

Can a State Order Its Utilities to File “Feed-in Tariffs”? Two Paths to Non-Preemption

Legal Basis for the State Order: PURPA

Key Legal Features of this Path

1. Seller must be QF (self-certified or FERC certified).
2. State orders utility to buy at the state-set price, which must equal utility’s “avoided cost.”
3. Seller is exempt from FPA.

Result: *Clear path to a FiT: Utility must buy at the state-set tariff price; no FERC approval of the sale is necessary.*

What if the “avoided cost” price provides insufficient revenue to generators? Under FERC’s *American Ref-Fuels* precedent, state can create two-part payment:

Avoided cost (required by PURPA)	+	1.	Supplement (outside of PURPA)
			Order the utility to buy RECs from the QF; <i>and/or</i>
			provide the QF grants or incentive payments (funded by rates or taxes; <i>and/or</i>
			Set the utility-paid price above avoided cost but grant the utility tax credit equal to the above-avoided cost increment.

Caution

This PURPA path *does not work* if FERC has exempted the host utility from its PURPA purchase obligation (see 16 U.S.C. 824a-3(m)(1)(A)-(C), added by EAct 2005), *unless* the QF can “tag” another utility, via host utility’s Order 888 tariff or RTO’s regional tariff. If the PURPA path fails, State must act under state law. **See the right side of the diagram.**

Legal Basis for the State Order: State Statute

Key Legal Features of this Path

1. Seller can be QF or non-QF.
2. Seller of power will become a “public utility” under FPA (unless in AK, HI, or most of TX). Seller must prove its price satisfies FPA’s “just and reasonable” standard. **(QFs \leq 20 MW are exempt from this standard. But see Caution-2* below).**
3. State must order utility to *offer to buy* at the state-set price, subject to FERC approval (authors’ view; no FERC precedent). Under FERC’s *CL&P* case, state cannot *command utility to buy* at the state-set price.

To meet FPA’s just and reasonable standard, seller has two options

Cost Basis

FERC undertakes price-cost review, *contract-by-contract*. FERC approves the contract if the price recovers no more than prudent costs plus a reasonable return on equity.

Market Basis

FERC market power review, *seller-by-seller*. Seller submits technical study every three years. If FERC finds no seller “market power,” FERC grants seller *blanket approval* to enter contracts at will, at any price.”

Question: Instead of contract-by-contract and seller-by-seller reviews, can/will FERC create safe harbors for sellers’ prices?

What if the “just and reasonable” price provides insufficient revenue to generators?

If state-desired price exceeds the FPA’s “just and reasonable” price, the state can provide supplemental payments, as it can under PURPA. (Authors’ view; no FERC precedent.) *See second box, left-hand side.*

Caution

Until FERC modifies or clarifies its *CL&P* precedent,

1. avoided cost cap appears to apply to QFs and non-QFs; **but**
2. *it is especially unclear whether **QFs \leq 20 MW and below**, selling under a state law mandate, are capped at avoided cost. If they are not capped, then there is a **second clear path for FiTs: QFs sized 20 MW and below, selling under a state law mandate, would be free of both PURPA** (because they sell under state mandate, outside PURPA) **and the FPA** (because FERC exempted them).