UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

Qualifying Facilities Rates & Requirements	)	**Docket Nos.**
	)	
Implementation Issues Under the Public Utility Regulatory Policies Act of 1978	)	**RM19-15-000 &**
	)	
	)	**AD16-16-000**
	)	
	)	
	)	

REQUEST FOR REHEARING OF

THE NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION, RENEWABLE ENERGY COALITION, IDAHYDRO, OREGON SOLAR ENERGY INDUSTRY ASSOCIATION, AND NEWSUN ENERGY LLC

TABLE OF CONTENTS

In accordance with Rule 713 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice & Procedure, 16 CFR § 385.713, and Section 313 of the Federal Power Act, 16 U.S.C. § 825*l*, the Northwest and Intermountain Independent Power Producers Association ("NIPPC"), the Community Renewable Energy Association ("CREA"), the Renewable Energy Coalition ("REC"), IdaHydro, the Oregon Solar Energy Industries Association ("OSEIA"), and NewSun Energy LLC (collectively the "Northwest Coalition") hereby respectfully submit this Request for Rehearing of the Commission's Final Rule implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA"), adopted by Order No. 872, *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978* ("Order No. 872"), issued in this docket on July 16, 2020. To the extent the Commission concludes that Order No. 872 is not subject to rehearing, the Northwest Coalition respectfully requests that this pleading be treated as a Motion for Reconsideration under Rules of Practice & Procedure 212, 16 CFR § 385.212.

EXECUTIVE SUMMARY

Order No. 872 violates PURPA by eliminating requirements that have long been recognized as essential for developing qualifying facilities ("QFs").

First, FERC violates PURPA's requirement that it "encourage" QFs by adopting rules that will actively undermine QFs. It permits unpredictably variable energy rates, capacity rates of zero, and no minimum contract term, rendering many QFs unfinanceable. Order No. 872 also violates PURPA's requirement that its rules be non-discriminatory. The standard utility rates and contracts Order No. 872 cites ensure that utilities can repay capital costs from capacity charges and are protected from market volatility by adjustable energy rates. Under the Order, QFs are placed in the opposite position, exposed to market volatility risk and with no mechanism to ensure repayment of financing. The evidence upon which FERC relies fails because it does not support the Commission's conclusions and ignores large volumes of contrary evidence.

Second, allowing competitive solicitations to be the exclusive means for QFs to obtain a long-term power purchase agreement ("PPA") arbitrarily departs from longstanding precedent without explanation or evidence.

Third, FERC reduces the threshold for QFs assumed to have market access in the organized markets from 20 MW to 5 MW without evidence that the original basis for the 20 MW threshold has changed, especially for entities like irrigation districts or local governments who operate QFs but whose primary business is not power production.

Fourth, FERC arbitrarily applies the new 10-mile rule to any existing facilities that must make substantive changes to their certification documents, contradicting FERC precedent without explanation.

Fifth, the Commission violated the National Environmental Policies Act ("NEPA") by undertaking a major federal action without completing a necessary environmental analysis.

The Northwest Coalition represents the broad interests of independent power producers selling power to, and purchasing interconnection services from, electric utilities in the Northwest and Rocky Mountain states. Some non-utility electric generators rely upon PURPA's must-purchase provisions for developing and operating in the absence of organized markets. The Commission's Order will curtail future development of cogeneration facilities and renewable energy facilities under 80 MWs. The Order will undermine the continued operation of existing QFs upon the expiration of their current contracts when the full impact of the new rules will apply to them. The Order could force the abandonment of these existing and economic PURPA facilities that have provided reliable and clean power to Northwest consumers for decades.

STATEMENT OF ISSUES
AND
SPECIFICATIONS OF ERROR

In accordance with the Commission's Rule of Practice & Procedure 713(c), 18 CFR § 385.713(c), the Northwest Coalition submits the following statement of issues and specifications of error:

I. The Commission's Reversal of the Bedrock Requirement that QFs Be Offered Fixed Prices for Energy Is Arbitrary, Capricious, and Not in Accordance with Law. The Commission erred in the following respects in deciding to revise Section 292.304(d) of its regulations to remove the requirement that states offer each QF a fixed price for energy calculated at the time of contracting:

A. By Amending Section 292.304(d) of the Commission's Regulations to Authorize States to Deprive QFs of Fixed Energy Prices, the Commission Has Violated Section 210(a) of PURPA's Requirement that the Commission's Rules Encourage QFs. PURPA requires that the Commission adopt rules that "encourage" QFs. Order No. 872 does the opposite, exposing QFs to the possibility that they could obtain long-term contracts with an avoided cost energy rate that varies unpredictably, an avoided cost capacity rate that could be zero, and no minimum contract term. This outcome cannot reasonably be said to "encourage" QFs under any reasonable definition of the term. The Commission departs arbitrarily and without explanation from its long-held view that to "encourage" QFs requires contract terms that can be financed.

Representative Authority: 16 U.S.C. § 824a-3(a); *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, at 12,224 (Feb. 25, 1980); *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983); *Allco Renewable Energy, Ltd. v. Mass. Elec. Co.*, 208 F. Supp. 3d 390 (D. Mass. 2016).

B. By Amending Section 292.304(d) of the Commission's Regulations to Remove QFs' Right to Fixed Energy Prices, the Commission Violated Section 210(a) of PURPA's Proscription Against Discrimination of QFs. Order No. 872 adopts rules which require QFs to bear all market risk in highly volatile and unpredictable short-term markets. It justifies this by relying on evidence that, under standard utility rate constructs, utilities are insulated from market risks and guaranteed capacity payments for their generation that are sufficient to ensure repayment of utility investments. Order No. 872 is discriminatory because it places QFs at a disadvantage compared to regulated utilities.

Representative Authority: 16 U.S.C. § 824a-3(b); *Environmental Action, Inc. v. FERC,* 939 F.2d 1057, 1061-62 (D.C. Cir. 1991).

C. The Commission's Novel Construction of PURPA's Avoided Cost Cap as a Bar to Long-Term Avoided Cost Forecasts Is Arbitrary, Capricious, and Not In Accordance with Law. Order No. 872 arbitrarily abandons FERC's long-held view that so long as the avoided costs are reasonably forecasted at the time of contracting, fixed prices do not violate PURPA Section 210(b)'s avoided cost cap even if those fixed prices may exceed the avoided costs at the time of delivery at some point during the contract term. The Order's new interpretation fails because it reads out of the statute the requirements that the Commission "encourage" QFs and treat them without discrimination, and it arbitrarily departs from the past agency interpretation.

Representative Authority: 16 U.S.C. § 824-3(b); Order No. 69, 45 Fed. Reg. at 12,224; *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 49-51, 103 S. Ct. 2856 (1983); *N.Y. Cross Harbor R.R. v. Surface Transp. Bd*., 374 F.3d 1177, 1187-88 (D.C. Cir. 2004) (agency must act in accordance with statute's overarching purpose).

D. In Amending Section 292.304(d) of the Commission's Regulations to Remove QFs' Right to Fixed Energy Prices, the Commission Relied on Factual Conclusions that Are Supported by Insufficient Evidence and Ignore Relevant Evidence. FERC's conclusion that it can allow variable avoided cost energy rates fails for lack of substantial evidence on two distinct points:

1. **The Commission's conclusion that avoided costs have exceeded actual avoided costs is supported by no credible evidence and ignores relevant factors.** The Commission's justification for adopting this rule fails because the evidence it relies on does not demonstrate that QF prices have consistently exceeded utility avoided costs. Instead, the evidence only compares fixed avoided cost rates to market prices in certain periods when market prices have declined, and, as the Commission itself recognizes, market prices do not reflect utility avoided costs. The Commission arbitrarily ignores evidence demonstrating that QF prices are quite favorable when compared to utility avoided costs. It also ignores evidence demonstrating that prices are likely to rise in the future and that fixed-price QF contracts provide substantial benefits to consumers by protecting them from unpredictable market price increases and market volatility.

2. **The Commission's assumption QFs will be able to secure financing without fixed energy prices is supported by insufficient evidence and ignores extensive evidence to the contrary.** FERC's conclusion that QFs can be financed using contracts with variable energy rates is without evidentiary foundation and arbitrarily ignores or misconstrues evidence from many different sources demonstrating that exposing generation projects to unpredictable market risks makes it impossible to finance QFs. FERC relies on evidence that non-QF renewable energy projects have grown in recent years, but cites no evidence of the underlying contract terms and ignores evidence that these projects have largely been built on the strength of fixed-price contracts. FERC also takes evidence out of context and ignores real-world

evidence that attempts to develop generation based on short-term prices have failed, and that short-term prices do not represent utility avoided costs for long-term energy.

Representative Authority: *Transmission Access Policy Group v. FERC*, 225 F.3d 667, 688 (D.C. Cir. 2000) (agency cannot rely on "abstract allegations"); *Petro Star Inc. v. FERC*, 835 F.3d 97, 107 (D.C. Cir. 2016); *Port of Seattle v. FERC*, 499 F.3d 1016, 1035 (9th Cir. 2007).

E. The Commission Relies on Arbitrary Reasoning to Support the Decision to Reverse 40 Years of Precedent and Suddenly Authorize States to Deprive QFs of Fixed Energy Prices. Order No. 872 abandons decades of FERC precedent holding that fixed-price contracts are necessary to encourage QFs and support financing of QFs with arbitrary and capricious reasoning and fails to respond to legitimate objections raised by commenters opposing the proposal. It also ignores evidence that QFs require a substantial minimum term to support financing and fails to establish any minimum contract term despite well-established precedent requiring contract terms to be long enough to support financing and substantial evidence that state commissions have undermined PURPA by imposing unreasonably short contract terms.

Representative Authority: *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 949 (D.C. Cir. 2004); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (2005).

II. Authorizing States to Use Competitive Solicitations (RFPs) to be the Exclusive Means of Securing a Long-Term PPA to Sell Energy and/or Capacity Is Arbitrary, Capricious, and Not In Accordance with Law. Order No. 872 errs in at least three respects by authorizing exclusive use of RFPs to offer QFs long-term PPAs:

A. Authorization of Exclusive Use of RFPs Violates the Statute's Requirements that the Commission's Rules Encourage QFs and Require Utilities to Purchase Energy and Capacity from QFs. Order No. 872's decision to now authorize states to use competitive solicitations (or RFPs) as the exclusive means for a QF to receive a long-term contract to sell energy and capacity violates Section 210(a) of PURPA, which requires that utilities purchase all energy *and* capacity made available from QFs and that the Commission's rules encourage QFs.

Representative Authority: 16 U.S.C. § 824a-3(a)(2); Order No. 69, 45 Fed. Reg. at 12,219, 12,224-12,225; *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861, 865 (9th Cir. 2019); *Windham Solar LLC*, 156 FERC ¶ 61,042, at P 5 (July 21, 2016).

B. The Commission's Authorization of the Exclusive Use of RPPs Fails to Adequately Consider and Explain Departure from Past Precedent Interpreting PURPA. The Commission has held that a state may not use RFPs as the exclusive means for QFs to obtain a contract to sell energy and capacity, yet Order No. 872 arbitrarily reverses that precedent and the Commission's own prior interpretation of Section 210(a) of PURPA without acknowledging the significant change.

Representative Authority: *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515-16, 129 S. Ct. 1800, 1811 (2009); *Windham Solar LLC*, 156 FERC ¶ 61,042, at P 5 (July 21, 2016).

C. The Commission's Decision to Allow RFPs as the Exclusive Means for QFs to Obtain a Long-Term PPA Relies on Insufficient Evidence and Fails to Rationally Address Relevant Factors Identified in Comments Submitted to the Commission. The Commission's determination that states may use RFPs as the exclusive means of offering long-term PPAs fails for lack of sufficient evidence and reasoning establishing that the new policy will continue to encourage QFs and prevent discrimination against QFs. In particular, FERC ignores evidence of continuing utility bias in RFP processes and that the continuing operation of many existing QFs is endangered by Order No. 872. FERC also fails to explain why it failed to adopt safeguards recommended by the parties that would help ensure the competitive solicitations are operated fairly.

Representative Authority: *Port of Seattle v. FERC*, 499 F.3d 1016, 1035 (9th Cir. 2007).

III. The Commission's Expansion of Relief From PURPA Under Section 210(m) Is Arbitrary, Capricious, and Not in Accordance with Law. The Commission's decision to reduce the threshold for QFs assumed to have market access in the organized markets from 20 MW to 5 MW has no evidentiary foundation and relies on arbitrary reasoning that overlooks the relevant factors presented to the Commission. In particular, there is no evidence that the circumstances identified for establishing the 20 MW threshold have changed and the evidence relied on by FERC fails to demonstrate any such change or justify departure from the 20 MW threshold. The Commission also arbitrarily ignores evidence demonstrating that small QFs with 25 MW or less of capacity continue to face unique burdens that hinder their access to competitive markets.

Representative Authority: Order No. 688, *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, 117 FERC ¶ 61,078 (2006), *order on reh'g,* Order No. 688-A, 119 FERC ¶ 61,305 (2007), *aff'd, Am. Forest & Paper Ass'n v. FERC,* 550 F.3d 1179 (D.C. Cir. 2008); *FCC v. Fox Television,* 556 U.S. 502, 515 (2009); *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992).

IV. The Application of Order No. 872's New 10-Mile Rule to Existing Facilities Is Arbitrary, Capricious, and Not in Accordance with Law. In applying the new rebuttable presumption to existing facilities whenever they file a recertification with any substantive change, the Commission has acted beyond its authority to adopt retroactively effective regulations and departs from its own past practice of exempting existing facilities without reasoned explanation.

Representative Authority: 16 U.S.C. 796(17)(A); *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208-09, 109 S. Ct. 468, 471-72 (1988), *see also Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 225, 109 S. Ct. 468, 480 (1988) (Scalia, J., concurring); *PPL Wallingford Energy LLC v. FERC,* 419 F.3d 1194, 1198 (2005); *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 71 Fed. Reg. 7,852, at 7,865 (Feb. 15, 2006).

V. The Commission's Failure to Conduct an Environmental Assessment and/or and Environmental Impact Statement Violates the National Environmental Policy Act. The Commission has violated the National Environmental Policies Act ("NEPA") by undertaking a major federal action that may have a significant impact on the human environment without completing the proper environmental analysis. Despite the Commission's assertions, an environmental assessment and/or and environmental impact statement is required for this rulemaking, and categorical exclusions do not apply.

