *Midwest ISO Transmission Owners*, then-D.C. Circuit Judge Roberts provided a famously succinct and lucid explanation of this transition:

In the bad old days, utilities were vertically integrated monopolies; electricity generation, transmission, and distribution for a particular geographic area were generally provided by and under the control of a single regulated utility. Sales of those services were “bundled,” meaning consumers paid a single price for generation, transmission, and distribution. As the Supreme Court observed, with blithe understatement, “[c]ompetition among utilities was not prevalent.”

In its pathmarking Order No. 888, FERC required utilities that owned transmission facilities to guarantee all market participants non-discriminatory access to those facilities. . . . That is, FERC required all transmission-owning utilities to provide transmission service for electricity generated by others on the same basis that they provided transmission service for the electricity they themselves generated. To effectuate this introduction of competition, FERC required public utilities to “functionally unbundle” their wholesale generation and transmission services by stating separate rates for each service in a single tariff and offering transmission service under that tariff on an open-access, non-discriminatory basis.

...

² *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *pets. for rev. denied in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (per curiam), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

³ *See Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *pets. for rev. dismissed sub nom. Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (per curiam).

By 1999, FERC had come to a less sanguine view of the curative powers of functional unbundling. In FERC’s view, inefficiencies in the transmission grid and lingering opportunities for transmission owners to discriminate in their own favor remained obstacles to robust competition in the wholesale electricity market. FERC concluded that these problems could be remedied through the establishment of RTOs [Regional Transmission Organizations], explaining that “better regional coordination in areas such as maintenance of transmission and generation systems and transmission planning and operation” was necessary to address regional reliability concerns and to foster regional competition. . . . FERC concluded that RTOs would: “(1) improve efficiencies in transmission grid management; (2) impose [sic] grid reliability; (3) remove remaining opportunities for discriminatory transmission practices; (4) improve market performance; and (5) facilitate lighter handed regulation.” To further encourage RTO development, FERC directed transmission-owning utilities either to participate in an RTO or to explain their refusal to do so.

373 F.3d at 1363-65 (citations omitted).

C. Congress Recognized the Market-Based Transformation of the Electric Industry By Enacting PURPA Section 210(m) to Restrict the Mandatory Purchase and Sale Requirements and Limit Eligibility for Qualifying Facility Status

By 2005, Congress recognized that the evolution of our electric supply system from a monopoly-based model to an intensely competitive market-based model—including, *inter alia*, mandatory open access transmission tariffs for all public utilities pursuant to FERC Order No. 888 and the widespread implementation of organized regional markets pursuant to FERC Order No. 2000—required a similar competitive evolution for Qualifying Facilities under PURPA. Therefore, EPAct 2005 amended PURPA to include a new section 210(m) that removed several no

longer necessary commercial advantages that Qualifying Facilities had originally been granted in 1978.

Of particular relevance here, Congress terminated utilities' obligation to purchase energy from Qualifying Facilities "if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to" competitive wholesale markets through Regional Transmission Organizations, Independent System Operators, or comparable Transmission Organizations "that provide a meaningful opportunity" to sell energy and capacity "to buyers other than the utility to which the qualifying facility is interconnected." 16 U.S.C. § 824a-3(m)(1); *see also id.* § 796(27)-(29) (defining the types of organizations described in PURPA section 210(m)(1)). Thus, Congress itself placed a significant limitation on the specific method it had earlier authorized to "encourage" Qualifying Facilities.

Congress likewise terminated utilities' obligation to sell energy to Qualifying Facilities "if the Commission finds that—(A) competing retail electric suppliers are willing and able to sell and deliver electric energy to [Qualifying Facilities] . . . ; and (B) the electric utility is not required by State law to sell electric energy in its service territory." *Id.* § 824a-3(m)(5). In other words, the energy sales requirement was effectively eliminated in the 26 states that have retail competition.

Congress also restricted eligibility to become a qualifying cogeneration facility by requiring that the Commission ensure, *inter alia*, that “the electrical, thermal, and chemical output of the cogeneration facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility.” *Id.* § 824a-3(n).

Finally, Congress eliminated the restriction on ownership of Qualifying Facilities by electric utilities, *see also id.* § 796(27)-(29), which created the opportunity for utilities and utility holding companies to bid on companies that own Qualifying Facilities and thereby expanded secondary markets for the purchase and sale of Qualifying Facilities’ power-producing assets.

