



## **State-Level Feed-In Tariffs for Renewable Energy: Comments on FERC's California Decision<sup>1</sup>**

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### **I. Legal Background**

- A. A feed-in tariff envisions a wholesale transaction: sales from a renewable producer to the utility.
- B. A wholesale sale of electricity triggers one of two federal statutes: the Public Utility Regulatory Policies Act of 1978 (PURPA) or the Federal Power Act of 1935.
- C. Both federal statutes have preemptive features.
  - 1. The Federal Power Act preempts states from setting a wholesale price. Only FERC can set wholesale prices.
  - 2. PURPA requires states to set the wholesale price, for "qualifying facilities." But PURPA it preempts state-set prices that exceed the utility's "avoided cost."
- D. States designing feed-in tariffs must steer around these two preemptive statutes.

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<sup>1</sup> *California Public Utilities Commission, et al.*, Docket Nos. ER 10-64-000 and EL 10-66-000, Order on Petitions for Declaratory Order (July 15, 2010).

## II. What did California do?

- A. The California statute requires utilities to file tariffs that offer to purchase, for ten years, at a price set by the California Commission, electricity that is generated by certain CHP generators and delivered to the grid.
- B. Eligible generators must have a generating capacity 20 MW or less, and must meet certain efficiency and emissions standards.
- C. According to FERC, the California Commission did not treat its purchase mandate as a PURPA mandate. See FERC Order para. 65 ("the CPUC has not argued that its AB 1613 program is an implementation of PURPA").

## III. What did FERC say?

- A. When a state requires the utility to offer to buy at a state-set wholesale price, the state is setting a wholesale price.
- B. Because the Federal Power Act preempts states from setting a wholesale price, and because the California Commission set a wholesale price, the California Commission is preempted.
- C. FERC reiterated its prior findings, in *Connecticut Light and Power* and *Midwest Power*, that a state requirement that the utility purchase from a QF at a state-set price not only is preempted by the FPA; it necessarily triggers PURPA's avoided cost cap.<sup>2</sup>
- D. A state can order feed-in tariffs, but they have to comply with PURPA: by setting a price that does not exceed the buying utility's avoided cost.
- E. If a seller is not a QF, the state can order the utility to purchase, but the state cannot set the offer price. Rather, the generator has to seek FERC approval of the rates it proposes to charge.

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<sup>2</sup> *Connecticut Light and Power Co.*, 70 FERC para. 61,012, *reconsideration denied*, 71 FERC para. 61,035 (1995), *appeal dismissed*, *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485 (1997); *Midwest Power Systems, Inc.*, 78 FERC para. 61,067 (1997).

#### IV. Problems with the FERC decision

- A. A state mandate to the utility, to offer to buy at a state-set wholesale price, is not synonymous with setting a wholesale price.
  - 1. There is no legal setting of a wholesale price until FERC approves the price. An utility's offer to buy at a price does not become a binding wholesale price until the seller accepts the offer and obtains FERC approval.
  - 2. So the state mandate does not produce a wholesale price; it merely starts a process that results in a wholesale price only when FERC approves that price.
- B. The effect of FERC's decision is to confine the state to the PURPA path. Doing so limits, and in some cases eliminates, states' options. Three reasons:
  - 1. The universe of technologies and sizes is limited under PURPA.
  - 2. A utility's avoided cost is different from the compensation necessary to attract particular types of renewable providers. They are two different concepts: utility cost vs renewable provider's cost. The utility's avoided cost can easily be lower than the renewable provider's cost, leaving the renewable provider with insufficient compensation.
  - 3. [This is a big one] The 2005 Energy Policy Act narrowed PURPA. A utility can obtain exemption from the PURPA purchase obligation by showing FERC that QFs in its territory have access to a competitive market. Many utilities in the RTO regions have obtained this exemption. In this areas, the FERC decision leaves the state with no options for mandating a utility purchase at a state-set price.
- C. I believe FERC was wrong in *Connecticut Light and Power* and *Midwest Power Systems*. When the source of the utility's obligation to purchase is state law, not PURPA, there is no triggering of PURPA. If the source of the mandate is state law, then any utility payment above avoided cost is not attributable to PURPA. If the payment is not attributable to PURPA, it cannot violate PURPA.
- D. FERC did not discuss other ways to achieve states' goals, such as creating safe harbors for above-avoided-cost pricing under the FPA.

## V. On the bright side

- A. FERC's footnote 93 is an invitation to discuss a Federal Power Act path: "[93] If the CPUC believes that it needs additional guidance on how CHP generators may establish rates that are just, reasonable and not unduly discriminatory or preferential, it may file a petition for declaratory order seeking guidance."
- B. There are multiple ways to for FERC and states to cooperate in establishing principles and processes for establishing feed-in tariffs consistent with the federal law restrictions. See the table from the NRRI-NREL paper.<sup>3</sup> Each "current law" path falls into one of three categories, involving varying levels of certainty and effort:
  - 1. Paths that are available now, with no further action necessary by FERC.
  - 2. Paths that would become available if FERC clarified or modified its precedents.
  - 3. Paths that would become available if FERC issued new rules, declaratory orders or both, to create safe harbors, rebuttable presumptions, or other guidance that rendered state-set tariff prices lawful under the FPA.

Additional paths are possible if Congress amends PURPA or the FPA to remove or reduce existing statutory constraints.

- C. A productive next step would be for FERC to initiate an inquiry to explore those options.

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<sup>3</sup> Hempling, Elefant, Corey and Porter, *Renewable Energy Prices in State-Level Feed-in Tariffs: Federal Law Constraints and Possible Solutions* (Natl Renewable Energy Lab Technical Report NREL/TP-6A2-47408 (January 2010)).