Representative Authority: 42 U.S.C. § 4332(A); 18 CFR § 380.5(12); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1033-34 (D.C. Cir. 2008).

ARGUMENT

In contravention of the requirements of Section 210 of PURPA, Order No. 872 fundamentally and arbitrarily upends the longstanding regulatory scheme that has supported development of qualifying facilities. As the Supreme Court has explained, "'Congress believed that increased use of these [cogeneration and small power production] sources of energy would reduce the demand for traditional fossil fuels,' and it recognized that electric utilities had traditionally been 'reluctant to purchase power from, and to sell power to, the nontraditional facilities.'"[1] Thus, Section 210(a) of PURPA requires that the Commission maintain "such rules as it determines necessary to *encourage* cogeneration and small power production[.]"[2] Similarly, given the recognized reluctance of utilities to purchase power from their competitors, Section 210(b) of PURPA affirmatively commands that:

> rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase— (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and (2) *shall not discriminate against qualifying cogenerators or qualifying small power producers*.[3]

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[1] *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 (1983) (*API*) (quoting *FERC v. Mississippi*, 456 U.S. 742, 750 (1982)).
[2] 16 U.S.C. § 824a-3(a) (emphasis added).
[3] 16 U.S.C. § 824a-3(b) (emphasis added).

As explained below, the Commission has misconstrued the evidence and relied on flawed reasoning to ignore these statutory requirements. Accordingly, the Commission should reverse course and grant rehearing.

I. Order No. 872's Reversal of the Bedrock Requirement that QFs Be Offered Fixed Prices for Energy Is Arbitrary, Capricious, and Not in Accordance with Law

In a reversal of 40 years of precedent existing since enactment of PURPA, Order No. 872 unlawfully "guts"[4] the bedrock requirement that QFs be offered fixed energy rates, which have long been recognized as *necessary* for the development of QFs.[5] Furthermore, the right to secure fixed energy prices supports the continued operation of existing QFs upon the expiration of their existing contracts when substantial interconnection and other capital upgrades must typically be undertaken, and elimination of fixed prices is likely to result in loss of substantial existing QF capacity. For the multiple reasons explained below, this decision suffers from numerous legal flaws and should be reversed.

A. Authorizing States to Deprive QFs of Fixed Energy Prices Violates PURPA by Failing to "Encourage" QFs

Order No. 872's elimination of QF's right to fixed energy prices violates PURPA's bedrock requirement that the Commission's rules "encourage" QFs. The legislative history confirms that Congress "wish[ed] to make clear that cogeneration is to be encouraged under this section . . . ."[6] Encouragement of QFs is the underlying purpose Section 210 of PURPA.[7] Order No. 872 even agrees that "PURPA does not provide discretion to the Commission to determine

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[4] Order No. 872, 172 FERC ¶ 61,041 at Glick, Comm'r, dissenting in part at P 1.

[5] *Id.* at P 232.

[6] H.R. Rep. No. 95-1750, at 97-98 (1978) (Conf. Rep.).

[7] *See API*, 461 U.S. at 417 (holding that the "basic purpose of § 210 of PURPA was to increase the utilization of cogeneration and small power production facilities and to reduce reliance on fossil fuels").

whether QFs should be encouraged."[8] Yet the Order fails to grapple with the fact that depriving QFs of fixed energy prices eliminates the encouragement that has supported development of QFs for 40 years.

The pre-existing must-purchase rules faithfully encouraged QFs with the requirements that utilities purchase all energy and capacity offered by QFs and that such purchases be made, at the election of the QF, at fixed-price rates for energy and capacity calculated at the time of the legally enforceable obligation (or "LEO").[9] In the case of long-term fixed prices, Order No. 69 found that there is a "*need for certainty* with regard to return on investment in new technologies."[10] The Commission adopted this regulation "to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with *<u>the</u> <u>need</u> for [QFs] to be able to enter into contractual commitments <u>based</u>, <u>by</u> <u>necessity</u>, <u>on</u> <u>estimates</u> <u>of</u> <u>future</u> <u>avoided</u> <u>costs</u>*."[11] Since 1980, "FERC has 'consistently affirmed the right of QFs to long-term avoided cost contracts or other legally enforceable obligations with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred.'"[12] Indeed, Order No. 872 acknowledges these findings of a need for certainty to support QF development.[13] Yet, as further explained below, Order No. 872's repeal of the requirement for fixed-price certainty is supported by no rational

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[8] Order No. 872, 172 FERC ¶ 61,041 at P 70.

[9] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980); 18 CFR § 292.304(d)(2) (2019).

[10] Order No. 69, 45 Fed. Reg. at 12,224.

[11] *Id.* (emphasis added).

[12] *Allco Renewable Energy, Ltd. v. Mass. Elec. Co.*, 208 F. Supp. 3d 390, 398-400 (D. Mass. 2016) (quoting *JD Wind 1, LLC*, 130 FERC ¶ 61,127, 61,631 (2010), and holding that rate based on unknown, future market prices does not comply with 18 CFR § 292.304(d)(2)(ii)).

[13] Order No. 872, 172 FERC ¶ 61,041 at P 99.

conclusion that QFs will continue to be developed without such certainty.

As Commissioner Glick aptly explains, "[p]rior 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."[14] Yet "as a result of this Final Rule, QF developers will face the very real prospect of not receiving any fixed revenue stream, whether for energy or capacity, in areas where they also cannot secure hedging products or other mechanisms needed to finance a new QF."[15] 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."[16] Furthermore, despite Order No. 872's assertion that nothing in PURPA requires the Commission to ensure financeability of individual QFs, PURPA "*does require the Commission to encourage* their development, which we have previously equated with financeability."[17] Order No. 872 eliminates the requirement for fixed energy prices without replacing it with any other requirement providing the "requisite encouragement," or as we explain below, any rational explanation in support of the decision. Indeed, under Order No. 872, QFs could face a world in which there is no minimum contract term, a payment of zero for their capacity, and an avoided cost energy price based on highly volatile and unpredictable short-term markets. Obviously, this would render it impossible to finance a QF, and no reasonable person could conclude that such requirements "encourage" QFs.

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[14] Order No. 872, 172 FERC ¶ 61,041 at Glick, Comm'r, dissenting in part at P 10 (emphasis added).

[15] *Id.* at Glick, Comm'r, dissenting in part at P 12.

[16] *Id.*

[17] *Id.* Glick, Comm'r, dissenting in part at P 13 (emphasis added).

On the contrary, rendering many QFs not financeable at all, or financeable only at extreme interest rates, discourages QFs, an outcome antithetical to what PURPA requires.

B. Subjecting QFs to Variable Energy Prices Violates PURPA's Non-Discrimination Provision By Placing QFs on Unequal Footing with Incumbent Utilities

Order No. 872 further errs by misconstruing and thus violating PURPA's prohibition against discriminatory rates for purchases from QFs. Given the recognized reluctance of utilities to purchase power from their competitors, Section 210(b) of PURPA affirmatively commands that "the rates for such purchase . . . *shall not discriminate against qualifying cogenerators or qualifying small power producers*.[18] Congress specifically recognized 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."[19] Because QFs' costs of development and operation are not recoverable from ratepayers, QFs must rely entirely upon the avoided cost rates and forecasted revenues from sales. Thus, Congress carefully included an unqualified proscription against rates that had a discriminatory effect on QFs.[20] Indeed, Order No. 872 agrees that PURPA's non-discrimination standard is more restrictive than the Federal Power Act's prohibition against "*unduly* discriminatory" rates because there is no such qualification in PURPA.[21]

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[18] 16 U.S.C. § 824a-3(b) (emphasis added).

[19] Conf. Rep. at 97-98.

[20] *See Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061-62 (D.C. Cir. 1991) (vacating FERC order that excluded QFs from open-access tariff because this "would effect an administrative repeal of this congressional choice" to disallow discrimination against QFs).

[21] Order No. 872, 172 FERC ¶ 61,041 at P 82 (emphasis added).

Yet Order No. 872 authorizes a plainly discriminatory framework by eliminating the certainty of a predictable revenue stream afforded by fixed prices. As numerous commenters explained, utilities can still rate-base long-term investments, thereby ensuring that they can recover their capital investments plus an authorized return, and then also recover their actual operating costs under traditional cost-of-service ratemaking.[22] In contrast, under Order No. 872's new framework authorizing variable energy pricing, the QF is deprived of even a reasonable ability to forecast avoided cost prices from which it must recover its investment, much less the guarantee of such recovery provided to the typical utility. This outcome places QFs on unequal footing and ensures that utilities continue to dominate the generation market. In sum, the new regime is discriminatory because it permits utilities to make acquisition decisions based on long-term cost forecasts, which contain inherent forecast risk, but ties QFs to unpredictable future changes in markets.

Order No. 872 itself agrees with the basic facts that demonstrate the discriminatory impact. The Order admits: "It is true that electric utilities with franchised service territories that make sales at retail are often effectively guaranteed the recovery of their energy costs in their retail rates by their state regulatory authorities—provided that such costs are prudently incurred."[23] But the Order goes on to incorrectly reason that because PURPA bars cost-based rates for QFs, there is no discrimination.[24] In doing so, the Order fails to address the critical point – utilities obtain virtually guaranteed cost recovery and virtually absolute certainty that they will recover their costs plus a profit, whereas the QF now does not even get the certainty as

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[22] *See, e.g.,* OR. REV. STAT. ANN. § 756.040; *Gearhart v. Pub. Util. Comm'n of Oregon*, 356 Or. 216, 220 (Or. 2014).

[23] Order No. 872, 172 FERC ¶ 61,041 at P 40.

[24] *Id.* at PP 41, 85-88.

to the prices it can rely upon if it is able to successfully perform under its contract. The discrimination is the failure to put QFs on reasonably equal footing to utilities by providing QFs with the certainty of the right to beat the utility's long-term marginal cost of generation, which typically is the same long-term cost estimate used to justify the utility's own rate-base acquisitions.[25]

As the D.C. Circuit has explained in reversing the Commission in *Environmental Action v. FERC*, PURPA's anti-discrimination requirement requires the Commission to place QFs on essentially equal footing with incumbent utilities.[26] There, FERC had approved a merger on the condition that the merged utility permit other utilities to transmit power across the merged transmission system. However, FERC excluded QFs from this open access requirement. The court held that FERC's refusal to provide QFs with transmission rights equivalent to other transmission customers amounted to "an administrative repeal of [the] congressional choice" to place QFs "on *an essentially equal competitive footing* with competing suppliers."[27] Notably, in a passage relevant here, the court rejected the Commission's argument that providing open access to QFs would provide them a competitive advantage due to their preferential right to compel purchases by any utility at the avoided costs. The court explained "the principal effect of the preference seems to be to ensure that large power producers do not discriminate against QFs[,]" and "[i]n any event, such advantage as a QF may have stems directly from the

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[25] The Commission's reliance on *Town of Norwood v. FERC*, 962 F.2d 20 (D.C. Cir. 1992), is misplaced because it simply describes standard utility rates of this kind, with a variable energy rate "designed to recover the [utility's] variable costs." *See* Order No. 872, 172 FERC ¶ 61,041 at P 38 n.56. Order No. 872 achieves the opposite for QFs, leaving them without assurance that fixed capacity payments will be sufficient to support financing of their facilities and forcing them to bear market risk through variable energy rates tied to volatile, short-term markets, with no assurance that their variable costs will be recovered.

[26] *Envtl. Action*, 939 F.2d at 1061-62.

[27] *Id.* at 1062.

Congress's policy choice to encourage the sale of power by QFs rather than by traditional utilities."[28]

Although the discriminatory policy in *Environmental Action* regarded transmission access and not price certainty, the same principle applies equally here. There, the Commission's "effort to place QFs on an essentially equal competitive footing with competing suppliers, . . . by giving such suppliers the access it denies to QFs would effect an administrative repeal of this congressional choice; by definition, this is not in the public interest."[29] In this case, the Commission's alleged effort to place QFs on equal footing with incumbent utilities by giving such utilities the certainty of return on investment that will be denied to QFs is plainly discriminatory.

Indeed, as was pointed out in comments, this interpretation of the anti-discrimination requirement is even supported by the Montana Public Service Commission ("Montana PSC") in the context of price certainty and allocation of forecast risk, even though that state agency generally supported the Commission's proposed rule. The Montana PSC accurately observed in a recent PURPA dispute before it that "it would not be even-handed for [the Montana PSC] to address" price forecast risk "only with respect to QFs when the problem also occurs with non-QF resources, *and often to a greater degree*."[30] Accordingly, the Montana PSC concluded from the plain language of the PURPA statute, that it must apply similar fixed-price contract terms to QF

[28] *Id.*

[29] *Id.* (internal quotation omitted).

[30] *In re Northwestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1*, Docket No. D2016.5.39, Order No. 7500c at ¶ 114 (July 21, 2017) (emphasis added).

contracts as the length of the analogous guaranteed recovery it affords to its regulated utility to ensure it "does not engage in discriminatory rate making for QFs."[31]

Instead of faithfully applying PURPA's non-discrimination requirement, Order No. 872 misconstrues its requirements and judicial precedent interpreting it. The Order asserts that the Supreme Court, in *API*, held the "'full-avoided-cost rule plainly satisfies the nondiscrimination requirement[,]'" and thus, according to the Order, the full avoided cost rule alone, without long-term price certainty, is sufficient to prevent discriminatory treatment.[32] But this quotation is out of context. The Supreme Court did not address whether the failure to offer fixed prices to QFs results in discrimination because that was not the issue before the Court.[33] The relevant issue before the Court was whether the full avoided cost rule required states to set the rates at a level that is too high. The Court unanimously held that full avoided cost rule was consistent with the statute, and it rejected utility claims to the contrary.[34] Given that context, the quoted passage stands for the unremarkable proposition that paying the QFs the same level of costs that the utility would otherwise incur – i.e., the full avoided costs – was consistent with PURPA's requirement for non-discriminatory rates. But that holding does not stand for the proposition asserted by Order No. 872. To the contrary, now that the Commission will authorize states to allow only utilities to have the necessary certainty for long-term investment, the Commission has indeed violated the statute's proscription against non-discrimination.

