

*BEAR GULCH SOLAR, LLC V. MONTANA PUBLIC SERVICE  
COMMISSION: STATE COMMISSIONS AND THE  
FUTURE OF THE PURPA MANDATORY  
PURCHASE REQUIREMENT*

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INTRODUCTION

Over the last ten years, the once-dormant Public Utility Regulatory Policies Act of 1978<sup>1</sup> (“PURPA”) has taken on new life. Enacted in part to incentivize renewable energy development, PURPA created the first and only federal requirement for public utilities to purchase renewable energy and capacity. Recently, state-level implementations of PURPA have come under increased scrutiny as more and more facilities attempt to invoke the Act to secure purchase agreements with utilities. Calls for PURPA reform have even drawn the attention of several members of Congress.<sup>2</sup>

Section 210 of PURPA imposes a mandatory purchase requirement on publicly regulated utilities.<sup>3</sup> These utilities must purchase electric energy from “qualifying facilities” (“QFs”) at the utility’s avoided cost of constructing new fossil fuel capacity.<sup>4</sup> A QF is any small power production facility “of 80 MW [megawatt] or less whose primary energy source is renewable (hydro, wind or solar), biomass, waste, or geothermal resources.”<sup>5</sup> Put another way, the mandatory purchase requirement is a legally enforceable mechanism to drive investment in renewable energy.

Until recently, many renewable energy producers could not afford to provide capacity at or below a utility’s avoided cost of building new fossil fuel

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1. Pub. L. No. 95-617, 92 Stat. 3117 (Nov. 9, 1978) (codified in scattered sections of 15, 16, 42, and 43 U.S.C.).
  2. Bills intended to reform PURPA were introduced in 2019 in the U.S. House of Representatives by Rep. Tim Walberg of Michigan, PURPA Modernization Act, H.R. 1502, 116th Cong. (2019), and in the Senate by Sen. John Barrasso of Wyoming, UPDATE PURPA Act, S. 1760, 116th Cong. (2019). For a discussion of the history and legacy of PURPA, see CleanLaw, *Phil Sharp and Ari Peskoe Celebrate PURPA’s 40th Birthday*, HARVARD ENVTL. & ENERGY LAW PROGRAM (Nov. 15, 2018), <https://perma.cc/ZP87-VC79>.
  3. 16 U.S.C. § 824a-3(a)(2) (2018).
  4. *Id.*
  5. *What Is a Qualifying Facility?*, FERC, <https://perma.cc/9EB2-X9X3>; see also 18 C.F.R. § 292.204 (2019). Some cogeneration facilities are also eligible for QF status under PURPA. See 18 C.F.R. §§ 292.203(b), 292.305 (2019). Cogeneration facilities are facilities that produce both electric energy and thermal energy (such as heat or steam) in a manner that is more efficient than producing each type of energy separately. See PURPA, Pub. L. No. 95-617, § 201, 92 Stat. 3117, 3134 (Nov. 9, 1978) (codified at 16 U.S.C. § 796(18)(A)) (defining a cogeneration facility); *What Is a Qualifying Facility?*, FERC, <https://perma.cc/Z63J-GTA6> (further clarifying the definition). A full discussion of such facilities falls outside the scope of this Comment.

capacity.<sup>6</sup> As a result, few generators attempted to invoke the mandatory purchase requirement, and PURPA remained underutilized in many states.<sup>7</sup> However, with decreases in the cost and increases in the efficiency of renewable energy production, an increasing number of QFs are requesting to enter into purchase agreements with utilities under Section 210. Technological developments in utility-level solar and wind capacity have resulted in a new period in energy pricing, “the coal cost crossover.”<sup>8</sup> In 2019, the combined cost of operating and maintaining existing coal plants surpassed the cost of building and operating new renewable energy facilities.<sup>9</sup> The “crossover” means nearly all QFs should be able to sell energy at or below their public utility’s avoided cost rate in the very near future, enabling them to take advantage of Section 210. As a result, utilities in many states are struggling to provide purchase agreements to all QFs who have met the Section 210 standard and have opted to “provide energy or capacity pursuant to a legally enforceable obligation”<sup>10</sup> (“LEO”) as implemented in their state. Those QF producers left without contracts have petitioned state public utilities commissions (“PUCs”) across the country to enforce PURPA and have appealed PUC decisions to FERC for review.<sup>11</sup>

In addition to pressure from QF producers, utilities are also experiencing pressure from many state governments to move to higher percentages of renewable energy.<sup>12</sup> Congress provided a mechanism for PURPA to have a role in the transition to a more diversified energy supply by including provisions for the interconnection and purchase of energy from non-utility generators.<sup>13</sup> The ongoing deregulation of the electric energy industry and rise of regional trans-

6. Nichola Groom, *Decades-Old Green Power Law Is a Fresh Nuisance to U.S. Utilities*, REUTERS (Mar. 29, 2017), <https://perma.cc/39ZG-YQGS>.
7. See Manussawee Sukunta, *PURPA—Qualifying Capacity Increases but It’s Still a Small Portion of Added Renewables*, U.S. ENERGY INFO. ADMIN.: TODAY IN ENERGY (Aug. 16, 2018), <https://perma.cc/QTX9-TTPP> (“Between 2008 and 2017, more than 103 gigawatts (GW) of renewable generating capacity entered service in the United States, of which only 14 GW is certified to have qualifying facility small power producer status under [PURPA]. . . . In recent years, the installation of qualifying facilities has increased, mainly as a result of solar PV [photovoltaics]. The capital costs of solar PV have dropped to less than the utilities’ avoided cost, making the technology cost competitive.”).
8. ERIC GIMON ET AL., ENERGY INNOVATION, POLICY, & TECH. LLC, *THE COAL COST CROSSOVER: ECONOMIC VIABILITY OF EXISTING COAL COMPARED TO NEW LOCAL WIND AND SOLAR RESOURCES 2* (2019), <https://perma.cc/W2E3-H7R2>.
9. *Id.*
10. 18 C.F.R. § 292.304.
11. See, e.g., Gavin Bade, *States, Greens Face Off over PURPA Implementation at FERC*, UTIL. DIVE (Oct. 24, 2019), <https://perma.cc/EJL8-KEK7>.
12. See Megan Cleveland, *States’ Increasing Renewable Energy Ambitions*, 27 NAT’L CONF. OF STATE LEGISLATURES 5 (2019), <https://perma.cc/W36S-K9JM> (“At least four states have increased their RPS requirements in the past two years, and seven states and Washington, D.C., have targets of 50 percent or greater.”).
13. Pub. L. No. 95-617, § 2, 92 Stat. 3117, 3119 (codified at 16 U.S.C. § 2601).