D. The Commission’s Implementation of Aggressive New Market-Based Reforms Continued in the Wake of EPAct 2005

EPAct 2005 not only required modifications to PURPA, but also made other important statutory changes to promote and police competition. Chief among these changes were: (1) repeal of the Public Utility Holding Company Act, which had imposed numerous restrictions on utility ownership and prevented many kinds of transactions; (2) amendment of the merger and acquisitions control provisions of Federal Power Act (FPA) section 203, 16 U.S.C. § 824b; (3) enactment of a new FPA section 215, *id.* § 824o, to provide for the establishment of a national Electric Reliability Organization to create mandatory transmission standards under the Commission’s supervision; (4) creation of a new FPA section 222, *id.* § 824v, to

define and prohibit market manipulation; and (5) amendment of FPA section 316A, *id.* § 825o-1, to allow the Commission to impose civil penalties of up to \$1 million/day for violations of the Commission’s orders, regulations, and market rules.

These amendments to the FPA and PURPA set in motion a wave of Commission rulemaking proceedings designed to enhance reliability and advance competition, including competition in areas previously regarded as natural monopolies and the creation of entirely new competitive products. For example, Order No. 719 created separate markets for the sale of electric generating capacity—i.e., the commitment to sell electricity when needed—as a distinct product from the sale of energy.⁴ Order No. 1000 created competition for electric transmission and limited federal tariff entitlements to build new transmission facilities within a utility’s own state-franchised service territory.⁵ Order No. 745 created rules for the sale of demand response as a form of supply, thus allowing customers to be paid for *not consuming* electricity at the same price they would have been paid for producing

⁴ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh’g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 (2009).

⁵ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *pets. for rev. denied sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (per curiam).

a like quantity of power.⁶ And Order No. 2222 removed barriers to the participation of distributed energy resource aggregations in organized markets, thus allowing wholesale market participation by any resource located on the distribution system, on any subsystem thereof, or behind a customer meter.⁷

The common theme in all of those deregulatory reforms has been to expand market access with the goal of enhancing competition and supporting lower prices.

E. Order No. 872 Conforms the Commission’s PURPA Regulations to the Current Realities of an Open and Competitive Market

The Commission’s continuous push for market-based reforms in the wake of EPAAct 2005 has provided utilities with a wide array of new options to lower their avoided costs. Order No. 872 represented the next and necessary step in this ongoing effort to improve competition by enacting measures to prevent or control attempts to exploit the protections that Qualifying Facilities enjoy. Specifically, Order No.

⁶ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187, *order on reh’g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *rev’d & remanded sub nom. FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260 (2016).

⁷ *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222, 172 FERC ¶ 61,247 (2020), *order on reh’g*, Order No. 2222-A, 174 FERC ¶ 61,197 (2021), *modified*, Order No. 2222-B, 175 FERC ¶ 61,227 (2021).

872 reforms the Commission's PURPA regulations in ways that reflect the Commission's pursuit of enhancements to competition and market transparency by:

- (1) updating the avoided costs rules to provide flexibility to distinguish fixed and variable costs, Order No. 872 at P 57 (2-SolarER-403);
- (2) establishing a rebuttable presumption that locational marginal prices (LMPs) in organized markets accurately reflect avoided costs, *id.* P 59 (2-SolarER-403-04);
- (3) modifying its site/distance rule to allow individualized determinations that facilities located more than one mile, but less than ten miles apart, are at the same site, *id.* P 62 (2-SolarER-405); and
- (4) reducing the rebuttable presumption of non-discriminatory access for small power production Qualifying Facilities from 20MW to 5MW, *id.* P 64 (2-SolarER-406).

These long-overdue reforms do not undermine PURPA's support for Qualifying Facilities. Rather, they restore a more level playing field that reflects current market realities.

F. The Commission's PURPA Reforms Provide States With Additional Tools to Determine Avoided Cost Rates

Finally, it is important to underscore that the states, not FERC, are in the best position to "encourage" Qualifying Facilities because "it is the state's responsibility in the first instance to determine an avoided-cost rate consistent with the Commission's PURPA regulations," which dissatisfied utilities may then challenge through a petition for enforcement pursuant to PURPA section 210(h)(2)(B), 16 U.S.C. § 824a-3(h)(2)(B). *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215, at P 41 (2013); *Council of the City of New Orleans*, 145 FERC ¶ 61,057, 61,423 (2013).