Again, as Commission Glick logically explains with regard to PURPA's anti-discrimination requirement, "[v]ertically integrated utilities effectively receive guaranteed fixed-

[31] *Id.*

[32] Order No. 872, 172 FERC ¶ 61,041 at PP 83 (quoting *API*, 461 U.S. at 413).

[33] *API*, 461 U.S. at 413.

[34] *Id.* at 413-418.

price contracts through their rights to recover prudently incurred investments[,]" and "[t]he equivalent right to receive fixed-price contracts has to date proved an integral element of the Commission's ability to satisfy PURPA's prohibition on discriminatory rates."[35] Order No. 872 illogically relies on utility's fuel adjustment clauses as somehow being comparable to the new price uncertainty created for QFs by the variable energy pricing in the new rules. But suggesting that utility fuel adjustment clauses – which guarantee recovery of actual costs for utilities – are "the same thing as having your entire revenue exposed to variations in prevailing market conditions is hogwash."[36] The existence of such fuel adjustment clauses "in no way suggests that vertically integrated utilities are subject to anything remotely close to the level of revenue variation contemplated in this Final Rule."[37]

Indeed, an examination of the cost recovery adjustment mechanisms the Commission so heavily relies on to justify its approach to avoided cost pricing demonstrates the validity of Commissioner Glick's point.[38] Those mechanisms provide a capacity payment that is sufficient to ensure the utility recovers its capital costs for construction of new generation, while the cost recovery adjustment clause adjusts the utility's rates based on the cost of fuel used to generate electricity – if those costs go up, recovery goes up, and *vice versa.* The result removes the market risk to the utility, ensuring that changes in fuel prices will not undercut its ability to cover the costs of financing its generation. But Order No. 872 treats QFs far differently. There is no guarantee that the long-term avoided capacity payment will be sufficient to support financing of

[35] Order No. 872, 172 FERC ¶ 61,041 at Glick, Comm'r, dissenting in part at P 14.
[36] *Id.* at P 15.
[37] *Id.*
[38] Order No. 872, 172 FERC ¶ 61,041 at P 341.

a QF's generator, and permitting avoided cost energy payments to vary with volatile short-term market prices forces QFs to bear the risks of market volatility.

In sum, Order No. 872 misconstrues and violates PURPA's proscription against non-discriminatory rates by eliminating the price certainty necessary to place QFs on equal footing with incumbent utilities.

C. Order No. 872's Novel Construction of PURPA's Avoided Cost Cap as a Bar to Long-Term Avoided Cost Forecasts Is Arbitrary, Capricious, and Not In Accordance with Law

In justifying reversal of the requirement for fixed energy prices, Order No. 872 misconstrues PURPA Section 210(b)'s bar against rates exceeding avoided costs as a bar to maintaining the requirement that states offer fixed prices based on the utility's forecasted avoided costs.[39] This novel interpretation of the statute runs directly counter the Commission's long-standing interpretation of PURPA since 1980 – which is, that so long as the avoided costs are reasonably forecasted at the time of contracting, fixed prices do not violate the avoided cost cap even if those fixed prices may exceed the avoided costs at the time of delivery at some point during the contract term.[40] This interpretation reasonably gives effect to the purpose of PURPA to "encourage" QFs through necessary use of fixed prices without exceeding the avoided cost cap in the statute.

This interpretation of the statute has been a bedrock principle of the Commission's implementation of PURPA from the start. In Order No. 69, the Commission explained: "Paragraphs (b)(5) and (d) [of Section 292.304] are intended to reconcile the requirement that the

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[39] *Id.* at PP 82, 295-296; *see also* 16 U.S.C. § 824a-3(b) ("No such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.")

[40] *E.g.,* Order No. 69, 45 Fed. Reg. at 12,224.

rates for purchases equal the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments based, by *necessity*, on estimates of future avoided costs."[41] Furthermore, directly contrary to how Order No. 872 recasts the statute, Order No. 69 construed it as follows: "The Commission does not believe that the reference in the statute to the incremental cost of alternative energy was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between qualifying facilities and electric utilities."[42] The Commission interpreted the statute's avoided cost cap as a cap on the level of "estimated avoided costs."[43] In other words, the statute is logically construed to entitle QFs to fixed prices containing reasonable estimates of the utility's avoided costs at the time of contracting, which are typically based on the same cost estimates the utility uses to justify its own rate-based generation acquisitions. Indeed, the Commission has rejected utility arguments that this interpretation of the PURPA violates the statutory avoided-cost cap.[44]

Order No. 872 points to various untested and misplaced allegations of overestimates of avoided costs in long-term contracts to support its new interpretation of the statute, but in the end the Commission's new interpretation rests on the limited conclusion that "overestimations and underestimations of future avoided costs may not even out."[45] That conclusion, which is

[41] *Id.* (emphasis added).
[42] *Id.*
[43] *See Id.* ("So long as the total payment over the duration of the contract term does not exceed the estimated avoided costs, nothing in these rules would prohibit a State regulatory authority or non-regulated electric utility from approving such an arrangement.).
[44] *See, e.g., N.Y. State Elec. & Gas Corp.*, 71 FERC ¶ 61,027, 61,116 (1995) (rejecting such an argument, and stating, "It is now far too late in the Commission's implementation of PURPA for NYSEG to argue, for the first time, that these particular regulations have legal and policy flaws requiring that we abrogate contracts entered into under these regulations.").
[45] Order No. 872, 172 FERC ¶ 61,041 at P 286 (emphasis added).

unsupported by the evidence in any event, hardly requires the new statutory interpretation that ignores the requirement to encourage QFs through use of non-discriminatory rates. In effect, Order No. 872 elevates the statute's avoided-cost cap on the purchase price over the significance of PURPA's requirement for non-discriminatory rates and the requirement to encourage QFs. But all three elements are contained in the statute, and the Commission cannot read out or diminish the requirement to encourage QFs and ensure non-discriminatory rates.

Moreover, the Order unlawfully ignores the overall purpose of the statute to "encourage" QFs when the caselaw is clear that the Commission must accord adequate weight to the statute's overall purpose of encouraging QFs.[46] It is well established that:

> Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law, … because an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.[47]

This abrupt attempt to recast the statute – after Congress has declined to address the issue for 40 years – is an arbitrary reversal of the Commission's longstanding interpretation.[48]

Indeed, other sections of Order No. 872 acknowledge that the statute's avoided cost cap does *not* bar the use of forecasted avoided cost rates that are reasonable estimates at the time of contracting. The Order states: "With regard to forecasts, we acknowledge that the forecast used to set the avoided cost rate must meaningfully and reasonably reflect the utility's avoided costs

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[46] *See N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1187-88 (D.C. Cir. 2004) (reversing the Surface Transportation Board where it overlooked the statute's overarching purpose to preserve and promote continued rail service).

[47] *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1026 (9th Cir. 2007) (internal quotations and alterations removed).

[48] *Motor Veh. Mfrs. Assn. of U.S,, Inc.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 49-51 (1983) (*State Farm*).

over time."[49] In doing so, the Commission cites 18 CFR § 292.304(b)(5), which even in the new rule still states that rates calculated at the time of a LEO (for example, a contract) do not violate the requirement that the rates not exceed avoided costs if they differ from avoided costs at the time of delivery.[50] The Commission's interpretation of the statute is not even consistent to the extent that it relies on the avoided-cost cap as the basis to reverse the requirement for long-term fixed energy prices.

In sum, Order No. 872 misinterprets PURPA with its novel assertion that the avoided cost price cap now *mandates* that the Commission stop requiring states to offer fixed energy prices to QFs.

D. Order No. 872's Authorization of Variable Energy Prices Is Supported by Insufficient Evidence and Ignores Relevant Evidence

In addition to misconstruing the statute, Order No. 872's decision to stop requiring fixed energy prices is supported by insufficient evidentiary and factual basis. The Commission's major rule change "cannot rely solely on unsupported or abstract allegations."[51] Nor can it rely on irrelevant and out of context comparisons to overrule its own prior factual findings and long-standing precedent, while simultaneously ignoring relevant factors and the most "concrete evidence" presented to the agency.[52] As explained below, Order No. 872 contains insufficient

[49] Order No. 872, 172 FERC ¶ 61,041 at P 230.

[50] Order No. 872, 172 FERC ¶ 61,041 at P 230 n.356.

[51] *Transmission Access Policy Group v. FERC*, 225 F.3d 667, 688 (D.C. Cir. 2000).

[52] *See Petro Star Inc. v. FERC*, 835 F.3d 97, 107 (D.C. Cir. 2016) (FERC acts arbitrary and capricious where it fails to address "the most concrete evidence put forth" by participants in proceedings before the Commission); *see also Port of Seattle v. FERC*, 499 F.3d 1016, 1035 (9th Cir. 2007) ("An agency's ruling will be deemed arbitrary and capricious where the agency 'entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.'") (*citing State Farm*, 463 U.S. at 43).

factual basis for the factual conclusions upon which it relies to repeal the requirement that states offer fixed prices.

1. The finding that avoided costs have exceeded actual avoided costs is supported by no credible evidence and ignores relevant factors

Order No. 872 relies largely on the assumption that overestimations and underestimations in long-term fixed-price contracts have not balanced out as assumed in Order No. 69,[53] but no credible evidence supports the assumption that Order No. 69 was incorrect on this point. While the Commission cites many sources of untested submissions by utility parties, the underlying allegations therein amount to little more than unsupported, off-point, and abstract comparisons, which fall short of the requisite factual basis.[54] Simply put, the Order is supported by no evidence that, over life of PURPA, overestimations and underestimations have not evened out as predicted in Order No. 69 because the allegations and evidence only look at snapshots or short-term market trends. Indeed, the Commission ignores the significant role QFs have played in forcing these declines in electricity prices.[55] That is, when market prices are high, reflecting a shortage of generation resources, avoided cost prices encourage market entry by QFs, driving down the cost of generation. This is not a sign of PURPA's failure, but an indication of PURPA's success in improving the competitiveness of generation markets and driving down electricity prices – a major consumer benefit that Order No. 872 will jeopardize.

Scrutiny of the allegations cited by the Commission reveals their flaws. Order No. 872 cites to a submissions by the Edison Electric Institute ("EEI") and the Idaho Public Utilities Commission ("Idaho PUC") that purports to compare QF contract costs to alternative wholesale

[53] Order No. 872, 172 FERC ¶ 61,041 at P 283.
[54] *Id.* at P 55, n. 89, P 233 n. 362, P 254, n. 403.
[55] *See* NIPPC-CREA-REC-OSEIA Comments at 21-22.

energy prices at the Mid-Columbia hub.[56] These comparisons unreasonably compare the all-in PURPA contract prices, which typically include compensation for energy and long-term 15-year to 20-plus-year capacity commitments, to the Mid-Columbia energy prices, which is not a long-term capacity commitment. Although NIPPC-CREA-REC-OSEIA made this point in their comments and even supported it with an expert report,[57] Order No. 872 fails to address the flaw in the evidence upon which it relies, and instead affirmatively relies upon that flawed evidence to overrule decades of precedent.

Next, Order No. 872 unreasonably relies on allegations supplied by Idaho Power Company which purports to compare QF contract costs to the costs of Idaho Power's non-QF resources.[58] Even assuming the data is accurately presented, it compares the all-in PURPA contract prices (again, including all-in energy and capacity costs) to the "net power supply costs" of Idaho Power's non-QF resources, which does not include the fixed capacity costs in rate base. Most of the listed "net power supply costs" are roughly analogous to, for example, the Combined Cycle Price for as-available energy developed in Order No. 872.[59] As the expert report submitted by NIPPC-CREA-REC-OSEIA explained, the relevant data to answer the question is

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[56] *Id.* at P 233 n. 362.

[57] NIPPC-CREA-REC-OSEIA Comments at 31-32, Attachment 1.

[58] *See* Order No. 872, 172 FERC ¶ 61,041 at P 254 n. 403 (citing Idaho Power Comments at 10-11, which assert: "The cost of PURPA generation contained in Idaho Power's base rates, on a dollars per MWh basis, is not just greater than Mid-C market prices, it is greater than all the *net power supply cost components* currently recovered in base rates. Idaho Power's average cost of PURPA generation included in base rates is $62.49/MWh. At $62.49/MWh, the average cost of PURPA purchases is greater than the average cost of FERC Account 501, Coal at $22.79/MWh; greater than FERC Account 547, Natural Gas at $33.57/MWh; greater than FERC Account 555, Non-PURPA Purchases at $50.64/MWh; and significantly greater than what is being sold back to the market as FERC Account 447, Surplus Sales at $22.41/MWh." (Emphasis added.)).

[59] For example, FERC Account 547 costs, supplied by Idaho Power, include only the "cost delivered at the station . . . of all fuel, such as gas, oil, kerosene, and gasoline used in other power generation." 18 CFR § 101.547.

data comparing all-in costs of QFs versus the all-in costs of the utility generation,[60] but these sources cited by Order No. 872 do not contain such comparisons of relevant data points.

Much of the remaining allegations cited by Order No. 872 generally shows nothing more than the fact that energy prices have declined in the past decade, which does not prove that overestimations will generally exceed underestimates of avoided costs. Instead, that evidence leads to the conclusion that any long-term resource (QF or non-QF) acquired immediately before such decline in energy prices would appear to be overpriced when evaluated at the point in time where the energy prices were at their low point. The Order even agrees that the recent decline in natural gas prices is the source of declining energy prices, which have applied broadly to all resources, not just QFs.[61] Even the EEI evidence demonstrates this point. The EEI data alleges that PacifiCorp could have secured a 10-year fixed price Mid-Columbia contract in 2014 at a price of $45.87 per MWh, but the price had dropped to $30.22 per MWh on June 30, 2016, which it compares to PURPA contracts that are typically 15-year to 20-year fixed price agreements.[62] But by the reasoning of Order No. 872, the 2014 contract acquisition of Mid-Columbia power would also become an above-avoided-cost acquisition even if it were more competitively priced than alternative sources of power available in 2014.

In fact, all the evidence cited by the Commission covers only a limited period from approximately 2012 to 2019. The Commission cannot logically reject Order No. 69's conclusion that overestimates and underestimates of long-run avoided costs will even out over time because the Commission has examined only a small subset of the 40 years since Order No. 69 was adopted. Moreover, evidence already in the record demonstrates that this period was anomalous

[60] NIPPC-CREA-REC-OSEIA Comments at 31-32, Attachment 1.
[61] Order No. 872, 172 FERC ¶ 61,041 at P 287.
[62] *Id.* at P 254 n. 403.

because, unlike any prior period in PURPA's history, electricity markets experienced an extended period of slack or even falling demand, unlike any period since PURPA was adopted.[63] Accordingly, the evidence cited by the Commission fails because it examines only a small subset of PURPA's history and that subset is anomalous both in terms of electricity demand and electricity prices.