mission organizations (“RTOs”) and independent system operators (“ISOs”) that lie outside PURPA’s jurisdiction have thrown the future relevance of the Act into question. Currently, the fate of PURPA is being determined in disputes about issues such as the calculation of avoided cost rates, determination of the LEO standard, and adjudication of competing claims between utilities and producers in front of state commissions and state and federal courts around the country.<sup>14</sup>

*Bear Gulch Solar, LLC v. Montana Public Service Commission*<sup>15</sup> is the latest in a line of cases challenging the legality of PURPA LEO standards set by state PUCs. The LEO standard outlines the criteria a QF must establish before a utility is obligated to purchase their energy and capacity. The standards are either codified in state regulations or established by previous PUC decisions.<sup>16</sup> LEOs that remain stable over time enable potential renewable power generators to create viable business plans and enter the market.

*Bear Gulch* addresses a stark disconnect between Montana’s LEO standard and the federal requirements under PURPA. The case demonstrates how uncertainty in the regulatory environment can frustrate Congress’s intent in passing Section 210 of PURPA: to encourage renewable energy production by stabilizing entry costs and overcoming utility reluctance.<sup>17</sup> This Comment uses *Bear Gulch* to explore emerging trends in PUC regulation and implementation of PURPA, arguing that the Ninth Circuit decision to moot the proceeding prioritizes commissioner preferences over congressional intent and the interests of renewable energy producers, allowing state commissions to frustrate PURPA’s purpose with impunity.

Part I of the Comment explores the history of PURPA QFs and the process for establishing a mandatory purchase agreement, outlining the current regulatory environment around the country. Part II examines *Bear Gulch*, show-

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14. See, e.g., *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861, 862–63 (9th Cir. 2019); *Lawrenceburg Power, LLC v. Lawrenceburg Mun. Utils.*, No. 4:18-cv-00232-TWP-DML, 2019 WL 4749968, at \*6–8, (S.D. Ind. Sept. 30, 2019); *sPower Dev. Co., LLC v. Colo. Pub. Utils. Comm’n*, No. 17-cv-00683-CMA-NYW, 2019 WL 3230988, at \*1–2 (D. Colo. July 18, 2019); *Great Divide Wind Farm 2 LLC v. Becenti Aguilar*, No. CIV 19-0099 JB/CG, 2019 WL 2144829, at \*1–4 (D.N.M. May 16, 2019); *Monticello Wind Farm, LLC v. Pub. Serv. Comm’n of Utah*, 449 P.3d 128, 131 (Utah 2019).
  15. 775 F. App’x 295 (9th Cir. 2019).
  16. See 16 U.S.C. § 824a-3(f)(1), (2) (2018) (states must implement rules or decisions that comply with FERC regulations); 18 C.F.R. § 292.304(d) (2019) (FERC regulation defining the LEO); *Power Res. Grp., Inc. v. Pub. Util. Comm’n of Tex.*, 422 F.3d 231, 238 (5th Cir. 2005) (“This requirement is FERC’s response to the reluctance of traditional electric utilities to purchase power from nontraditional electric generation facilities, a problem identified by Congress which could hinder the development of such nontraditional facilities.”).
  17. *Bear Gulch Solar, LLC v. Mont. Pub. Serv. Comm’n*, 356 F. Supp. 3d 1041, 1050–51 (D. Mont. 2018) (quoting *Indep. Energy Producers Ass’n v. Cal. Pub. Utils. Comm’n*, 36 F.3d 848, 850 (9th Cir. 1994)), *aff’d in part and rev’d in part*, 775 F. App’x 295 (9th Cir. 2019).

ing how the challenge to Montana's LEO standard proceeded through the PURPA appeal system. Part III discusses whether the Ninth Circuit missed an opportunity to clarify state obligations to comply with the federal PURPA mandate, and instead has expanded state power to allow PUCs to move the goalposts at will through rulemakings. The outcome of *Bear Gulch* is disjointed in that it implicitly accepts that new QFs should plan, raise capital, and execute power purchase agreements under PURPA without any assurance that the regulatory environment they rely on will not change suddenly, allowing PUCs to effectively control renewable development under PURPA in their states.

## I. HISTORY OF PURPA AND STATE IMPLEMENTATION

PURPA is a directive from Congress. It is the only federal law that mandates the purchase of renewable energy by utilities and authorizes FERC to make rules outlining the acceptable parameters for its implementation. States are then responsible for making specific regulations implementing the law. As is explained below, this three-tiered structure has led to a diverse set of implementations at the state level. QFs and utilities have the opportunity to challenge these specific implementations at all three levels of organization; they can petition the state PUC for enforcement, object to the validity of the enforcement decision, or make a facial challenge to the state regulation at FERC, and then proceed to state or federal court for review or enforcement of FERC's findings.

Most disputes arise when utilities refuse to execute all or part of a contract, or "power purchase agreement" ("PPA"), with a QF. In *Bear Gulch*, a group of QFs challenged Montana's LEO standard in the wake of the PUC's decision to lower the rate the QFs would receive for their electricity. The utility, North-Western, attempted to execute PPAs with the QFs under the lower rate, despite the fact that the PPAs were signed before the Montana Commission changed the rates.

The unexpected regulatory shift at issue in *Bear Gulch* illustrates the tension between state implementation and congressional intent and is a clear example of the harmful consequences state commission decisions can have on renewable development under PURPA. To show why such shifts undermine PURPA, this Part will outline the history of the legislation, the relationship between FERC and the state PUCs, and the importance of the LEO for increasing the number of renewable energy QFs.