Petitioners miss the mark when they claim that the Commission’s reform of its avoided cost regulations—specifically, its modification of the fixed rate rule and its determination that locational marginal prices in organized markets are a reasonable proxy for avoided costs—are changes that will necessarily harm Qualifying Facilities. *See, e.g.*, Mont. Env’tl. Info. Ctr., *et al.* (MEIC) Br. at 18, 38, 40-44, 50-55. Contrary to petitioners’ mistaken view, these reforms are explicitly meant to provide *options* that states may employ to ensure that the rates paid to Qualifying Facilities comply with the statute. *See* Order No. 872 at P 260 (“[N]othing in the revision being implemented in this final rule would prohibit a state from calculating a QF’s avoided cost energy rate . . . in the manner the Commission has long allowed, if a state determined that such an approach best reflects the purchasing electric utility’s avoided costs.”) (2-SolarER-516); *see also*, *e.g.*, *id.* at P 57 (2-SolarER-403); *id.* at P 36 (2-SolarER-388); Order No. 872-A at P 134 (1-SolarER-89).

II. Petitioners’ NEPA Argument Lacks Merit, as the PURPA Reform Regulations Have No Foreseeable Environmental Impacts and PURPA Is Not Designed to Achieve Any Specific Environmental Outcome

Petitioners attempt to recast PURPA as an environmental regulation statute to support their argument that Order No. 872 failed to comply with the Commission’s NEPA obligations. NEPA requires federal agencies to prepare a statement on the environmental impact of “major Federal actions significantly affecting the quality

of the human environment.” 42 U.S.C. § 4332(C) (2018); *see also Regulations Implementing the National Environmental Policy Act*, Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987). In petitioners’ view, Order No. 872 “conflicts with Congress’s express goals to encourage renewable generation and avoid discrimination,” and therefore a robust environmental analysis of Order No. 872 inevitably “would have confirmed that undermining renewable energy development by rolling back important aspects of FERC’s existing rules has significant environmental impacts.” MEIC Br. at 2; *see also, e.g., id.* at 4, 15. NewSun further suggests that PURPA was enacted in response to fears of global warming forecasted by President Carter’s science advisor and that the privileges enjoyed by Qualifying Facilities must be preserved to “avoid[] the worst effects of climate change.” NewSun Br. at 1.

Petitioners’ reasoning goes something like this: (1) PURPA requires the Commission to “encourage” small power production facilities, 16 U.S.C. § 824a-3(a); (2) eligible small power production facilities include—but are not limited to—wind and solar facilities that do not produce greenhouse gas emissions, 16 U.S.C. § 796(17); (3) therefore, any regulatory reform that fails to affirmatively “encourage” small power production facilities as much as possible necessarily triggers analysis under NEPA in the form of an environmental assessment (EA) or a more stringent environmental impact statement (EIS).

This argument misinterprets PURPA's design and intent. The Commission reasonably explained in its orders below that NEPA did not require an EA, much less an EIS, because "there is no way to determine whether issuance of the rule will significantly affect the quality of the human environment." Order No. 872 at P 711 (3-SolarER-757). Quite simply, there is no way to reasonably predict whether the Commission's PURPA reforms—as compared to the outdated PURPA regulations—would impact the aggregate number of renewable resources.

Moreover, PURPA was not enacted to advance environmental objectives, but rather economic ones. The directive to "encourage" Qualifying Facilities does not distinguish between facilities based on their environmental attributes. This is evident, for example, in the types of facilities that Congress chose to categorize as Qualifying Facilities. While PURPA includes renewable wind and solar resources among the various types of eligible small power production facilities, *see* 16 U.S.C. § 796(17)(A), (E), that same category also includes facilities that produce significant amounts of greenhouse gases in addition to conventional air pollutants. *See, e.g.,* U.S. Energy Information Administration, *Biomass Explained: Biomass and the Environment* (Dec. 9, 2020), <https://www.eia.gov/energyexplained/biomass/biomass-and-the-environment.php> (last visited Nov. 20, 2021).