Order No. 872 next incorrectly concludes that QF resources are uniquely problematic because utility-owned resources will be able to lower the costs to ratepayers to reflect declining natural gas prices through cost-based rates and power supply adjustment clauses.[64] The conclusion that utilities have "been required to lower their energy rates as prices have declined" is baseless.[65] The Order cites no evidence that any utility has lowered its retail rates in response to declining gas prices over this same timeframe. In addition to being supported by no evidence cited in the Order, the assumption could only hold true for the ongoing operating costs of utility-owned gas plants. As the data submitted to the Commission demonstrates, however, the utilities have also acquired (or may have deferred acquisition of) non-QF resources that also lock in significant price risk, including hydropower upgrades and upgrades to aging coal facilities and other resources that do not use natural gas.[66]

Order No. 872 even agrees with many of the flaws in the data submitted by utility parties, and expressly disavows reliance on the highly touted "Concentric Report" compiled by experts for the utility parties. As was the case with much of the other less formal allegations submitted, the Concentric Report purported to compare costs of alternative utility generation to QF costs,

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[63] NIPPC-CREA-REC-OSEIA Comments at 34-35, n. 57 (citing information from the National Renewable Energy Laboratory and other sources).

[64] Order No. 872, 172 FERC ¶ 61,041 at PP 288, 302.

[65] *Id.* at P 302.

[66] *E.g.,* NIPPC-CREA-REC-OSEIA Comments at 31-32, Attachment 1.

except instead of being compiled on an ad hoc basis like the other evidence, it was compiled by qualified experts. It relied on utility acquisition of renewable resources through RFPs to long-term QF avoided cost rates and concludes the QFs were more expensive.[67] But as GridLab explained, "[i]f QF avoided cost pricing is higher than prices set through competitive bidding, . . . that is because the utility's production costs are higher than competitive prices."[68] Order No. 872 itself concedes the comparison made by Concentric is not reliable because "it is not clear that the difference in costs identified by Concentric can be ascribed to the fixed rates in the QF contracts or rather to the fact that the avoided cost rates in the QF contracts were based on more expensive non-renewable capacity that was avoided by the purchasing utilities."[69] This same critique applies generally to all of the so-called data submitted to the Commission by the utilities in this proceeding, which is clearly cherry picked to ignore the actual avoided costs of the utility's own non-renewable capacity that was in fact avoided by the purchasing utility's acquisitions of QF capacity. After all, the long-term avoided costs are set by the states based on the utilities' own long-term marginal cost projections used to justify non-QF acquisitions.

Order No. 872 also essentially assumes energy prices will fall indefinitely to justify eliminating the requirement for fixed energy prices, but in doing so it fails to even address the extensive evidence submitted contrary to that expectation, at least in the Northwest.[70] As NIPPC-CREA-REC-OSEIA's comments demonstrated, the current IRPs for each of the Northwest's investor-owned utilities predict significantly increased electricity demand and increasing market prices at the same time those utilities are facing retirements of much or all of

[67] Order No. 872, 172 FERC ¶ 61,041 at P 267.
[68] *Id.* at P 277.
[69] *Id.* at P 293.
[70] NIPPC-CREA-REC-OSEIA Comments at 33-36.

their coal fleets.[71] Likewise, evidence demonstrates that price declines driven by the natural gas "fracking" boom are unlikely to continue.[72] Those are the same market fundamentals that inform the marginal costs of generation for the same utilities upon which those utilities will ultimately rely to commit to long-term generation acquisitions. Order No. 872 completely ignores this evidence and fails to explain why it is reasonable for utilities to rely upon increasing energy prices in forecasts to acquire their own non-QF generation but not to rely on that same forecast for the avoided cost rates offered to QFs. Finally, even where avoided costs set earlier in time may be higher than actual avoided costs at the time of delivery or where prices may show a decreasing trend over time, that may show that PURPA, among other factors, is encouraging competitive economic forces to bring in more supply when it is needed and then drive ratepayer costs down. This outcome certainly does not serve as an adequate justification to eliminate the fixed price option.

Commissioner Glick accurately concludes that there is simply insufficient evidence to support the Commission's abrupt reversal of its long-standing fixed price policies. "[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."[73] Instead, "when presented with a couple allegations that avoided costs were overestimated, the Commission now concludes that that possibility suggests it must abandon the fixed-energy rate contract altogether."[74] Order No. 872 "makes no effort to validate these allegations, or assess whether the overestimations of avoided cost were, in fact, balanced out."[75]

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[71] *Id.*
[72] *Id.* at 32-33.
[73] Order No. 872, 172 FERC ¶ 61,041 at Glick, Comm'r, dissenting in part at P 16.
[74] *Id.* (footnote omitted).
[75] *Id.*

He correctly concludes that "it is arbitrary and capricious to point to only half the picture in abandoning a forty year- old principle."[76]

In sum, Order No. 872 is supported by irrelevant and thus insufficient evidence of overestimations of avoided costs to support the conclusion PURPA suddenly compels the Commission to no longer require critically important fixed energy prices in QF contracts.

2. The assumption QFs will be able to secure financing without fixed energy prices is supported by insufficient evidence and ignores extensive evidence to the contrary

The next critical error in judgment is Order No. 872's assumption that QFs will be able to obtain financing in the absence of the certainty afforded by fixed energy prices. Instead of meaningfully engaging with the overwhelming evidence to the contrary, Order No. 872 arbitrarily concludes "the variable avoided cost energy rate option implemented by this final rule will still allow QFs to obtain financing."[77]

As Commissioner Glick succinctly explains, this finding arises from no factual basis whatsoever. "If anything, the record before us confirms the continuing importance of fixed-price contracts. Numerous entities with experience in financing and developing QFs explain that a fixed revenue stream of some sort is necessary to obtain the financing needed to develop a new QF."[78] As the evidence demonstrates, "[t]he fixed revenue stream is particularly important because QFs are overwhelmingly developed outside of the organized markets, meaning that

[76] *Id.*

[77] *Id.* at P 336.

[78] *Id.* at Glick, Comm'r, dissenting in part at P 11 (citing SEIA Comments at 29; North Carolina Attorney General's Office Comments at 5; Con Ed Development Comments at 3; South Carolina Solar Business Association Comments at 6; sPower Development Company, LLC Comments at 11; Resources for the Future Comments at 6-7.).

developers cannot necessarily obtain hedging contracts to create the revenue predictability needed to obtain financing."[79]

Order No. 872 speculates that QFs do not need fixed prices, or presumably PURPA itself, to be developed by citing irrelevant and incomplete data regarding the extent of non-QF renewable generation developed in recent years.[80] The fact that renewables have been developed outside of PURPA does not prove such resources were developed without fixed price contracts, especially outside of the organized wholesale markets where PURPA remains most relevant, – a point made in numerous comments but ignored by Order No. 872. Indeed, the Order appears to acknowledge that there are no relevant examples, and instead relies on speculation that QFs may be able to obtain financing without fixed energy prices.[81] The Order even states that the "Commission did not suggest that this evidence supports a conclusion that substantial non-QF capacity is being financed and constructed without any form of fixed revenue to support financing."[82] And it ignores evidence that non-QF renewable generation has been developed

[79] *Id.* (citing SEIA Comments at 29-30 ("As both Mr. Shem and Mr. McConnell explain, financial hedge products are not available outside of ISO/RTO markets."); Resources for the Future Comments at 6-7 ("[W]hile hedge products do support wind and solar project financing, they would not be suited for most QF projects. To hedge energy prices, wind projects have used three products: bank hedges, synthetic power purchase agreements (synthetic PPAs), and proxy revenue swaps. . . . From US project data for 2017 and 2018, the smallest wind project securing such a hedge was 78 MW, and most projects were well over 100 MW. *Additionally, as hedges rely on wholesale market access and liquid electricity trading, all of the projects were in ISO regions*.") (emphasis added)).

[80] *Id.* at P 38 n. 57 (citing random EIA data regarding the levels of QF and non-QF independent power producer generation online as of the end of 2019).

[81] *Id.* at P 38, n. 58.

[82] *Id.* at P 242.

using fixed-price contracts.[83] Yet the Order arbitrarily speculates that QFs will be able to obtain financing due to the backstop rights in PURPA's must-purchase provisions, which allegedly will leave QFs "better positioned than non-QFs to negotiate the necessary contractual arrangements for financing."[84] But the Order completely overlooks that it has removed the only regulations that provided the QF any negotiating leverage – namely, that the QF could always fall back on the mandatory requirement that the utility offer it long-term *fixed* prices.

Order No. 872 also cites certain evidence out of context to attempt to support its conclusion – misinterpreting the Fitch Ratings agency report cited by NIPPC-CREA-REC-OSIEA for the proposition that variable and unpredictable time-of-delivery index prices will support financing.[85] The Fitch report does not state projects can be financed based on variable index prices, especially outside of organized wholesale markets. The general thrust of the Fitch report is that price uncertainty undermines a project's financing prospects.[86] Fitch bluntly states: "Exposure to market price risk reduces remuneration predictability depending on the share of the associated revenues compared with the total."[87] Of course, that's the same point made by

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[83] Comments of the Public Utility Commission of Oregon at 5 (stating: "In Oregon and much of the West, resource development generally occurs through bilateral, long-term power purchase agreements with utilities or through utility-owned resources whose costs are recovered from ratepayers. In neither case would it be accurate to say that developers are compensated based on as-available energy prices, raising questions about the accuracy of the assumptions supporting the Commission's proposal in many areas of the West.").

[84] Order No. 872, 172 FERC ¶ 61,041 at P 242.

[85] *Id.* at P 116 (asserting that "Fitch states that it gives a 'stronger' evaluation to projects with power sales contract prices that are 'indexed using simple, broad-based publicly available indexation formulas.'"); *see also* NIPPC-CRA-REC-OSEIA Comments at 37-38 (discussing "Global Infrastructure & Project Finance, Renewable Energy Project Rating Criteria," *Fitch Ratings* (Feb. 26, 2019), available at: https://www.fitchratings.com/site/re/10061770.)

[86] NIPPC-CRA-REC-OSEIA Comments at 37-38 (so explaining).

[87] "Global Infrastructure & Project Finance, Renewable Energy Project Rating Criteria," *Fitch Ratings* (Feb. 26, 2019), at p. 9, available at: https://www.fitchratings.com/site/re/10061770.

extensive attestations and declarations by experts submitted to the Commission,[88] but Order No. 872 skips over that well-established fact. The quote of the Fitch report upon which Order No. 872 relies merely establishes that if prices are based on some sort of indexation, the project will receive a higher financing score if the prices are based on transparent indexation formulas. That should not be surprising, but it hardly establishes QFs can be financed without fixed price contracts.

Similarly, the Commission takes out of context the Technical Conference testimony of the American Forest & Paper Association.[89] Examining the full context, it is clear that the excerpt of testimony cited by the Commission is a hypothetical contract with a utility that is included in the utility's rate base, not a QF contract. Further, the testimony is clear that the Association disagrees with one of the Order No. 872's central propositions, that QF prices are systematically higher than market prices, and that the proper solution to that problem, even if it exists, is to refine the avoided cost calculation, not to fundamentally alter the right to a fixed-price contract.[90]

Order No. 872 also repeatedly relies on an out-of-context excerpt from the Technical Conference testimony of the Solar Energy Industries Association.[91] The context of that excerpt makes clear that fixed prices are essential to finance any project, including a QF:

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[88] *See, e.g.,* NIPPC-CREA-REC-OSEIA Comments at Attachment 2 ¶ 8 (stating, "The basic premise of project finance is that lenders provide project development capital based solely upon an individual project's risks and expected future revenue. The proposed reliance upon volatile short-term market pricing for most, or all, of a project's expected revenue will not provide lenders comfort that future revenue can be reasonably expected to cover financing costs."); *see also* Order No. 872, 172 FERC ¶ 61,041 at Glick, Comm'r, dissenting in part at P 11 (collecting similar declarations by numerous other financing experts).

[89] Order No. 872, 172 FERC ¶ 61,041 at P 237 n. 370 ("Now you sign a long-term IPP contract. That contract [has] got a variable energy cost in it").

[90] Transcript of FERC Technical Conference, AD16-16-000, June 29, 2016, at 149-54.

[91] *E.g.,* Order No. 872, 172 FERC ¶ 61,041 at P 237 n. 371.

> For a project to be financeable, the developer must obtain a PPA that includes: *Fixed Price*: A predictable stream of revenue from the project asset is the fundamental basis of any project financing. . . . Developers need rates for such sales of energy and/or capacity to be fixed, based on avoided costs calculated at the time the obligation (of the QF to sell and the utility to buy) is incurred, rather than varying over time.[92]

Certainly nothing in the referenced comments supports the Commission's claim that a fixed capacity price, no matter how small, would be sufficient to support long-term financing of QFs.

Order No. 872 also arbitrarily ignores real-world evidence demonstrating that exposure to short-term market variability has created insuperable problems in financing long-term generation projects. This evidence includes: (1) that state utility regulators in some cases discourage utility reliance on short-term markets because they are excessively volatile and create undue market risk;[93] and (2) that reliance on short-term markets in the ISO/RTO regions for long-term contracts has created a well-documented "missing money" problem, affecting the ability to maintain some long-term capacity in these regions.[94]

The Commission did not adequately consider other evidence demonstrating that projects cannot be financed if they rely on short-term markets. First, there is strong evidence that LMP prices have been distorted in some places by artificially low bids from plants that are operated uneconomically.[95] The Commission's response is that these artificially depressed prices represent the utilities' true avoided cost.[96] This makes no sense in light of the Commission's repeated insistence that any measure of avoided cost must "accurately" reflect the utility's true avoided cost, a reflection lacking in zero-cost bids by uneconomic plants.

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[92] Comments of the Solar Energy Industries Association, Docket No. AD16-16-000 at 3-4 (filed June 7, 2016).

[93] NIPPC-CREA-REC-OSEIA Comments at 54-55.