*A. Introducing PURPA: The Federal Architecture*

PURPA was signed into law by President Jimmy Carter as part of the National Energy Act of 1978<sup>18</sup> (“NEA”) which, in response to the 1973 energy crisis, introduced reforms attempting to stabilize and reshape the supply and demand sides of the energy economy. As the component of the NEA focused on regulating utilities, PURPA established five major goals for the new regulatory regime:

- Increase conservation of electric energy, efficiency of facilities and resources, and provide equitable retail rates to consumers;
- Improve the wholesale distribution and reliability of electric energy, including by increasing the role of FERC;
- Encourage the development of hydroelectric power (and other sources of renewable energy);
- Conserve and reduce demand for natural gas; and
- Encourage the development of crude oil transportation systems.<sup>19</sup>

Section 210 of PURPA aims to further these goals by increasing the number of producers supplying alternative or renewable energy to the grid, thereby decreasing American dependence on foreign oil and natural gas through diversification.<sup>20</sup> It mandates publicly regulated utilities to purchase energy and capacity from statutorily defined QFs, comprising alternative energy producers at cogeneration and small power production facilities.<sup>21</sup>

QFs are further defined in FERC’s official regulations.<sup>22</sup> FERC initially interpreted PURPA through a set of regulations aimed at clarifying the legislation while leaving significant discretion to the states to implement them.<sup>23</sup> FERC mandates that a standard rate be set for QFs with capacity under 100

18. The National Energy Act of 1978 was a compendium of statutes, consisting of PURPA, Pub. L. No. 95-617, 92 Stat. 3117 (Nov. 9, 1978); the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 (Nov. 9, 1978); the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (Nov. 9, 1978); the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (Nov. 9, 1978); and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (Nov. 9, 1978).

19. See 16 U.S.C. § 2601.

20. Peter Maloney, *PURPA’s Puzzle: FERC Workshop Revisits 1978 Law, Embattled as Ever*, UTIL. DIVE (July 28, 2016), <https://perma.cc/9V3W-JJ3N> (“PURPA was passed during the oil crises of the 1970s and was originally intended to spur the development of small renewable power plants and cogeneration plants—now known as combined heat and power (CHP).”).

21. PURPA § 210, 16 U.S.C. § 824a-3; *id.* § 201, 16 U.S.C. § 796.

22. 18 C.F.R. § 292.204.

23. Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA, 45 Fed. Reg. 12,214, 12,215 (Feb. 25, 1980) (codified at 18 C.F.R. pt. 292).

kilowatts (“kW”) since these small projects are rarely viable options for competitive commercial production.<sup>24</sup> The FERC regulations allow states, utilities, and QFs to choose between several options for implementation. Specific standards and implementation are delegated to the state regulatory authorities with oversight by FERC,<sup>25</sup> with only loose guidelines for calculating avoided costs, establishing a LEO for utilities to purchase energy, and certifying QFs.<sup>26</sup> Non-regulated utilities apply their own procedures in compliance with FERC rules.<sup>27</sup>

### B. *Introducing PURPA: State Implementation*

A state regulatory authority is any state agency that has “ratemaking authority for the sale of electric energy by any electric utility.”<sup>28</sup> Generally, this agency is a PUC, which regulates public utility companies providing energy, transportation, water, and telecommunications services in the state.<sup>29</sup>

PURPA was intended to disrupt the traditional model of vertically integrated monopoly utilities, creating benefits for ratepayers by encouraging competition in generation while ensuring that QFs receive fair rates.<sup>30</sup> As with most rate-making legislation, rates charged to QFs must be “just and reasonable . . . and in the public interest.”<sup>31</sup> With the proliferation of renewable technology at scale, QF producers can finally afford to operate at or below the utility’s avoided cost. Specific regulatory regimes at the state level have had a significant impact on the number of PURPA QFs by providing a framework for when a utility incurs a LEO to purchase energy and how the utility’s avoided cost is calculated.

PUCs are charged with devising rules and policies within the parameters set by FERC and PURPA but are given control over interconnection processes and rate determinations. Section 210’s commission enforcement provision gave

24. 18 C.F.R. § 292.304.

25. *See, e.g.*, *FERC v. Mississippi*, 456 U.S. 742, 746–50 (1982) (describing the respective roles of states and the Secretary of Energy in the administration and implementation of PURPA).

26. *See generally* 18 C.F.R. §§ 292.301–314.

27. *See* ROBERT E. BURNS & KENNETH ROSE, *PURPA TITLE II COMPLIANCE MANUAL 11* (2014), <https://perma.cc/D6MU-WM8A> (“[N]on-regulated utilities have authority under PURPA to implement section 210 consistent with FERC’s regulations.”).

28. 16 U.S.C. § 2602(17) (2018).

29. The state commissions are charged with implementing state and federal laws regulating utilities, as well as ensuring reliable service to consumers at just and equitable rates. *See, e.g.*, *Introduction*, HAW. PUB. UTILS. COMM’N, <https://perma.cc/YD4V-YK6W>.

30. *See* Jonas J. Monast, *Electricity Competition and the Public Good: Rethinking Markets and Monopolies*, 90 U. COLO. L. REV. 667, 676–77 (2019) (discussing how PURPA “was an initial step toward utilizing competition to transform the electricity sector in socially beneficial ways”).

31. 16 U.S.C. § 824a-3(b).

the PUCs enforcement authority over the mandatory purchase requirement,<sup>32</sup> and its review provision granted QFs the ability to seek administrative review of state decisions at FERC and judicial review in federal court.<sup>33</sup>

Most states have developed policies for the determination of Section 210 avoided cost rates, and all states are required to set standard tariff rates for QFs with capacity below 100 kW.<sup>34</sup> FERC regulations allow states to determine frameworks for approving a utility's avoided cost estimate, which in turn determines rates. These avoided cost determinations can be made by the PUC directly or by the utility subject to approval by the PUC.<sup>35</sup> FERC has provided clarification about avoided cost rates with respect to "energy costs" and "capacity costs."<sup>36</sup> These regulations define avoided cost as "the cost that the purchasing utility can avoid as a result of obtaining energy and capacity from these sources, rather than generating an equivalent amount of energy itself or purchasing the energy or capacity from other suppliers."<sup>37</sup> Beyond that guidance, avoided cost rate determinations are heavily influenced by individual PUC estimates and modeling procedures. Potential QFs generally evaluate their business prospects using the published rates in their area.