PURPA was enacted alongside several other statutes in response to a crippling energy shortage that was destroying the nation's economy and undermining national

security. Congress explained the core purposes of the statute in PURPA section 2, 16 U.S.C. § 2601. PURPA section 210 was animated by the need (1) to “provid[e] 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,” and (2) “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, . . . and to provide other measures with respect to the regulation of the wholesale sale of electric energy.” *Id.* § 2601(1)-(2).

The other core purposes of the statute reflect an all-inclusive strategy for maximizing domestic energy production. They were “to provide for the expeditious development of hydroelectric potential at existing small dams to provide needed hydroelectric power;” to provide “for the conservation of natural gas while insuring that rates to natural gas consumers are equitable;” and “to encourage the development of crude oil transportation systems.” *Id.* § 2601(3)-(5).

In *FERC v. Mississippi*, the Supreme Court explained that PURPA “was part of a package of legislation, approved the same day, designed to combat the nationwide energy crisis.” 456 U.S. at 745.⁸ Having just emerged from that crisis,

⁸ PURPA’s companion legislation included the Energy Tax Act of 1978, Pub. L. No. 95–618, 92 Stat. 3174 (1978); the National Energy Conservation Policy Act, Pub. L. No. 95–619, 92 Stat. 3206 (1978); the Powerplant and Industrial Fuel Use

the Court’s opinion rejecting Mississippi’s constitutional objections to PURPA described the reasons for enacting the statute as follows:

In part because of their reliance on oil and gas, electricity utilities were plagued with increasing costs and decreasing efficiency in the use of their generating capacities; each of these factors had an adverse effect on rates to consumers and on the economy as a whole. S. Rep. No. 95–442, at 9. Congress accordingly determined that conservation by electricity utilities of oil and natural gas was essential to the success of any effort to lessen the country’s dependence on foreign oil, to avoid a repetition of the shortage of natural gas that had been experienced in 1977, and *to control consumer costs*.

Id. at 745-46 (emphasis added).

The Supreme Court took the same position the following year in *American Paper Institute*. Like this case, *American Paper Institute* examined the limits of the Commission’s charge to “encourage” Qualifying Facilities. Citing the “basic purpose” of PURPA section 210 described in *FERC v. Mississippi*, the Court held that the Commission did not abuse its discretion by adopting a “full avoided cost” rate for Qualifying Facilities that imposed unnecessarily high costs on consumers. 461 U.S. at 417. The Court found that the Commission had adequately explained why circumstances *at that time* made it necessary to prioritize incentives to develop Qualifying Facilities and held that “it was reasonable for the Commission to

Act of 1978, Pub. L. No. 95–620, 92 Stat. 3289 (1978); and the Natural Gas Policy Act of 1978, Pub. L. No. 95–621, 92 Stat. 3351 (1978). *See FERC v. Mississippi*, 456 U.S. at 745 n.2 (1982) (describing the legislative “package”).

prescribe the maximum rate authorized by Congress and thereby provide the maximum incentive for the development of cogeneration and small power production.” *Id.* at 417–18. The Court’s opinion focuses entirely on economic conditions and says nothing about environmental considerations.

FERC confronted the question of fuel neutrality head-on in its landmark order *Southern California Edison Co.*, 71 FERC ¶ 61,269 (1995). There, FERC held that the Public Utilities Commission of California had violated PURPA by requiring the state’s utilities to purchase significant amounts of unneeded Qualifying Facility capacity at prices far in excess of their avoided costs because the state commission had prioritized renewable generation and had failed to consider all potential power suppliers when determining the utilities’ avoided costs. The Commission explained that:

With PURPA, Congress was seeking to diversify the Nation’s generation fuel mix and promote more efficient use of fossil fuels when they were used for generation by encouraging renewable technologies and cogeneration, in order to cushion against further price shock and reduce dependence on fossil fuels. *In promoting greater fuel diversity, however, Congress was not asking utilities and utility ratepayers to pay more than they otherwise would have paid for power.* As we explained in the February 23 order, PURPA requires an electric utility to purchase power from a QF, but only if the QF sells at a price no higher than the cost the utility would have incurred for the power if it had not purchased the QF’s energy and/or capacity, i.e. would have generated itself or purchased from another source. *The intention was to make ratepayers indifferent as to whether the utility used more traditional sources of power or the newly-encouraged alternatives.*