[94] NIPPC-CREA-REC-OSEIA Comments at 57-58.

[95] *Id.* at 56.

[96] Order No. 872, 172 FERC ¶ 61,041 at PP 155-57.

Second, the Commission ignores a principle lessons of the 2000-01 California electricity crisis cited by the NIPPC-CREA-REC-OSEIA's comments, which is that reliance on short-term markets for long-term energy supplies was, as the Commission determined, the most serious flaw in California's market design.[97] The Commission responds that it has instituted measures to mitigate market power in California,[98] but this partial response omits the institution of a measure of equal importance: eliminating the over-reliance of California's utilities on the short-term markets for long-term energy.

Moreover, Order No. 872's reliance on the prospects for QFs' ability to leverage the use of hedges is without any factual basis.[99] Hedges are not an adequate replacement to fixed energy prices that provide the level of certainty needed to encourage QFs. Order No. 872 identifies no further evidence beyond the irrelevant evidence cited in the NOPR on the alleged potential of hedges for QFs. As that evidence discusses only hedging within the ISO/RTO regions, there certainly is no evidence that such a hedging approach to resolve financing issues is possible in the Northwest or other areas outside the ISO/RTO regions. Furthermore, even in organized markets, the hedges would only be available to larger projects. As evidence submitted by NIPPC-CREA-REC-OSEIA demonstrated, "many hedge providers decline to work with small projects because they are not cost effective and have higher risk profiles."[100] Further, "[d]ue diligence and transaction expenses that would be incurred to implement small hedge contracts, including attorney, independent engineer, and insurance advisor fees, often exceed the hedge provider's anticipated revenue from a small hedge contract, while operating risks are perceived

[97] NIPPC-CREA-REC-OSEIA Comments at 56-57.
[98] Order No. 872, 172 FERC ¶ 61,041 at P 163.
[99] *Id.* at P 345.
[100] NIPPC-CREA-REC-OSEIA Comments at Attachment 2, ¶ 9.

to be higher because the impact of any equipment failure would have a much greater impact on a small project's revenue than it would on a larger project's revenue."[101]

Despite the NOPR's heavy reliance on hedges to replace fixed energy prices, Order No. 872 appears to concede that there is no real evidence that hedges can cure the financing problem created for most QFs without fixed prices.[102] Instead, the Commission now speculates hedging may cure the problem for "at least some QFs" and arbitrarily leaves all other QFs without any prospects to overcome the lack of fixed price certainty.[103] In doing so, the Commission arbitrarily relies on hedges as a solution to the problem without adequate factual basis.

Finally, the Order paradoxically suggests that QFs will be *benefited* by variable prices because if the avoided costs increase, "variable energy cost energy pricing will protect and even benefit the QF itself, as it would not be locked into a fixed energy rate contract or LEO that would be below the purchasing electric utility's avoided cost."[104] This assertion ignores the Commission's own past finding – and extensive record evidence – that fixed-price certainty is needed to support investment in QFs in the first place, and the QF cannot "benefit" from unexpectedly high market prices if the QF does not exist. It also ignores the fact that Order No. 872's pricing construct, which would require consumers to pay higher costs when energy prices increase, eliminates the consumer protection advantages of long-term contracts, which protect consumers from market volatility, and would force consumers to pay more anytime market prices increase. As noted above, there is strong evidence that market prices are likely to increase

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[101] *Id.*

[102] Order No. 872, 172 FERC ¶ 61,041 at P 345 (stating that "the Commission never intended to suggest that hedging is cost-free or that it would be appropriate for all QFs").

[103] *Id.*

[104] *Id.* at P 290.

as a result of the loss of coal capacity, increasing demand for electricity, increasingly strict greenhouse gas limits, and other factors.

In sum, Order No. 872 ignores extensive evidence that eliminating the requirement for fixed energy prices will severely undermine the ability of QFs to obtain financing and is supported by insufficient evidence to conclude otherwise.

E. Order No. 872 Relies on Arbitrary Reasoning to Support the Decision to Reverse 40 Years of Precedent and Suddenly Authorize States to Deprive QFs of Fixed Energy Prices

In addition to the lack of factual basis, Order No. 872's repeal of the requirement for fixed energy prices also fails the "fundamental requirement of nonarbitrary administrative decision making" that the agency set forth rational reasons for its actions.[105] The Order fails the basic requirement that FERC "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[106] "[U]nless the [agency] answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned."[107] As explained below, FERC's "'failure to respond meaningfully' to objections raised by . . . part[ies] renders its decision arbitrary and capricious."[108]

Order No. 872 contains multiple passages of illogical and arbitrary reasoning in support of the decision to no longer require states to offer fixed energy prices to QFs. First, the Order

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[105] *See Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 949 (D.C. Cir. 2004) (citing to *State Farm*, 463 U.S. at 48-50).

[106] *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (2005) (quoting *State Farm*, 463 U.S. at 43).

[107] *Id.* (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)).

[108] *Id.*; *see also Transmission Access Policy Group*, 225 F.3d at 716 (reversing on an issue where FERC failed to "reach its conclusion by reasoned decision making").

justifies the elimination of fixed energy prices with the assumption that QFs will still receive fixed capacity rates and that this may be "sufficient to recover the QF's financing costs and should therefore continue to facilitate QF financing."[109] The Order asserts states will be incented to require longer term contracts because an Idaho PUC Commissioner expressed reluctance to offer long-term contracts with fixed prices.[110] Even though the Idaho PUC Commissioner never stated that Idaho would in fact extend contract terms if FERC adjusted the rules to allow for updates to the energy prices during the QF's contract term, Order No. 872 infers from her statements that Idaho would do so.

But the Order fails to connect the dots because nothing in the Order or the final rules requires that states actually offer minimum term lengths that would give effect to the assumed benefits of fixed capacity prices.[111] In reality, the rules now provide no right to any capacity payments because the Order declines to require contracts of the duration necessary to include such capacity payments.[112] And it ignores evidence that without a minimum contract term, QFs cannot be financed.[113] That is a classic example of arbitrary decision making.

Even worse, the Order even backtracks on existing precedent regarding contract length at a time when contract length becomes even more important and, in effect, reverses the Commission's own recent precedent on the subject without even acknowledging the change in policy, let alone explaining how it complies with the statute.[114] It is black letter law that "[a]n agency may not . . . depart from a prior policy *sub silentio*[.]"[115] But that is just what Order No.

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[109] Order No. 872, 172 FERC ¶ 61,041 at P 37.
[110] *Id.* at PP 43-44, P 348 n. 564.
[111] *Id.* at P 349, n. 566.
[112] *Id.*
[113] NIPPC-CREA-REC-OSEIA Comments at 39-40.
[114] Order No. 872, 172 FERC ¶ 61,041 at PP 359-360.
[115] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox TV Stations*).

872 does. Although the Commission's pre-existing rules do not specify a particular number of years as a minimum contract length, the Commission has established a general requirement that given the "'need for certainty with regard to return on investment,' coupled with Congress' directive that the Commission 'encourage' QFs, a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors."[116] Ignoring that existing principle, Order No. 872 affirmatively asserts that now "it is up to [the] states to decide appropriate contract lengths in a way that accurately calculates avoided costs so as to meet all statutory requirements."[117] By silently overruling the requirement for contract lengths of sufficient length to secure financing, the Commission has acted arbitrarily and without reasoned analysis.

Furthermore, the Order itself acknowledges and reaffirms the importance of securing contractual commitments in discussing the LEO rule. Specifically, Order No. 872 correctly states:

> QFs need a LEO in order to obtain financing to complete the project, and we find that, as an illustrative example, requiring submission of an interconnection request (as opposed to completion of a system impact study or transmission study) as one criteria strikes an appropriate balance between the competing needs.[118]

The Commission struck the appropriate balance needed to preserve the right of a LEO in that part of the Order. Yet the pricing decisions in the Commission's order make the right to a LEO – which is needed for financing – an empty right because the state and utility can refuse to provide any long-term prices or indeed the right to any LEO at all.

[116] *Windham Solar LLC*, 157 FERC ¶ 61,134, P 8 (2016) (quoting 16 U.S.C. § 824a-3(a) (2012) and 18 CFR § 292.304(d)(2) (2016)).
[117] Order No. 872, 172 FERC ¶ 61,041 at P 360.
[118] *Id.* at P 694.

Next, Order No. 872 relies on wholly inapplicable examples of power sale arrangements without fixed energy prices to reason that QFs should also be able to be financed and constructed without fixed energy prices. The Order states that "variable energy rate/fixed capacity rate construct is … a standard rate structure used throughout the electric industry for power sales agreements that include the sale of capacity."[119] As noted above, there is in fact no right to even obtain a fixed-price contract to sell capacity of any duration at all in the Commission's new rules. Setting that problem aside, however, the Order's reasoning is doubly irrational because there is no evidence that these unidentified transactions cited in the Order are in any way analogous to QF power purchase agreements.

For example, Order No. 872 relies on gas tolling arrangements.[120] But in doing so, the Order fails to consider or rebut the comments that such gas tolling arrangements have no applicability to the typical renewable energy power purchase arrangement.[121] The Order also relies on other unidentified merchant power generation plants' ability to finance construction of renewables, but it provides no relevant information about the underlying contracts or whether they even contain fixed prices, let alone how they secured financing.[122] Again, Commissioner Glick accurately refutes Order No. 872's reasoning on this point, stating:

> In the logical leap of the year, the Commission notes that in some areas of the country, unspecified resources are developed with a fixed-price contract for capacity and a variable price for energy and, separately, that renewables have grown nationwide more than seven-fold between 2005 and 2018. Final Rule, 172 FERC ¶ 61,041 at P 340. From those disparate observations, the Commission concludes that "renewable resources are able to acquire financing even without

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[119] *Id.* at P 38.
[120] *Id.* at P 341.
[121] *See* NIPPC-CREA-REC-OSEIA Comments at 42-43 (noting that this tolling construct would only work if "the Commission required capacity payments sufficient to permit QFs projects to be financed and required the variable energy component to be structured in a way that removes market risk from the QF" as is done in the case of a gas tolling agreement.).
[122] *Id.* at P 340.

> the right to require long-term fixed energy rates." *Id*. But nothing in the record suggests that that phenomenal growth in renewables was at all the result of that bifurcated contract structure. That, it should be clear, is not reasoned decision making. *Cf. Nat'l Ass'n of Recycling Indus., Inc. v. Fed. Mar. Comm'n*, 658 F.2d 816, 820 n.10 (D.C. Cir. 1980) ("We do not want, after all, blithely to compare apples and oranges. Likewise, an agency should also avoid unavailing comparisons of nonsubstitutes.").[123]

Furthermore, Order No. 872 completely ignores the impact of the removal of fixed energy prices on the fleet of existing QFs. These facilities have even less opportunity to overcome the market barriers that exist for new QFs. As NIPPC-CREA-REC-OSEIA previously explained, much of the existing renewable energy resources built prior to 1995 may need PURPA in its current form to be able to continue to sell power after the expiration of their current contracts.[124] The hundreds of small legacy QF facilities in the Northwest states, which consists predominantly of small hydropower, will be left with no meaningful opportunity to sell their power upon expiration of existing contracts if states eventually adopt the variable energy pricing provisions enabled by Order No. 872.[125] As previously explained, these legacy QFs often lack sophistication, cannot overcome high transaction costs, do not have economies of scale, and are unable to economically access alternative markets. Such facilities are often used to support primary business operations, such as improvements to irrigation supply infrastructure, and rely heavily on long-term price certainty for the sale of their QF energy and capacity to ensure responsible maintenance of their infrastructure, interconnection and power generation equipment.[126]

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[123] *Id.* at Glick, Comm'r, dissenting in part at P 12 n. 25.
[124] *See* NIPPC-CREA-REC-OSEIA Comments at 24-26.
[125] *Id.*
[126] *See Id.* at Attachment 4, ¶¶ 16-18.

Order No. 872 ignores these unique challenges facing these existing facilities and the likelihood of a significant *loss* of existing QF capacity as a direct result of the elimination of the requirement for fixed energy prices. Whatever applicability the Order's theories regarding use of hedges and other market tools may have with regard to sophisticated developers of new solar and wind facilities, the Order completely ignores the impact on these legacy QFs. Because the Order "entirely failed to consider" this "important aspect of the problem[,]" it is arbitrary and capricious.[127]

In sum, therefore, Order No. 872 fails to provide a rational explanation to support its elimination of the requirement for fixed energy prices, and indeed it even fails to address many of the significant objections made to the Commission's proposal. The Order must be reversed for that reason.

II. Allowing States to Use Competitive Solicitations (RFPs) to be the Exclusive Means of Securing a Long-Term PPA to Sell Energy and/or Capacity Is Arbitrary, Capricious, and Not In Accordance with Law

Order No. 872 arbitrarily reverses prior precedent to now authorize states to use competitive solicitations as the exclusive means for a QF to receive a long-term contract to sell energy and capacity.[128] Specifically,

> The Commission clarifies that, if a utility acquires all of its capacity through properly conducted competitive solicitations (using the factors described [in the Order]), and does not add capacity through self-building and purchasing power from other sources outside of such solicitations, the *competitive solicitations could be the exclusive vehicle for the purchasing electric utility to pay avoided capacity costs* from a QF.[129]

In such a case, the Order's newly adopted policy would allow the state to deny the QF the right

[127] *Port of Seattle*, 499 F.3d at 1035.
[128] Order No. 872, 172 FERC ¶ 61,041 at PP 365 n. 579, 421.
[129] *Id.* at P 421 (emphasis added); *Id.* at PP 427-37 (discussion the RFP criteria).

to ever sell capacity to the utility at a price higher than zero, even at times when the utility may have a capacity need,[130] and the QF would be entitled only to as-available energy prices.[131] In other words, if the state requires the utility to comply with the RFP criteria in the Order, then the QF would have no right to sell capacity to the utility without winning an RFP.[132] As explained below, the Commission should grant rehearing on this aspect of Order No. 872.

A. The Authorization of Exclusive Use of RFPs Violates the Statute's Requirements that the Commission's Rules Encourage QFs and Require Utilities to Purchase Energy and Capacity from QFs

Order No. 872's authorization of the exclusive use of RFPs for the sale of capacity violates the requirements of PURPA. Section 210(a) of PURPA states that the Commission's rules must "encourage" QF and must "require electric utilities to offer to – . . . purchase electric energy from such facilities."[133] While the term "electric energy" is not defined in the statute, the phrase's context within the statutory scheme unambiguously confirms that it includes both energy *and* capacity – meaning the Commission's rules must require utilities to purchase all energy and capacity made available from QFs.