Since the initial avoided cost regulations were promulgated, FERC has outlined several new concerns beyond cost that should be considered in rate calculations.<sup>38</sup> Currently, these standards include a provision for environmental costs that would have been incurred by the utility purchasing fossil fuel capacity.<sup>39</sup> Most states appear to have implemented a least-cost-to-consumers approach that complies with FERC regulations in which QF capacity must come in at or below the current wholesale cost to consumers, not the utility's discounted procurement cost.<sup>40</sup>

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32. *Id.* § 824a-3(h).

33. *Id.* § 824a-3(g).

34. 18 C.F.R. § 292.304(c)(1) ("There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.").

35. *See, e.g.*, Ala. Power Co., No. U-5213, 2018 WL 1316462 (Ala. Pub. Serv. Comm'n Mar. 6, 2018) (approving avoided cost rates proposed by the utility, Alabama Power, for 2018).

36. Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA, 45 Fed. Reg. 12,214, 12,225 (Feb. 25, 1980) (codified at 18 C.F.R. pt. 292) (discussing "cost" factors in setting rates).

37. *Id.* at 12,215. PURPA does not actually use the term "avoided costs" in the statute; FERC adopted that term to clarify the statutory phrase "incremental cost of alternative electric energy." *See* BURNS & ROSE, *supra* note 27, at 33.

38. 18 C.F.R. § 292.304(e).

39. *See* Cal. Pub. Utils. Comm'n, 133 FERC ¶ 61,059, 61,268 (Oct. 21, 2010) (citing S. Cal. Edison Co., 71 FERC ¶ 61,269, 62,080 (June 2, 1995)).

40. *See* ROBERT E. BURNS & KENNETH ROSE, NAT'L ASS'N OF REGULATORY UTIL. COMM'RS, PURPA TITLE II COMPLIANCE MANUAL 33 (2014), <https://perma.cc/QZJ4-5U56>.

State implementations have had varied results. The Supreme Court ruled in *FERC v. Mississippi*<sup>41</sup> that it was acceptable for states to implement PURPA through case-by-case basis adjudication rather than the adoption of regulations.<sup>42</sup> Thus, state regulatory models are characterized by ad hoc dispute resolution of claims,<sup>43</sup> competitive solicitation with request-for-proposal-style bidding, and residual discretion for FERC in unregulated areas with RTOs or ISOs.

*C. Defining the Mandate: The Legally Enforceable Obligation (“LEO”)*

Like rate-setting for avoided cost, states have implemented a variety of standards for determining when a utility incurs a legal obligation to purchase energy from a QF. As discussed above, Section 210 creates a mandatory purchase obligation for publicly regulated utilities to buy energy and capacity from QFs.<sup>44</sup> The requirement is a tool to increase QF access to the market. The LEO is the driving force in the proliferation of PURPA QFs and has been a source of litigation in recent years as utilities have attempted to avoid entering PPAs with QFs. The text of the provision reads:

[FERC] shall prescribe . . . such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to—

- (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and
- (2) purchase electric energy from such facilities.<sup>45</sup>

FERC’s regulations also state that QFs have the opportunity to enter into a PPA with a utility under either a “legally enforceable obligation” or an “as avail-

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41. 456 U.S. 742 (1982).

42. *Id.* at 751.

43. Examples of states that have adopted this approach to dispute resolution and rate evaluation in their regulatory framework include Alabama, ALA. CODE § 37-12-3 (2019), Hawaii, HAW. CODE R. § 6-74-3 (2019), and Virginia, 20 VA. ADMIN. CODE § 5-300-30 (2019).

44. 16 U.S.C. § 824a-3(a) (2018).

45. *Id.* FERC’s promulgated rules state that “[e]ach electric utility shall purchase . . . any energy and capacity which is made available from a qualifying facility.” 18 C.F.R. § 292.303(a) (2019). Furthermore, “[t]he Commission interprets this provision to impose on electric utilities an obligation to purchase all electric energy and capacity made available from qualifying facilities with which the electric utility is directly or indirectly interconnected, except during periods described in § 292.304(f) or during system emergencies.” Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA, 45 Fed. Reg. 12,214, 12,219 (Feb. 25, 1980) (codified at 18 C.F.R. pt. 292).



able” arrangement.<sup>46</sup> The FERC regulation does not define the term “legally enforceable obligation,” leaving the decision about how an obligation is formed and when it can be enforced against a utility up to individual states.<sup>47</sup> Several different state approaches to determining the existence of a LEO are discussed below.

Providing a guaranteed market for QF electricity is how Section 210 encouraged development in the otherwise cost-prohibitive renewable energy market. Despite the lack of viable alternative energy projects that existed when PURPA was passed, Section 210 allowed some QFs to enter into long-term contracts with traditional energy producers. In North Carolina and California, aggressive PURPA implementation through state rulemakings and competitive solicitation procedures has helped increase the viability of renewables by ensuring long-term, stable rates for generation.<sup>48</sup> States with less robust implementation strategies, or shorter-term contracts, have seen less growth.<sup>49</sup>

North Carolina had more PURPA solar QFs than any other state in 2016.<sup>50</sup> Unlike some other states, it does not actively manage the solicitation process for large QFs.<sup>51</sup> However, by calculating avoided cost to produce high rates for QFs, and working with the primary utility, Duke Energy, to plan for future PURPA capacity, North Carolina has managed to increase the number of PURPA QFs faster than almost any other state, making it “one of the leaders in renewable purchases.”<sup>52</sup> The approach has allowed North Carolina’s

46. 18 C.F.R. § 292.304(d).