Id. at 62,079–80 (emphases added). The Commission squarely rejected arguments that a fuel-neutral approach “will make it impossible for states to achieve resource diversity, environmental goals or resource planning objectives because they no longer will be able to use PURPA to encourage renewable generation.” *Id.* at 62,080. FERC explained “that states have numerous ways *outside of PURPA* to encourage renewable resources,” including “broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction,” as well as to “order utilities to build renewable generators themselves, or deny certification of other types of facilities if state law so permits.” *Id.* (emphasis added). In addition, “States also may seek to encourage renewable or other types of resources through their tax structure, or by giving direct subsidies.” *Id.*

Federal courts frequently rely on *Southern California Edison*, particularly in the context of preemption challenges. *See, e.g., Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018); *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 101 (2d Cir. 2017); *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013). State courts and state regulatory Commissions also frequently rely on *Southern California Edison* to explain the principle of customer “indifference” in the context of addressing challenges to avoided cost rates for renewable resources. *See, e.g., Vote Solar v. Mont. Dep’t of Pub. Serv. Regul.*, 2020 MT 213A, ¶ 41, 473 P.3d 963, 976 (2020); *Pub. Serv. Co. of Okla. v. State ex rel. Okla. Corp. Comm’n*,

2005 OK 47, ¶¶ 23-24, 115 P.3d 861, 876 (2005); *In the Matter of the Petition of Jawbone Holdings, LLC, to Set Terms & Conditions for Qualifying Small Power Prod. Facilities Under Mont. Code Ann. S 69-3-603*, No. 2020.12.126, 2021 WL 5161938, at *2–3 (Mont. Pub. Serv. Comm’n Oct. 29, 2021).

The purpose of PURPA is no mystery: it was intended to extract efficiently every available joule from domestic energy sources *to lower energy prices for consumers*. PURPA’s plain text, two Supreme Court decisions, and numerous decisions by federal courts of appeals, state courts, and state commissions confirm that the statute was meant to advance economic objectives, not environmental ones. PURPA section 210 is indifferent to the widely varying environmental attributes of Qualifying Facilities. Its superordinate objective was to reduce energy prices by increasing energy supplies.

Under section 210, wind and solar-powered energy resources are simply two of many forms of alternative energy production that could “lessen the country’s dependence on foreign oil, to avoid a repetition of the shortage of natural gas that had been experienced in 1977, and to control consumer costs.” *FERC v. Mississippi*, 456 U.S. at 746. This basic attribute of the statute further supports the conclusion that the Commission’s fuel-neutral reforms to its PURPA regulations have no predictable environmental impacts that require analysis under NEPA. *Cf. Am. Paper Inst.*, 461 U.S. at 416 (explaining why wide variations in the types and capacity of

Qualifying Facilities made it “extremely difficult, if not impossible” for FERC “to make any useful estimate” of economic impacts in its first PURPA rulemaking).

III. Special Protections for Qualifying Facilities Are Not Necessary To Promote the Widespread Development of Renewable Resources

Petitioners claim that Order No. 872 “prevents QF generation from displacing utility-owned, fossil fuel powered generation.” MEIC Br. at 15. NewSun takes the more aggressive position that Order No. 872 has destroyed any prospect of investment in Qualifying Facilities, arguing that “[n]o rational person would finance a project” on the terms adopted in Order No. 872. NewSun Br. at 2.

These claims are false. Qualifying Facilities are well-represented among the renewable resources that regularly displace fossil-fired generation in organized capacity markets. *See, e.g., infra* note 11. And Order No. 872 has not deterred very large numbers of new applications for Qualifying Facilities: as of November 19, 2021, the Commission had received at least 152 Qualifying Facility applications in the 34 business days since this fiscal year began on October 1, 2021.⁹

In any event, petitioners and NewSun wrongly suggest that the Commission must affirmatively “encourage” Qualifying Facilities to promote the successful

⁹ Applicants for Qualifying Facility status file a Form No. 556 with the Commission. These applications are readily identifiable in the Commission’s eLibrary.

transition to cleaner energy. The rapid and widespread deployment of new renewable resources is occurring unabated by the Commission's PURPA reforms.