Upon the enactment of PURPA, the Commission interpreted this statutory language as follows in Order No. 69:

> Section 210(a) of PURPA provides that the Commission prescribe rules requiring electric utilities to offer to purchase electric energy from qualifying facilities. *The Commission interprets this provision to impose on electric utilities an obligation to purchase all electric energy and capacity made available from qualifying facilities*.[134]

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[130] For example, the utility would still have a capacity need between RFPs, especially for smaller increments of capacity typically offered by QFs.

[131] *Id.* at P 422.

[132] *Id.* at PP 422-425.

[133] 16 U.S.C. § 824a-3(a)(2).

[134] Order No. 69, 45 Fed. Reg. at 12,219 (emphasis added); *see* NIPPC-CREA-REC-OSEIA Comments at 65 (quoting this passage).

Order No. 69 went on to explain why the statutory phrase “electric energy” must include both energy and capacity and rejected arguments to the contrary with detailed explanation. First, the Commission explained that “[t]he term ‘electric energy” is used throughout the [Federal Power] Act to refer both to electric energy and capacity[,]” and it could not “find any evidence that the term ‘electric energy’ in section 210 of PURPA was intended to refer only to fuel and operating and maintenance expenses, instead of all of the costs associated with the provision of electric service.”[135] Second, the Commission “note[d] that to interpret this phrase to include only energy would lead to the conclusion that the rates for sales to qualifying facilities could only include the energy component of the rate since section 210 also refers to ‘electric energy’ with regard to such sales.”[136] The Commission expressed its rational belief that “this was not the intended result[,]” and it would therefore “interpret the phrase ‘electric energy’ to include both energy and capacity.”[137]

Order No. 872 does not provide any basis to change the Commission’s longstanding interpretation that Section 210(a) of PURPA requires utilities to purchase all energy *and* capacity made available from QFs. But Order No. 872’s authorization to use RFPs as the exclusive means for QFs to sell capacity violates this statutory requirement. Instead of having the right to sell all energy and capacity made available, as the statute requires, QFs could now only sell capacity if they prevail in the RFPs with non-QF and utility self-build resources.

Applying these same legal requirements, the Ninth Circuit Court of Appeals recently invalidated the California PUC’s Re-MAT RFP program.[138] Under the Re-MAT program, “a

[135] Order No. 69, 45 Fed. Reg. at 12,225.
[136] *Id.*
[137] *Id.*
[138] *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861, 865 (9th Cir. 2019).

utility could purchase less energy than a QF makes available, an outcome forbidden by PURPA."[139] The same problem exists with Order No. 872's exclusive use of RFPs to offer to buy capacity from QFs. Therefore, Order No. 872's decision to allow states to refuse to require utilities to offer to purchase capacity from QFs violates the statutory requirement that utilities offer to purchase all capacity made available from QFs.

Moreover, as discussed above at length, Section 210(a) requires that the Commission design its rules implementing the statutory must-purchase obligation in such a manner that those rules will *encourage* the development of QFs. Allowing utilities to evade the mandatory purchase obligation through the exclusive use of RFPs where utility-owned resources commonly prevail cannot be squared with these statutory requirements. Indeed, the concept of a LEO was developed to ensure the rules encouraged QFs by preventing a utility from refusing to provide a capacity credit to a QF that offered to sell its capacity.[140] The exclusive use of RFPs deprives QFs of necessary encouragement in the same manner that the failure to offer QFs fixed energy prices does, as discussed at length above.

B. Order No. 872's Authorization of the Exclusive Use of RFPs Fails to Adequately Consider and Explain Departure from Past Precedent Interpreting PURPA

Order No. 872 arbitrarily fails to acknowledge the Commission's own past precedent and therefore also fails for lack of reasoned decision making. As noted above, the Commission cannot cast aside its own past precedents without even acknowledging it is doing so.[141] Failure to adequately explain this significant change in policy is arbitrary and capricious.

[139] *Id.*
[140] Order No. 69, 45 Fed. Reg. at 12,224.
[141] *Fox TV Stations*, 556 U.S. at 515-16.

The Commission's well-established precedent, as set forth in *Hydrodynamics* and consistent with the discussion in Order No. 69 discussed above,[142] is that PURPA requires a utility to purchase any energy and capacity made available by a QF and therefore precludes a utility from using an RFP as the exclusive means of offering to purchase QF energy and capacity. In *Hydrodynamics*, the Commission rejected the "Montana Rule", which imposed a "competitive solicitation process as the only means by which a QF greater than 10 MW can obtain long-term avoided cost rates."[143] The Commission explained:

> a utility may refuse to negotiate with a QF at all, and yet the Montana Rule precludes any eventual contract formation where no competitive solicitation is held. Such obstacles to the formation of a legally enforceable obligation . . . are . . . unreasonable here *and contrary to the express goal of PURPA to 'encourage' QF development*.[144]

In *Windham Solar LLC*, the Commission confirmed that it has held "a state regulation *to be inconsistent with PURPA* and the Commission's PURPA regulations 'to the extent that it offers the competitive solicitation process as the only means by which a QF . . . can obtain long-term avoided cost rates.'"[145] Thus, under pre-existing precedent, "regardless of whether a QF has participated in a request for proposal, that QF has the right to obtain a legally enforceable obligation."[146] This right is rooted in the Commission's longstanding interpretation of the Section 210(a) of PURPA itself, and it cannot be cast aside.

Order No. 872's reasoning for allowing states to use RFPs as a substitute for long-term PURPA contracts does not acknowledge these precedents or explain how the exclusive use of

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[142] 146 FERC ¶ 61,193 (2014).

[143] *Hydrodynamics Inc.*, 146 FERC ¶ 61,193 at P 33.

[144] *Id.* (emphasis added).

[145] *Windham Solar LLC*, 156 FERC ¶ 61,042 at P 5 (quoting *Hydrodynamics*, 146 FERC ¶ 61,193 at P 33) (ellipses in *Windham Solar*) (emphasis added).

[146] *Windham Solar LLC*, 156 FERC ¶ 61,042 at P 5.

RFPs could still comply with the statute. Aside from generally averring it expects RFPs will be fair with the newly adopted criteria, the Order cites no evidence suggesting that RFPs will provide an adequate mechanism for QFs to sell their energy and capacity or any other basis to overrule the Commission's *Hydrodynamics* and *Windham Solar* precedents. This failure to address and rationalize the change in policy is arbitrary and capricious.[147]

C. The Decision to Allow RFPs as the Exclusive Means for QFs to Obtain a Long-Term PPA Relies on Insufficient Evidence and Fails to Rationally Address Relevant Factors Identified in Comments Submitted to the Commission

Order No. 872 further errs in allowing exclusive use of RFPs to offer long-term PPAs because it relies on insufficient evidence to conclude that exclusive use of RFPs will encourage QFs. As noted above, the Commission's decisions must be supported by sufficient factual basis and cannot ignore relevant information that contradicts the conclusions reached.[148]

First, the Commission's decision fails to address multiple commenters' concerns with the inherent bias in utility-run RFPs and the difficulty and complexity of designing RFP requirements that are fair to IPP bidders, especially in regions with vertically integrated utility structures like the Pacific Northwest.[149] The evidence submitted demonstrates that the utilities have typically prevailed in RFPs in the Northwest, despite the extensive investigations and efforts of state regulators and IPP advocates to ensure a level playing field with more diverse

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[147] *State Farm*, 463 U.S. at 49-51.

[148] *E.g.*, *Port of Seattle*, 499 F.3d at 1035 (9th Cir. 2007) ("An agency's ruling will be deemed arbitrary and capricious where the agency 'entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.'") (*citing State Farm*, 463 U.S. 29 at 43 (1983)).

[149] *E.g.,* NIPPC-CREA-REC-OSEIA Comments at 13-25, 66-67 (detailing the difficulties with utility-run RFPs given the utility's inherent incentive to prevail in the RFP to earn its authorized return with a rate-based resource).

results.[150] Given that record, the Commission is required to conduct a more meaningful investigation and inquiry into the subject before it could rationally conclude that it has now developed bidding criteria for RFPs that would suffice to justify denial of a LEO to any QF. There is no basis upon which the Commission could determine that the bidding criteria it created will meet the statutory requirement to encourage QFs.

Additionally, the Order fails to explain why it rejected more restrictive criteria proposed by parties but not included in the rule.[151] For example, NIPPC-CREA-REC-OSEIA proposed consideration of the following additional criteria for any RFP process to overcome inherent utility-ownership bias: (1) require that the RFP include no utility-ownership options; or (2) if utility-owned generation may result, the RFP must be (i) administered and scored (not just overseen by an independent evaluator) by a qualified independent party, not the utility, (ii) any utility or affiliate ownership bid must be capped at its bid price and not allowed traditional cost-plus ratemaking treatment, and (iii) the product sought, minimum bidding criteria, and detailed scoring criteria must be made known to all parties at the same time, i.e., the utility or affiliate may not have an informational advantage in the RFP.[152] While the Order adopted a requirement for independent third-party design and administration of the RFP,[153] it rejected the rest of those proposals without discussion.[154]

The Order also ignores the lack of reasonable enforcement for its proposed exclusive use of RFPs. As NIPPC-CREA-REC-OSEIA previously explained, the practical effect of allowing

[150] *Id.* at 15-17; *Id.* at Attachment 2, Attachment A.
[151] Order No. 872, 172 FERC ¶ 61,041 at P 437.
[152] NIPPC-CREA-REC-OSEIA Comments at 67.
[153] Order No. 872, 172 FERC ¶ 61,041 at P 430 (requiring that an "independent third party design the solicitation, administer the bidding, and evaluate the bids prior to selection").
[154] *Id.* at P 437.

states to use RFPs as the exclusive means of access to long-term energy and capacity contracts will be to repeal the must-purchase obligation for most, if not all, QFs.[155] The utility could violate the RFP requirements in acquisition of capacity while it still has a state-authorized exemption from the purchase of capacity from QFs, but there is no recourse for the QFs that were deprived of the right to contract with the utility under PURPA while the utility acquired its own self-builds while refusing to contract with QFs. The Order establishes a process where the QF advocates would be left to challenge the RFPs after the fact, but at that point it is too late to correct the harm caused by the utility's reliance on the RFP process as a basis to refuse to contract with QFs in the interim.[156] As occurred in *Hydrodynamics*, QFs would be shut out of contracting to sell to the utility for years until the problem can be corrected prospectively. This policy invites litigation, but it does not encourage QF development.

Furthermore, the Order relies on insufficient evidence that small QFs and those primarily engaged in a business other than power production (e.g., irrigation districts, waste-to-power facilities, etc.) can succeed in the type of all-source RFP identified in the rule. Indeed, the Order ignores evidence that such QFs cannot be expected to participate in, let alone succeed, in such RFPs.[157] As noted above and supported by the record evidence, requiring existing QFs to prevail in an RFP to secure a contract to sell energy and capacity will ultimately result in the loss of substantial existing QF capacity, a result that is directly contrary to PURPA's requirement to adopt rules that encourage QFs. The Order summarily declines to adopt any exceptions other than a statement that 100 kW and smaller QFs can still obtain standard rates.[158] This aspect of

[155] *E.g.*, NIPPC-CREA-REC-OSEIA Comments at 66.
[156] *See* Order No. 872, 172 FERC ¶ 61,041 at PP 428, 438.
[157] NIPPC-CREA-REC-OSEIA Comments at 18-19, 67.
[158] Order No. 872, 172 FERC ¶ 61,041 at P 440.

the Order contains no meaningful explanation in response to the comments and instead cites the Commission's concerns regarding the impact on "price discovery" without participation of even the smallest and least sophisticated QFs.[159] The Order's reliance on price discovery fails to respond to the concern that the exclusive use of RFPs fails to encourage such QFs in contravention of PURPA.

In sum, the Commission's rushed decision to develop RFP criteria to be used as the exclusive avenue for QFs to secure a contract to sell energy and capacity is supported by insufficient factual basis that the new policy will continue to encourage QFs. The Order's failure to fully address relevant recommendations and objections to the proposed exclusive use of RFPs is arbitrary and capricious.[160]

III. Order No. 872's Expansion of Relief From PURPA Under Section 210(m) Is Arbitrary, Capricious, and Not in Accordance with Law

In Order No. 688, the Commission adopted a 20 MW threshold for QFs that are presumed to have effective access to the organized markets, which relieves utilities operating in those markets of PURPA's mandatory purchase obligation by operation of PURPA Section 210(m).[161] The Final Rule reduces this threshold to 5 MW.[162] But there is no evidence that circumstances have changed since Order No. 688 was adopted and Order No. 872 therefore fails for lack of reasoned decision-making. As Commissioner Glick correctly observed, "a borderline-

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[159] *Id.*

[160] *See PPL Wallingford Energy LLC v. FERC,* 419 F.3d 1194, 1198 (2005) ("unless the agency answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned" (internal quotation and alteration removed)).

[161] Order No. 688, *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* 117 FERC ¶ 61,078 at PP 74-78 (2006), *order on reh'g,* Order No. 688-A, 119 FERC ¶ 61,305 (2007), *aff'd, Am. Forest & Paper Ass'n v. FERC,* 550 F.3d 1179 (D.C. Cir. 2008).

[162] Order No. 872, 172 FERC ¶ 61,041 at PP 624-37.

truism about maturing markets does not explain how the barriers arrayed against small resources have dissipated, why it is reasonable to 'presume' that the remaining barriers do not inhibit non-discriminatory access, or why 5 MW is an appropriate new threshold for that presumption."[163]

In fact, although Order No. 688 is now nearly 15 years old, the Commission cites no empirical evidence to demonstrate that its original adoption of a 20 MW threshold met its expectation that QFs above this threshold would have effective access to the organized markets. Nor does it cite any evidence, apart from two anecdotal and atypical examples, that conditions have changed to such an extent that QFs down to 5 MW now have unhindered access to both short-term and long-term markets, as required under Section 210(m) to relieve utilities of PURPA's mandatory purchase obligation. And FERC ignores substantial record evidence that the threshold should be raised, not lowered.