47. *See* Metro Edison Co., 72 FERC ¶ 61,015, 61,050, 1995 WL 397198 (July 6, 1995) (“It is up to the States, not [FERC], to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.”).

48. North Carolina and California have the highest percentages of PURPA qualifying facility production in the country. *Form ELA-860 Detailed Data with Previous Form Data (ELA-860A/860B)*, U.S. ENERGY INFO. ADMIN. (2018), <https://perma.cc/E5G3-PX66>. Both states also have robust regulatory frameworks in place for implementing PURPA. *See* 4 N.C. ADMIN. CODE 11.R8-64 (2019); CAL. CODE REGS. tit. 18, § 905 (2019).

49. When the Annual Electric Generator Report data is sorted for PURPA qualifying facilities, certain states, like Louisiana and Alabama, which have limited PURPA regulations, also have very few QFs. *See* U.S. ENERGY INFO. ADMIN., *supra* note 48.

50. Manussawee Sukunta, *North Carolina Has More PURPA-Qualifying Solar Facilities than Any Other State*, TODAY IN ENERGY, U.S. ENERGY INFO. ADMIN. (Aug. 23, 2016), <https://perma.cc/222H-M8LT>.

51. Some states have competitive solicitation guidelines for QFs that incorporate their bids into a larger renewable energy planning process. *See, e.g.*, GA. COMP. R. & REGS. 515-3-4-.04(3)(e)(1) (2019); WASH. ADMIN. CODE § 480-106-020 (2019).

52. VICTOR B. FLATT, SETH YEAZAL & MILES WOBBLETON, UNIV. OF N.C. CTR. FOR CLIMATE, ENERGY, ENV'T & ECON., FEDERAL PARAMETERS ON THE DEFINITION OF AVOIDED COST UNDER PURPA AND LEGAL METHODS CURRENTLY USED AND ACCEPTABLE UNDER PURPA APPLICATION FOR STATES TO ENCOURAGE OR DISCOURAGE DISTRIBUTED GENERATION 11 (2017).

Commission to add elements to the utility's competitive solicitation process that reflect state priorities while continuing to provide avenues for new QFs to enter the market.<sup>53</sup>

PURPA-compliant implementations provide guidance for dispute resolution between utilities and QFs, setting or approving avoided cost rates and validating PPAs. Competitive solicitation procedures with significant PUC involvement are less common, but can be found in states like Colorado.<sup>54</sup> States in RTOs often have less-developed PURPA regulations because their utilities are exempted from Section 210, as discussed below.

*D. Amending the Mandatory Purchase Requirement:  
The Energy Policy Act of 2005*

In 2005, Congress amended PURPA, allowing utilities to request a waiver of their mandatory purchase obligations in areas where QFs have competitive access to markets for their energy and capacity.<sup>55</sup> The amendment, which added Section 210(m) to PURPA, listed three categories of competitive markets that would be acceptable alternatives to PUC enforcement.<sup>56</sup> Unlike standard PURPA-regulated utility companies, utilities in these regional competitive markets cannot incur a LEO, meaning they are not bound by the purchase requirements of PURPA.<sup>57</sup>

53. Changes in 2017 limited the number of North Carolina PURPA facilities that can earn long-term contracts. Long-term contracts for qualifying facilities below one megawatt ("MW") are limited to ten years instead of fifteen, and only facilities below 1 MW, instead of 5 MW, can access standard rates. All facilities above the 1 MW threshold need to negotiate with the utility to reach an agreement through a competitive bilateral negotiation process instead of the standard offer, and their contracts are limited as well. N.C. GEN. STAT. § 62-156 (2019); *see also* Biennial Determination of Rates for Purchases from QFs, N.C. Utils. Comm'n, No. E-100, Sub. 148, at 34–38 (Oct. 11, 2017), <https://perma.cc/U6BH-DUD2>.
54. *See, e.g.*, *sPower Dev. Co., LLC v. Colo. Pub. Utils. Comm'n*, No. 17-cv-00683-CMA-NYW, 2019 WL 3230988 (D. Colo. July 18, 2019).
55. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1253(a), 119 Stat. 594, 967 (codified at 16 U.S.C. § 824a-3(m) (2018)).
56. Section 210(m)(1) lists three types of competitive markets, two of which describe existing RTO and ISO structures in the United States. The third leaves an option open for any other market structure that did not exist at the time. *Id.* § 834a-3(m)(1).
57. When it was issued, Order 688 listed the markets that either already qualified as competitive markets within the meaning of FERC standards for exemption from the mandatory purchase agreement under Section 210(m), or were in the process of redesigning their market structure to become competitive markets. The listed markets were: California Independent System Operator ("CAISO"), Electric Reliability Council of Texas ("ERCOT"), ISO New England, Inc. ("ISO-NE"), Midwest Independent Transmission System Operator ("MISO"), New York Independent System Operator ("NYISO"), PJM Interconnection, LLC ("PJM"), and Southwest Power Pool, Inc. ("SPP"). FERC Order No. 688, 71 Fed. Reg. 64,341, 64,343–44 (Nov. 1, 2006) (codified at 18 C.F.R. pt. 292).