The Energy Information Administration reports that, “[a]s of September 2020, 38 states and the District of Columbia had established an RPS or renewable goal, and in 12 of those states (and the District of Columbia), the requirement is for 100% clean electricity by 2050 or earlier.” U.S. Energy Information Administration, *Renewable Energy Explained* (June 29, 2021), <https://www.eia.gov/energyexplained/renewable-sources/portfolio-standards.php> (last visited Nov. 20, 2021); *accord, e.g.*, National Conference of State Legislatures, *State Renewable Portfolio Standards and Goals* (Aug. 13, 2021), <https://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx> (last visited Nov. 20, 2021). Only two states in this circuit—Alaska and Idaho—have declined to implement renewable portfolio standards. *See id.*

Moreover, the federal government provides powerful support for renewable energy resources through renewable energy investment and production tax credits, *see* 26 U.S.C. §§ 45, 48, and numerous states have passed legislation that explicitly subsidizes renewable and other carbon-free energy resources through a wide variety of legislative measures.¹⁰

¹⁰ A comprehensive list of state Renewable Portfolio Standards and other clean energy incentives is maintained in the Database of State Incentives for

Indeed, the construction of new solar and wind facilities has become so prolific that the Commission recently initiated a rulemaking proceeding—the Transmission ANOPR, *see supra* at 6—to determine how to plan for and allocate the capital costs associated with the massive expansion of the transmission system necessary to support the integration of large quantities of renewable generation resources while ensuring the reliability and affordability of the interstate transmission grid. As the Commission explained,

The electricity sector is transforming as the generation fleet shifts from resources located close to population centers toward resources, including renewables, that may often be located far from load centers. The growth of new resources seeking to interconnect to the transmission system and the differing characteristics of those resources are creating new demands on the transmission system. Ensuring just and reasonable rates as the resource mix changes, while maintaining grid reliability, remains the priority in the regional transmission planning and cost allocation and generator interconnection processes.

Transmission ANOPR, 176 FERC ¶ 61,154 at P 3.

Importantly, because the size of these new renewable projects is so large, and because they are typically built with planned interconnections to organized markets, these new renewable projects are generally ineligible for Qualifying Facility status. Thus, the developers of these large projects must take on the financial risk for these projects without the benefit of the special protections and guaranteed returns that

Renewables & Efficiency (DSIRE), <https://programs.dsireusa.org/system/program> (last visited Nov. 20, 2021). At present, there are 2,652 entries.

Qualifying Facilities enjoy. These financial risks are instead mitigated, if applicable, by state renewable portfolio requirements or regional programs for renewable energy credits.

Although the financial risks for competitive, market-based renewable resources are significant, wind and solar energy resources have been successfully entering the market and rapidly displacing other types of generation resources. For example, PJM Interconnection, LLC, which administers the nation's largest Regional Transmission Organization covering 13 Mid-Atlantic states and the District of Columbia, conducts an annual auction to determine which resources will be awarded a capacity supply obligation to enter or remain in the market. PJM's last auction was held in May 2021 and renewable resources did very well: "1,728 MW of wind cleared in the auction, representing an increase of 312 MW over the previous capacity auction," while "[s]olar increased by 942 MW over the previous capacity auction, with 1,512 MW clearing."¹¹

In sum, petitioners err in suggesting that additional regulatory "encouragement" from the Commission is necessary to promote or sustain

¹¹ PJM Inside Lines, *PJM Successfully Clears Capacity Auction to Ensure Reliable Electricity Supplies: Auction Attracts Diverse and Efficient Resources at Lower Wholesale Costs* (June 2, 2021), <https://insidelines.pjm.com/pjm-successfully-clears-capacity-auction-to-ensure-reliable-electricity-supplies/> (last visited Nov. 20, 2021).

investment in renewable energy resources through rules governing Qualifying Facilities. The Commission's market-based approach, supplemented by federal tax credits and a wide variety of state renewable energy mandates, has already proved sufficient to attract substantial successful investment in and additional deployment of renewable resources. As the Commission has explained, the energy transition is well underway; the challenge now is to manage cost allocation fairly while also continuing to preserve grid reliability as the quantity of intermittent generation resources rapidly continues to grow. *See, e.g.,* Transmission ANOPR, *supra*, at P 3.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

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Respectfully submitted,

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9th Cir. Case Number(s) Nos. 20-72788, 20-73375, 21-70113 & 21-70083

I am the attorney or self-represented party.

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I hereby certify that on November 22, 2021, I electronically filed this brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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