In fact, the Commission based its conclusion in Order No. 688 that 20 MW is the appropriate threshold in substantial part on three pieces of evidence: (1) "[m]ost QFs larger than 20 MW are interconnected to higher voltage lines, typically considered to be transmission lines, while smaller QFs tend to be interconnected to lower voltage radial lines, frequently considered to be distribution," and therefore subject to state interconnection programs rather than FERC's interconnection rules;[164] (2) many such "lower voltage facilities are radial systems designed to carry power from the high-voltage grid downstream to loads, and there may be technical enhancements required to move power injected into such facilities upstream to the transmission grid to access the broader wholesale market,"[165] and, (3) "[s]maller QFs are also more likely to have to overcome other obstacles, such as jurisdictional differences, pancaked delivery rates, and

[163] *Id.* at Glick, Comm'r, dissenting in part at P 22.
[164] Order No. 688-A, 119 FERC ¶ 61,305 at P 96, n. 41.
[165] *Id.* at P 96.

perhaps additional administrative procedures, to obtain access to distant buyers."[166] As the Commission concluded, "[t]aken together, these factors support a rebuttable presumption that smaller QFs have substantially less ability to access wholesale markets than do larger QFs."[167]

The Commission can cite no evidence that any of these factors have changed. In fact, small QFs are still generally connected to lower-voltage and radial facilities that are subject to state rather than FERC-mandated interconnection procedures, these facilities still generally require technical enhancements to reach larger wholesale markets, and small facilities still face pancaked rates and additional administrative burdens to reach distant markets. The Commission's justification for changing the 20 MW threshold fails because none of these facts have changed in the fifteen years since Order No. 688 was adopted and the Commission can provide no "reasoned explanation . . . for disregarding facts and circumstances that underlay" its prior policy adopted in Order No. 688.[168]

In fact, the Commission has repeatedly concluded in the intervening years that QFs below 20 MW face significant physical and practical barriers that prevent them from effectively participating in competitive markets in the ISO/RTO regions.[169] Order No. 872 cites two orders where the Commission concluded the specific small QFs have access to the organized markets,[170] but neither instance supports the Commission's conclusion that small QFs generally have effective access to those markets. On the contrary, both cases involved QFs owned by or

[166] *Id.*

[167] *Id.*

[168] *Fox TV Stations*, 556 U.S. at 516.

[169] *E.g., Northern States Power Co.*, 151 FERC ¶ 61,110, PP 31-36 (2015): *PPL Elec. Utils. Corp.*, 145 FERC ¶ 61,053, P 24 (2015); *Pub. Serv. Co. of New Mexico*, 140 FERC ¶ 61,191 (2012); *see also Cloverland Elec. Coop.*, 164 FERC ¶ 61,016 (2018) (QFs operating in ISO/RTO regions are not presumed to have access to organized markets if they interconnect with utilities that are not members of the ISO or RTO).

[170] Order No. 872, 172 FERC ¶ 61,041 at P 624, n. 958.

affiliated with GDF Suez, which was a regular participant in the ISO-NE markets and scheduled the QF power into those markets on the QFs' behalf, thus overcoming one of the major administrative barriers faced by QFs under 20 MW that are not so fortunate as to be affiliated with a major power marketer.[171] In addition, the Commission concluded that these had direct access to the ISO-NE markets on uncongested transmission lines.[172] Finally, each order by its terms finds only that the specific QFs at issue participated in the organized markets,[173] and makes no generalized finding about the ability of QFs to participate in organized markets. Accordingly, the orders provide no support for the Commission's conclusion that small QFs have as a class somehow found ways around the barriers to market access identified in Order No. 688.

The Commission's remaining claims for lowering the threshold to 5 MW fare no better. The Commission claims, without benefit of evidence, that market participants "have gained a better understanding of the mechanics of such markets,"[174] but the Commission offers no evidence that this "better understanding" exists among small QFs in the 5-20 MW range. Nor does it cite any evidence that better understanding translates into better market access. Certainly, a better understanding does nothing to overcome the physical and institutional barriers to market access identified in Order No. 688. And, while acknowledging that cogeneration facilities should remain subject to the 20 MW cap because cogenerators are generally engaged in primary businesses other than power production,[175] it ignores evidence that many other types of small power producers are also engaged in primary businesses other than power production and

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[171] *Fitchburg Gas & Elec. Light Co.*, 146 FERC ¶ 61,186, P 37 (2014); *City of Burlington, Vermont*, 145 FERC ¶ 61,121, PP 8, 32 (2013).

[172] *Fitchburg*, 146 FERC ¶ 61,186 at PP 33-35; *Burlington,*145 FERC ¶ 61,121 at PP 33-34.

[173] *Fitchburg*, 146 FERC ¶ 61,186 at P 29; *Burlington,*145 FERC ¶ 61,121 at P 36.

[174] Order No. 872, 172 FERC ¶ 61,041 at P 629.

[175] *Id.* at P 625.

therefore lack the sophistication and resources necessary to penetrate the extreme complexities of the organized electric markets.[176]

The Commission also cites changes to its interconnection rules even though it acknowledges that the existence of such processes "does not on its own demonstrate non-discriminatory access for resources under 20 MW."[177] Indeed, the advent of fast-track procedures for facilities under 5 MW does nothing to improve access for facilities between 5 and 20 MW, and the Commission's assertion that the fast-track rules implicitly assumes that facilities above 5 MW can freely interconnect with the grid is wrong.[178] The 5 MW threshold was chosen because it expanded the universe of facilities eligible for fast track process "while ensuring safety and reliability."[179] There is nothing in FERC's orders on the fast track process even suggesting that facilities above 5 MW were excluded because they have market access. On the contrary, the fast-track process was adopted because previous versions of the Commission's Small Generator Interconnection Procedures and Agreements were becoming unnecessary barriers to market entry.[180]

Similarly, the Commission cites to Order No. 688's requirement that ISOs and RTOs structure their markets to accommodate energy storage resources as small as 100 kW. But nothing in either Order No. 688 or in the Commission's fast-track procedures overcome the physical and administrative barriers identified as inhibiting QFs below 20 MW from accessing the organized markets. And none of these reforms address the fundamental problems of QFs

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[176] NIPPC-CREA-REC-OSEIA Comments at 79-80.
[177] Order No. 872, 172 FERC ¶ 61,041 at P 631.
[178] *See Id.* at P 630.
[179] Order No. 792, *Small Generator Interconnection Agreements and Procedures,* 145 FERC ¶ 61,159, P 103 (2013).
[180] Order No. 792 at P 26.

interconnecting on low-voltage distribution systems or radials. Nor do they overcome the administrative problems created by having to deal with multiple entities and pancaked rates to achieve effective access to the organized markets.

The Commission also acknowledges that many small power producers, such as irrigation districts, operate small hydroelectric projects that are an adjunct to their primary mission, and therefore, like cogeneration facilities, face unique barriers in accessing these markets. Indeed, the NIPPC-CREA-REC-OSEIA comments demonstrated that many small hydroelectric projects operate as part of irrigation or municipal works, and therefore lack the sophistication and resources necessary to access the complex organized markets.[181] The Commission abused its discretion in acknowledging this evidence but refusing to retain the 20 MW threshold for these small generators. The Commission's answer – allowing these small generators to challenge the presumption that they have market access – is no answer because the reduction in the threshold for these generators is both unsupported by any evidence and contrary to the record evidence. Further, the Commission's approach forces these small operators to expend substantial resources in fighting much larger and more sophisticated utilities to obtain market access, defeating the principle goal of PURPA.

The Commission also ignores other evidence that smaller generators face unique barriers to achieving full access to competitive markets. These include the fact that the standard trading block in wholesale markets is 25 MW, requiring smaller generators to aggregate their output to participate in these markets, if they can participate at all.[182] Similarly, the Commission ignores evidence that requirements that transmission be scheduled in 1 MW blocks places a

[181] NIPPC-CREA-REC-OSEIA Comments at Attachment 2 ¶¶ 5-7; *id.* at Attachment 3 ¶¶ 12-13; *id.* at Attachment 4.

[182] NIPPC-CREA-REC-OSEIA Comments at 78, n. 156.

disproportionate burden on small generators.[183] By ignoring evidence contrary to its conclusions, the Commission errs because "a FERC order neglectful of pertinent facts on the record must crumble for want of substantial evidence."[184] The evidence, if anything, supports increasing the threshold to at least 25 MW and the Commission abuses its discretion by failing to address this evidence.

IV. The Application of Order No. 872's New 10-Mile Rule to Existing Facilities Is Arbitrary, Capricious, and Not in Accordance with Law

The Commission has erred in its failure to exempt existing facilities from applicability of the newly created 10-mile rule for determining eligibility as a small power production facility. Instead, the Commission arbitrarily applies the new rule to any existing facility that makes any substantive change to its certification documents with the Commission, which contradicts the Commission's own past practice without reasoned explanation.

The statutory definition of a small power production facility describes the size limit as "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."[185] Ever since 1980, Section 292.204(a)(2) of the Commission's regulations have established that facilities are considered to be located at the "same site" if they use the same energy resource, are owned by the same person(s) or affiliates, and are located within one mile of each other, as measured from the electrical generating equipment of the facilities.[186] Facilities located more than one mile apart enjoyed absolute certainty that the rules would not result in them being located at the same site.

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[183] *Id.* at 78-79.

[184] *Tenneco Gas v. FERC,* 969 F.2d 1187, 1214 (D.C. Cir. 1992).

[185] 16 U.S.C. 796(17)(A) (emphasis added).

[186] 18 CFR § 292.204(a)(2)(i); Order No. 70, 45 Fed. Reg. 17,959, 17,965 (March 20, 1980).

Many facilities were built in reliance on this bright-line rule.[187]

But Order No. 872 largely adopted the NOPR's proposal to provide utilities the opportunity to rebut the presumption that facilities located between one mile and 10 miles of each other are not a the same site, putting such facilities at risk of decertification if their aggregate net power production capacity exceeds 80 MW.[188] This is a major change in the regulatory landscape. As Terna Energy pointed out, this new rule creates an "exclusion zone" around a QF's electrical generating equipment from approximately three square miles to over 300 square miles – a 100 percent increase to the exclusion area for a single "site" and thus a single QF.[189] While Order No. 872 provides an important clarification that two facilities must be commonly owned or affiliated in order to be considered to be at the same site and potentially in violation of the rules,[190] Order No. 872 fails to meaningfully exempt existing facilities from applicability of the new rule. Although the Order states that "the settled expectations of the QFs should be respected," it applies the new 10-mile rule to existing facilities anytime a "substantive change" is made in a recertification of the facility after the rule takes effect.[191] The Order then explains that a "substantive change" includes, by way of example, a 10-percent change ownership of the facility or relatively minor increases in capacity (the greater of 1 MW or 5 percent) of the facility.[192]

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[187] *See* Terna Energy Comments at p. 4 ("Forty years of QF electric power generating facilities have been planned, developed, financed and constructed based on this long-standing bedrock rule in the Commission's PURPA regulations. That includes the six Terna QFs, which were likewise developed and constructed based on this foundational rule.").

[188] Order No. 872, 172 FERC ¶ 61,041 at PP 466-469.

[189] *Id.* at P 483 (citing Terna Energy Comments at 4).

[190] *Id.* at P 509, n. 797, P 511, n. 797.

[191] *Id.* at P 550 (amending 18 CFR § 292.207(c)(1), to allow protests anytime "substantive changes to the existing certification" are made).

[192] *Id.*

As a consequence of the failure to exempt existing facilities, owners of facilities financed and constructed in reliance on the former one-mile rule now face the risk of decertification almost any time a non-ministerial change is made, including sale of a relatively minor stake in ownership of the facility. The new rule decreases the marketability of such facilities and upsets investment-backed expectations of their owners, who often invest in a portfolio of resources with the expectation that it can eventually be sold to another owner. Worse, this new precedent of the Commission upsetting settled expectations undermines the predictability needed for long-term investments in generation assets.

Order No. 872's failure to exempt existing facilities is contrary to law and the Commission's own past practice. Failure to exempt existing facilities has an unlawful retroactive effect.[193] Where the agency acts under the Administrative Procedures Act, as the Commission does here, the APA does not authorize retroactive rules.[194] But the new rebuttable presumption will have the retroactive effect of applying to existing facilities seeking recertification. It will effectively bar the transfer or sale of existing assets that were lawfully qualified under the one-mile rule but cannot qualify under the new "10-mile rule" because they consist of more than 80 MW of aggregate capacity within 10 miles.

Furthermore, the failure to exempt existing facilities is a significant change from past practice, which Order No. 872 fails to address. The Commission's past practice in developing new certification criteria is to apply the new criteria only to new facilities, not existing facilities seeking recertification. Specifically, the Commission revised Section 292.205(d) of its regulations regarding the new operation and efficiency certification criteria required by the

[193] *See* NIPPC-CREA-REC-OSEIA Comments at 75 (making this same point).

[194] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988), *see also id.* at 225 (Scalia, J., concurring).

Energy Policy Act of 2005 for cogeneration facilities. Those new criteria applied only to "any cogeneration facility that was either not a qualifying cogeneration facility on or before August 8, 2005, or that had not filed a notice of self-certification or an application for Commission certification as a qualifying cogeneration facility under § 292.207 of this chapter prior to February 2, 2006 . . . ."[195] The Commission also explained, "we clarify that there is a rebuttable presumption that an existing QF does not become a 'new cogeneration facility' for purposes of the requirements of newly added section 210(n) of PURPA merely because it files for recertification."[196] Only changes to the facility that lead it to be a whole new facility, "such as an increase in capacity from 50 MW to 350 MW,"[197] could trigger the applicability of the new qualification criteria.

Despite the fact that NIPPC-CREA-REC-OSEIA's comments cited this precedent and recommended it be followed here,[198] Order No. 872 fails to discuss the subject or justify its far more limited legacy treatment that will ensnare numerous existing facilities. Because the Commission's decision fails to answer "objections that on their face seem legitimate, its decision can hardly be classified as reasoned."[199] Rather, the "'failure to respond meaningfully' to objections raised by . . . part[ies] renders its decision arbitrary and capricious."[200]

V. The Commission's Failure to Conduct an Environmental Assessment and/or and Environmental Impact Statement Violates the National Environmental Policy Act

[195] 18 CFR § 292.205(d).