In 2005, FERC Order 688 determined that QFs of 20 MW capacity or less (“20MW-and-smaller QFs”) are at risk of remaining uncompetitive in these larger wholesale markets.<sup>58</sup> Despite Order 688 and other subsequent orders from FERC, many states have not implemented new requirements to ensure that such QFs retain access to the market. Colorado, Georgia, and Michigan have issued guidance for determining when a LEO is incurred for 20 MW-and-smaller QFs, while many other states have retained the original 100 kW to 80 MW structure.<sup>59</sup>

There are three main approaches to determining the LEO standard that have been recently challenged in court:

*The Firm Power Approach.* States that use a “firm power” requirement for establishing a LEO require QFs to produce power at all times, including under adverse conditions such as when the sun is down or winds are calm. Traditional sources of energy are considered more “firm” than non-traditional sources and are considered less risky than sources with modulating output.<sup>60</sup>

Texas is one example of a state with a firm power LEO standard.<sup>61</sup> FERC determined that Texas’s firm power standard was non-compliant with PURPA in 2009.<sup>62</sup> In *JD Wind*, FERC found that the Texas rule would exclude major sources of renewable energy including wind and solar from ever generating a LEO because of the inconstant nature of generation.<sup>63</sup> FERC also found that PURPA treats such renewable sources as desirable alternatives to traditional electric energy production.<sup>64</sup> While FERC declined to initiate an enforcement action against the Texas PUC,<sup>65</sup> their declaratory order did explain that differences between “firm” and “non-firm” power are not relevant to QF LEO determinations.<sup>66</sup>

Despite FERC’s ruling, the Texas rule has remained in effect and was upheld by the Fifth Circuit as a valid LEO determination mechanism.<sup>67</sup> When FERC refuses to initiate an enforcement action in federal court and instead issues an administrative decision, the decision is intended by the agency to be

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58. *Id.*

59. See 4 COLO. CODE REGS. § 723-3(3611) (2019); GA. COMP. R. & REGS. 515-3-4-.04(3)(f) (2019); MICH. PUB. SERV. COMM’N, ISSUE BRIEF: PUBLIC UTILITY REGULATORY POLICIES ACT (PURPA) 1 (2019), <https://perma.cc/ER8E-JTNE>.

60. For a discussion of firm and non-firm power in the context of the renewable energy transition, see David L. Chandler, *Study: Adding Power Choices Reduces Cost and Risk of Carbon-Free Electricity*, MASS. INST. OF TECH. ENERGY INITIATIVE (Sept. 6, 2018), <https://perma.cc/P4NL-9667>.

61. 16 TEX. ADMIN. CODE § 25.242(c)(5) (2019).

62. See *JD Wind 1, LLC*, 129 FERC ¶ 61,148, para. 23, 27 (Nov. 19, 2009).

63. *Id.* at para. 26–28.

64. *Id.* at para. 5, 9–12, 14–16.

65. *Id.* at para. 1.

66. *Id.* at para. 27.

67. *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 400 (5th Cir. 2014).

purely advisory, even if it uses mandatory language.<sup>68</sup> To date, FERC has never brought an enforcement action under PURPA Section 210.<sup>69</sup>

*The Readiness Approach.* A second approach to the LEO requires QFs to have a signed contract with the utility for their agreed-upon rates or to prove that the project was “unconditional” and guaranteed to deliver power to the grid.<sup>70</sup> Under this approach, a LEO is established when a QF “cannot abandon a project without incurring a liability.”<sup>71</sup> In New Mexico, for example, a QF must interconnect and be ready to deliver energy before a LEO is established.<sup>72</sup>

*The Viability Approach.* Other states, including Oklahoma, have adopted a mixed approach measuring “viability” as a proxy for establishing a LEO.<sup>73</sup> Under this approach, a facility need not be completely interconnected for a LEO to exist so long as “meaningful progress has been made toward the project’s completion.”<sup>74</sup> Unlike the firm power and readiness approaches, the viability approach allows for a broad set of circumstances under which a LEO can be created. The viability approach leans heavily on traditional principles of contract law and ad hoc enforcement, as opposed to a robust set of regulations.

QFs that meet the requirements of the LEO standard in their state are guaranteed to have their energy purchased by a utility under PURPA and may petition their PUC to enforce that right.<sup>75</sup>

68. See *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 701 (D.C. Cir. 2017) (“[W]e are mystified by FERC’s continued use of mandatory language to resolve PURPA disputes in orders that it later insists are purely hortatory.”); *id.* at 702 (“FERC could avoid a great deal of confusion and waste of judicial resources by not using words like ‘shall’ and ‘must,’ and by making clear in its orders—as opposed to later in this court—that its discussions of PURPA-related issues are advisory only.”).
69. FERC has exclusive jurisdiction to bring an enforcement action in federal court for 60 days following the initial petition for review, after which the QF or other applying party may bring their action in district court. 18 U.S.C. § 824a-3(h)(2) (2018). To date, they have never brought such an action, instead often issuing a “Notice of Intent Not to Act and Declaratory Order,” as they did in *JD Wind*. 129 FERC ¶ 61,148, 61,148. For a more recent example, see *Great Divide Wind Farm 2 LLC*, 166 FERC ¶ 61,090 (Feb. 4, 2019).
70. See, e.g., *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm’n*, 347 P.3d 1273, 1275 (Mont. 2015).
71. *Id.*
72. See *Great Divide Wind Farm 2 LLC v. Becenti Aguilar*, No. CIV 19-0099 JB\CG, 2019 WL 2144829, at \*3 (D.N.M. May 16, 2019).
73. *Pub. Serv. Comm’n v. State ex rel. Okla. Corp. Comm’n*, 115 P.3d 861, 873 (Okla. 2005).
74. *Id.*; see also *S. River Power Partners, L.P. v. Pa. Pub. Util. Comm’n*, 696 A.2d 926, 931–32 (Pa. Commw. Ct. 1997) (holding that viability can be measured by net worth, partnership agreements, similar previous projects, creditworthiness, and other factors).
75. 16 U.S.C. §§ 824a-3(a)(2), (h) (2018); see also 18 C.F.R. § 292.304(d)(2)(i)(ii) (2019) (giving QFs the option to sell their energy output at the applicable tariff rate existing either “at the time of delivery” or “at the time the obligation is incurred”).

## II. BEAR GULCH: LITIGATING THE LEO STANDARD

*Bear Gulch* is one of the most recent cases discussing the validity of a state-defined LEO standard under PURPA. This Part gives an overview of the case, its origins in the Montana Public Service Commission (“MPSC”), and the set of appeals that led to the Ninth Circuit decision in June.<sup>76</sup>

### A. Facts of the Case

Bear Gulch Solar LLC and a group of other QFs brought suit against the MPSC following a change in PURPA tariff rates.<sup>77</sup> Each QF plaintiff in *Bear Gulch* was a solar photovoltaic facility under 3 MW in capacity in the service area of NorthWestern Energy, an MPSC-regulated utility.<sup>78</sup> From October 2015 until June 16, 2016, the avoided cost tariff rate at which Bear Gulch and other QFs could sell energy to NorthWestern averaged \$66 per megawatt-hour (“MWh”).<sup>79</sup> Relying on that rate, FLS Energy, the plaintiff’s parent company, invested about \$750,000 in new solar projects around Montana.<sup>80</sup>

On May 3, 2016, NorthWestern filed a request with the MPSC to lower the rate to \$31 per MWh.<sup>81</sup> NorthWestern assured FLS that the new rates would not go into effect for several months.<sup>82</sup> On May 17, in contravention of those assurances, NorthWestern filed a motion to suspend the tariff with the \$66 rate. FLS and NorthWestern finalized their PPA on June 2. By June 16, each QF plaintiff had executed the PPAs of June 2 and tendered them to NorthWestern. On June 16, the MPSC approved the lower rate.<sup>83</sup> The MPSC order “explicitly authorized NorthWestern to execute contracts . . . if prior to the date of this notice the QF had submitted (1) a signed power purchase agreement and (2) *executed an interconnection agreement*.”<sup>84</sup> The \$66 rate was suspended on July 25 and replaced with a \$31 rate.<sup>85</sup> The July 25 order, Order 7500, included a “safe harbor” provision that exempted from the freeze any QFs who had met the state’s LEO standard, known as the *Whitehall Wind* standard,

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76. *Bear Gulch Solar, LLC v. Mont. Pub. Serv. Comm’n*, 775 F. App’x 295 (9th Cir. 2019).

77. *Bear Gulch Solar, LLC v. Mont. Pub. Serv. Comm’n*, 356 F. Supp. 3d 1041, 1045 (D. Mont. 2018).

78. *Id.*

79. *See id.*

80. *Id.*

81. *See Application for Approval of Avoided Cost Tariff Schedule QF-1, Nw. Energy, Mont. Pub. Serv. Comm’n*, No. D2016.5.39 (May 3, 2016).

82. *Bear Gulch*, 356 F. Supp. 3d at 1046.

83. Notice of Commission Action, *Nw. Energy, Mont. Pub. Serv. Comm’n*, No. D2016.5.39 (June 16, 2016); *see also Bear Gulch*, 356 F. Supp. 3d at 1046.

84. *Bear Gulch*, 356 F. Supp. 3d at 1046 (numbering and emphasis added).

85. *Nw. Energy, Mont. Pub. Serv. Comm’n*, No. D2016.5.39, Order No. 7500 (July 25, 2016); *see also Bear Gulch*, 356 F. Supp. 3d at 1047.

prior to June 16.<sup>86</sup> None of the plaintiffs had met the standard as of June 16 since none had executed interconnection agreements.

Plaintiffs petitioned FERC for enforcement of the agreements under PURPA. FERC issued a declaratory order on December 15, 2016.<sup>87</sup> While FERC declined to bring an enforcement action, it found that the *Whitehall Wind* LEO standard was inconsistent with FERC regulations and PURPA, and therefore invalid.<sup>88</sup> On motion for reconsideration, the MPSC issued Order 7500d, which upheld the *Whitehall Wind* LEO standard despite FERC's order, "claiming the test was fair and reasonable."<sup>89</sup> Plaintiffs filed their complaint in federal court on January 12, 2018. Then, on March 6, 2018, a year and three months after the FERC declaratory order finding the *Whitehall Wind* LEO standard invalid, the MPSC initiated a rulemaking to revise the standard.<sup>90</sup>

### B. Procedural Posture

After initiating the March 2018 rulemaking, the MPSC moved to stay proceedings in federal court pending the outcome of the rulemaking and to dismiss for lack of subject matter jurisdiction.<sup>91</sup> On June 5, the District Court denied MPSC's motions.<sup>92</sup> It held that the MPSC had actively disregarded FERC's order when it issued Order 7500d by calling it "advisory only."<sup>93</sup> The motion to stay was denied because the MPSC could have begun the new rulemaking at any point following FERC's December 2016 order and, in the opinion of the court, initiated the rulemaking at least in part in response to the litigation.<sup>94</sup>

On June 26, MPSC finalized its rulemaking revising the LEO standard, which only applies prospectively,<sup>95</sup> and moved once again for summary judgment.<sup>96</sup> Plaintiffs also filed for summary judgment, arguing that MPSC's LEO

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86. See *Nw. Energy*, Order No. 7500, at para. 47 (citing *In the Matter of Whitehall Wind LLC*, Mont. Pub. Serv. Comm'n, No. D2002.8.100, Order No. 6444e (June 4, 2010)).

87. *FLS Energy, Inc.*, 157 FERC ¶ 61,211 (Dec. 15, 2016).

88. *Id.* at 5.

89. *Bear Gulch*, 356 F. Supp. 3d 1048; *Nw. Energy*, Mont. Pub. Serv. Comm'n, No. D2016.5.39, Order No. 7500d, para. 107 (Nov. 24, 2017) (denying motion for reconsideration); see also *Nw. Energy*, Order No. 7500, at para. 47, 56.

90. The adoption of New Rule I pertaining to the creation of a LEO involving QFs, New Rule II pertaining to access to avoided cost modeling data for a QF, and the amendment of ARM 38.5.1901. 5 Mont. Admin. Reg. 550 (Mar. 6, 2018) (notice of public hearing).

91. *Bear Gulch*, 356 F. Supp. 3d at 1043.

92. *Id.*

93. *Id.* at 1050.

94. *Id.* at 1043.

95. *Id.* at 1048.

96. *Id.* at 1043.

standard violated PURPA, and requesting the court to allow all QFs that qualified under the new LEO standard to sell electricity at the old, \$66 rate.