[196] *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 71 Fed. Reg. 7,852, 7,865 (Feb. 15, 2006) (to be codified as 18 CFR pts. 131, 292).

[197] *Id.*

[198] NIPPC-CREA-REC-OSEIA Comments at 76.

[199] *PPL Wallingford Energy LLC*, 419 F.3d at 1198 (quoting *Canadian Ass'n of Petroleum Producers*, 254 F.3d at 299.).

[200] *See Id.*; *see also Transmission Access Policy Group*, 225 F.3d at 716 (reversing on an issue where FERC failed to "reach its conclusion by reasoned decision making").

Despite the sweeping adverse impact the newly adopted PURPA rules will likely have on the development and continued operation of a large category of renewable energy facilities throughout the country, Order No. 872 incorrectly asserts that there is no need to conduct an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS").[201] The Order is wrong. The Commission has violated NEPA by undertaking a major federal action that may have a significant impact on the human environment without completing the proper environmental analysis. Order No. 872 provides no persuasive reason to ignore the evidence of likely environmental impact of this major change in its regulations affecting renewable energy and cogeneration development.[202]

A. The Record Supports the Need for an EA and Possibly an EIS

NEPA applies to proposed federal actions, including rulemakings, that "*may have* an impact on man's environment[.]"[203] The Ninth Circuit has explained: "[A]n EIS must be prepared if 'substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor. . . . The plaintiff need not show that significant effects *will in fact occur*, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS *must* be prepared."[204] Furthermore, the Commission's own NEPA rules confirm that the Commission must complete an EA with a proposed change in regulations.[205]

[201] Order No. 872, 172 FERC ¶ 61,041 at PP 710-736.

[202] *E.g.,* NIPPC-CREA-REC-OSEIA Comments at 83-98; Public Interest Organizations Comments at 21-26.

[203] 42 U.S.C. § 4332(A) (emphasis added).

[204] *See LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir. 1988) (internal quotations omitted) (emphasis in *LaFlamme*); *see also* NIPPC-CREA-REC-OSEIA Comments at 83-85 (discussing applicability of NEPA).

[205] 18 CFR § 380.5(12).

Under the applicable standard, the comments submitted to the Commission in response to the NOPR unquestionably established that the major rule change may have a significant effect on the environment.[206] It should be quite obvious that a new rule that "guts"[207] the regulations under the only federal law requiring utilities to purchase power from renewable and cogeneration facilities may have a significant effect on the human environment. Order No. 872 does not appear to seriously dispute that the new rules *may* have a significant effect on the human environment, and instead it appears to merely conclude the precise impact would be difficult to pinpoint.[208] According the Order, "there is no way to determine whether issuance of the rule *will* significantly affect the quality of the human environment."[209] But the standard is not whether the new rule *will* affect the human environment. The question is whether it *may*, and the answer is "yes." Instead of investigating and disclosing those potential effects, Order No. 872 attempts to create new reasons not to conduct an EA or EIS beyond the misplaced arguments in the NOPR.

B. The Impacts Are Not Too Speculative or Uncertain for NEPA Analysis

First, Order No. 872 builds off of the NOPR's claim that the impacts are too speculative to study.[210] While Order No. 872 argues the Commission cannot predict how states will implement the new regulations, it is certain that the states could not lawfully deny fixed-price contracts to QFs under the pre-existing regulations. Furthermore, the NOPR's reasoning answers the wrong question – the question is whether the proposed rules *may have* a significant impact on the human environment. Given that test and the past history of state reluctance to implement

[206] *E.g.*, NIPPC-CREA-REC-OSEIA Comments at 83-98; Public Interest Organizations Comments at 25-26; Allco Finance Comments at 22-31.

[207] Order No. 872, 172 FERC ¶ 61,041 at Glick, Comm'r, dissenting in part at P 1.

[208] *Id.* at P 717.

[209] *Id.* at P 711 (emphasis added).

[210] *Id.* at PP 712-719.

PURPA, the Commission must assume that the states will eliminate the right to fixed-price contracts, and that the development of new QFs will grind to a halt. That type of analysis is what must be done in an EA or EIS.

As commenters pointed out, the Commission has conducted NEPA analysis for three prior rulemakings that are analogous the present one – (1) adoption of the initial PURPA regulations in 1980,[211] (2) the Commission's Competitive Bidding NOPR in 1988,[212] and (3) even the much more far-reaching Order No. 888.[213] This fact strongly undermines the claim that the Commission lacks the ability to forecast the impacts of such nationwide rule changes in the energy industry.

Order No. 872 claims the Commission could not conduct the same analysis as when it adopted the initial PURPA rules in 1980, arguing that analysis of environmental impacts was simpler then because very few renewable and cogeneration facilities were online prior to the rule.[214] This argument fails to address how it is the Commission was able to conduct environmental analysis at later times, including the Competitive Bidding NOPR in 1988 after substantial QF capacity was online and for Order No. 888 in 1992 – both of which involved market changes of equal or greater magnitude and complexity than the present rulemaking.

Next, Order No. 872 cites additional legal authority beyond that cited in the NOPR. The Commission primarily relies on the Ninth Circuit's decision in *Center for Biological Diversity v.*

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211 *See* NIPPC-CREA-REC-OSEIA Comments at 94-95.

212 *See* Public Interest Organizations Comments at 25 (citing *Regulations Governing Bidding Programs, Notice of Proposed Rulemaking*, FERC Stats. & Regs. ¶ 32,455 at 32,047 (1988), 2015 WL 8610975 (Mar. 16, 1988)).

213 *See* NIPPC-CREA-REC-OSEIA Comments at 96.

214 Order No. 872, 172 FERC ¶ 61,041 at PP 728-738.

Ilano,[215] but that case is inapposite. In *Center for Biological Diversity*, the Forest Service changed the designation of 5.3 million acres of forest land to a designation of "landscape-scale area" under the Healthy Forests Restoration Act, which expressed an intent that the agency "quickly" make such designations to address a growing beetle infestation and wildfire risk.[216] Indeed, the Healthy Forest Restoration Act contained deadlines for such designations that were plainly incompatible with the timeframe for NEPA analysis, and therefore the court concluded that NEPA analysis would conflict with Congress's clear intent for urgent action.[217] In contrast here, there is no identified urgency in the statute enacted in 1978 or otherwise, and the Commission has itself previously conducted NEPA analysis for proposed actions under PURPA. The court also relied on its finding that the designation did not authorize any discrete projects and would only potentially lead to such projects, making the exercise of an EIS too speculative.[218] But as noted above this reasoning has no applicability to the Commission, which has exhibited the capability to conduct detailed market analysis on the impact of its proposed rules and their likely environmental impacts.

In any event, the courts have regularly required NEPA analysis in cases where the agency proposes rules that will have an impact on future development, even for widespread regulatory changes that do not themselves authorize any discrete project. For example, in *American Bird Conservancy, Inc. v. FCC*, the D.C. Circuit vacated the Federal Communication Commission's rules and procedures for approving new communications towers where the agency failed to

[215] 928 F.3d 774, 780 (9th Cir. 2019); *see* Order No. 872, 172 FERC ¶ 61,041 at PP 710, 712-15.
[216] *Ctr for Biological Diversity*, 928 F.3d at 780.-81.
[217] *Id.*
[218] *Id.* at 781.

prepare the environmental analysis required by its own NEPA regulations.[219] The court admonished, "'[i]t must be remembered that the basic thrust of the agency's responsibilities under NEPA is to predict the environmental effects of a proposed action before the action is taken and those effects fully known.'" [220] Order No. 872's "precondition of certainty before initiating NEPA procedures would jeopardize NEPA's purpose to ensure that agencies consider environmental impacts before they act rather than wait until it is too late."[221]

Order No. 872 includes out-of-context quotations from a number of other cases in support of its uncertainty argument, but none of these additional cases support the Commission's position.[222] The law is clear – NEPA requires the agency to "engage in reasonable forecasting. Because speculation is . . . implicit in NEPA, [] we must reject any attempt by the agency to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as a crystal ball inquiry."[223] The Commission is fully capable of

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[219] 516 F.3d 1027, 1033-34 (D.C. Cir. 2008).

[220] *Id.* at 1033 (quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1091-92 (D.C. Cir. 1973), which held Atomic Energy Commission was required to issue an EIS for its liquid metal fast breeder reactor program even though ultimate environmental impact of the program depended on future actions of other parties and was uncertain).

[221] *Id.*

[222] Order No. 872, 172 FERC ¶ 61,041 at PP 716-18 (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519, 534 (1978) (agency conducted NEPA analysis and dispute was over whether it considered proper alternatives); *N. Plains Res. Council v. Surface Transp. Board*, 668 F.3d 1067, 1078-79 (9th Cir. 2011) (rejecting agency's position that impact of proposed action was too speculative to conduct NEPA analysis); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 830 (D.C. Cir. 1976) (issue was adequacy of EIS; court held it was inadequate for failing to forecast and disclose impacts); *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (holding EIS was adequate because it *did address* greenhouse gas impacts of a proposed LNG facility); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (reviewed adequacy of an EA that the agency prepared); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (holding that psychological harm is not covered by NEPA, but EIS was conducted on the impacts of re-opening a nuclear power plant).

[223] *N. Plains Res. Council*, 668 F.3d at 1079 (internal quotation omitted).

conducting reasonable forecasting of the impacts of the new PURPA rule and consideration of alternatives that might have less adverse impact.

C. Categorical Exclusions Do Not Apply

Next, the Commission relies on categorical exclusions, which it never cited in the NOPR.[224] This new argument is without merit. The categorical exclusions are not applicable to this major rule change.

As a threshold matter, the Commission cannot rely on categorical exclusions in cases like this one where it is clear there may be significant environmental impacts.[225] Despite the potential applicability of a categorical exclusion, the Commission's regulations state that: "Where circumstances indicate that an action may be a major Federal action significantly affecting the quality of the human environment, the Commission . . . [w]ill prepare an environmental assessment or an environmental impact statement."[226] Furthermore, the regulation states: "Such circumstances may exist . . . [w]here the environmental effects are uncertain."[227] Therefore, even if a categorical exclusion could arguably apply (which is not the case here), the Commission would still be required by its own rules to conduct an EA or and EIS in this case in light of the likely impacts identified in the record.

In any event, however, the categorical exclusions Order No. 872 cites do not apply here. The Commission cites categorical exclusions from NEPA for rules that: (1) are clarifying in

[224] Order No. 872, 172 FERC ¶ 61,041 at PP 720-727.

[225] The Council on Environmental Quality's regulations state that categorical exclusions are limited to the "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 CFR § 1508.4 (2019).

[226] 18 CFR § 380.4(b)(1)(ii).

[227] 18 CFR § 380.4(b)(2)(vii).

nature, (2) are corrective in nature, (3) are procedural in nature, or (4) do not substantially change the effect of the regulation being amended.[228] None of these exceptions apply to the actions challenged in this rehearing request or to the Order as a whole.

The Order claims that the new rule's changes to "how competitive solicitations can be used to set avoided cost rates" is merely "clarifying" in nature.[229] But as noted above, the Commission's decision to change its long-standing precedent by allowing use of RFPs as the exclusive means for all QFs to obtain a long-term contract to sell energy and capacity is a major change in policy. Overruling existing precedent is not "clarifying" in nature. As discussed above, this new policy will almost certainly impair the ability of new QFs to be constructed and operate and result in loss of existing QF capacity.

The Order next relies on the exemption for actions that are "corrective" for the remainder of the rule changes subject to this rehearing request.[230] Without citing any authority, the Commission asserts that it "interprets the categorical exclusion for changes to its regulations that are corrective in nature as including changes needed in order to ensure that a regulation conforms to the requirements of the statutory provisions being implemented by the regulation."[231] As Commissioner Glick explains, this line of reasoning is that "because the Commission believes that the changes adopted are necessary to conform with the statute, they are mere corrective changes, which, in turn, qualifies them for the categorical exemption from any environmental review under NEPA, or so the argument goes."[232]

The Commission's reliance on the "corrective" exclusion fails because it is contrary to

[228] Order No. 872, 172 FERC ¶ 61,041 at PP 720-27 (citing 18 CFR 380.4(a)(2)(ii)).
[229] *Id.* at P 721.
[230] *Id.* at P 722-26.
[231] *Id.* at P 722.
[232] *Id.* at Glick, Comm'r, dissenting in part at P 25.

obvious intent of the categorical exclusion for corrective changes to regulations. The categorical exclusion applies only to an action to correct an error, such as a misplaced word or mis-numbered section. The Order does not correct any errors. It adopts the biggest policy change under PURPA since enactment.

Additionally, as Commissioner Glick explains, this argument fails because it would exempt virtually any action the Commission takes under any of its enabling statutes from environmental analysis. All the Commission would need to do to avoid NEPA is state the action is required because the Commission deemed it to be in the "public interest" or "just and reasonable."[233]

Examination of the specific changes made demonstrates the flaws in the Order's reasoning. The Order claims that repealing the requirement that states offer fixed energy prices is corrective in nature because the change is "required based on the Commission's finding that . . . there have been numerous instances where overestimates and underestimates of energy avoided costs used in fixed energy rate contracts have not balanced out, causing the contract rate to not violate the statutory avoided cost rate cap."[234] But such allegations have existed for decades. Further, even if the Commission's finding and interpretation of the statute were correct, the precise action taken by the Commission was not prescribed by the PURPA statute. The Order also relies on changed circumstances to "correct" the one-mile rule and the changes to exemptions from PURPA under Section 210(m), thus making those actions exempt from NEPA.[235] Neither action was merely corrective of anything. Nor was either action compelled by the applicable statutory provision.

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[233] *Id.* at Glick, Comm'r, dissenting in part at P 26.
[234] *Id.* at P 723.
[235] *Id.* at P 724-25.

The overarching problem with the Commission's reasoning is that had the Commission engaged in NEPA analysis, or any other reasonable analysis of the likely impact of its proposed rule, it may well have identified less disruptive changes to the renewable energy and cogeneration industries that rely on the pre-existing PURPA regulations.

In sum, Order No. 872 violates NEPA by undertaking a major federal action that may have a significant impact on the human environment without completing and EA or an EIS.

CONCLUSION

For the reasons discussed above, the Commission should grant rehearing of Order No. 872.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each party to this proceeding as reflected in the official service list compiled by the Secretary of the Commission.

Dated: August 17, 2020

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