### C. District Court Opinion

Senior District Judge Charles C. Lovell delivered the district court opinion. Judge Lovell held that the court had jurisdiction to determine whether the *Whitehall Wind* LEO standard violated PURPA, and that the standard was in violation.<sup>97</sup> However, he also determined the court lacked jurisdiction to issue a permanent injunction that would have ordered the MPSC to allow plaintiffs and other similarly situated QFs who satisfied the new LEO standard to sell power under the old, \$66 avoided cost rate.<sup>98</sup>

Interestingly, with respect to whether the new rulemaking mooted the proceeding, the district court found that the MPSC was “evading review” by beginning their rule revision process concurrently with this litigation.<sup>99</sup> The evading review prong of the exception to the mootness doctrine relies on “a reasonable expectation that the plaintiffs will be subject to the challenged action again.”<sup>100</sup> Judge Lovell grounded the ongoing controversy in part of FERC Order 7500, which had declared the *Whitehall Wind* standard invalid. The opinion agreed with FERC’s declaratory order that the standard effectively put the decision to buy energy and capacity solely in the power of the utility, eliminating any ability of the QF to negotiate, and declared that the *Whitehall Wind* standard violated PURPA.<sup>101</sup> The opinion stated:

Plaintiffs’ case here, in the simplest of terms, is that they answered our nation’s call for new energy at a clearly agreed and effective compensation only to find, ultimately, after expending hundreds of thousands of dollars in performance, that the agreed upon payment had been cut in half.<sup>102</sup>

However, this proved to be a small victory for the plaintiffs, because the court also held that it was unable to grant the second part of their petition because of the nature of the relief requested. First, the court held that, due to the jurisdictional scheme laid out in PURPA, whereby state courts review as-applied challenges and federal courts review facial rule challenges, it exhausted its jurisdiction and could only entertain the facial rule challenge, not the as-applied challenge for specific enforcement of the PPAs. Judge Lovell also denied the second part of Plaintiffs’ motion on the grounds that the requested

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97. *Id.* at 1050–51.

98. *Id.* at 1052.

99. *Id.* at 1050.

100. *Id.* at 1050 (quoting *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1018 (9th Cir. 2012)).

101. *See id.* at 1051.

102. *Id.* at 1053.

relief was non-prospective in nature. Judge Lovell merely noted that Plaintiffs “may or may not be able to take this matter to a state court for relief.”<sup>103</sup>

Although the plaintiffs did not secure the relief they requested, by rejecting the mootness challenge made by NorthWestern and the MPSC, the district court opinion gave voice to the plaintiffs’ concerns over fluctuation regulatory standards and codified FERC’s interpretation of their own regulations, effectively providing a check on the MPSC’s actions moving forward by requiring compliance with the federal regulatory regime.

#### D. Circuit Court Opinion

In an unpublished opinion, the Ninth Circuit overturned the portion of Judge Lovell’s decision dealing with mootness. The panel determined that the district court erred in concluding it could reach the merits of the plaintiffs’ request for declaratory relief.<sup>104</sup> The panel found that because there was no clear intent on the part of the MPSC to reinstate the *Whitehall Wind* standard following the conclusion of litigation, the controversy had ended and the case was moot.<sup>105</sup> The mere possibility of reinstatement, they found, was not sufficient to sustain the plaintiffs’ claim. The Circuit Court declined to entertain the substantive arguments on the *Whitehall Wind* LEO’s enforceability or FERC’s enforcement powers, and declined to inquire into the reasoning behind the MPSC rulemaking as Judge Lovell had below.

### III. FUTURE OF PURPA: IMPLICATIONS OF THE LEO RULEMAKING AND MOOTNESS FINDING IN *BEAR GULCH*

By declining to engage with the timing of the regulatory changes in question (the changes in the initial tariff and the LEO standard), the Ninth Circuit missed an opportunity to explore and define the limits of PUC decision making. The opinion also failed to address the MPSC’s apparent contravention of Congressional intent by manipulating the state-level PURPA regulations to discourage QFs from entering the market or even changing standards to prevent QFs from obtaining relief through ongoing litigation. If PURPA was intended even in part to encourage and bolster renewable energy development, state PUC regulations implementing PURPA should also be consistent with that objective. Allowing PUCs to change regulations in ways that actively disfavor QFs that have attempted to enter the market under this regulatory scheme frustrates the initial purpose of PURPA. This Part examines the possible impli-

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103. *Id.*

104. *Bear Gulch Solar, LLC v. Mont. Pub. Serv. Comm’n*, 775 F. App’x 295, 296 (9th Cir. 2019)

105. *Id.*



cations of the Ninth Circuit decision for future PURPA controversies and discusses the mootness exception relied upon by the district court in more detail.

### A. MPSC and the Role of Bias in State-Level PURPA Implementation

Stability of regulation is essential to encourage renewable energy project development.<sup>106</sup> It follows that consistency of state-level regulation is also central to achieving Section 210's purpose: increasing the percentage of non-traditional energy entering the electric grid. In the wake of the *Bear Gulch* decision, despite the new LEO standard, starting a new QF in Montana appears extremely risky. How can new QFs launch their businesses using PURPA if a PUC can change the rules whenever it is convenient? So long as their regulations conform to the overall federal scheme, states have the power to implement PURPA to the extent they see fit; this flexibility is inherent in every cooperative federalist regulatory scheme in the country.<sup>107</sup> But the MPSC both ineffectively implemented PURPA and did so in a way that is chilling renewable energy development, directly conflicting with the stated goals of the federal legislation.

In April 2019, prior to the release of the Ninth Circuit decision in *Bear Gulch*, a Montana district court stated in an order that the price drop from \$66 per MWh to \$31 per MWh, along with other changes to contract length in the MPSC's Order 7500, was explicitly intended to limit and eliminate future solar development in the state.<sup>108</sup> Judge James A. Manley wrote, "[t]he Commission acted in direct contravention of [PURPA], in furtherance of a contrary purpose," namely, to "kill [solar] development entirely."<sup>109</sup> While Judge Manley's order focuses on Montana administrative law and several aspects of Section 210 beyond the LEO standard, his statements highlight some of the MPSC's internal biases and political motivations that underlay the *Bear Gulch* litigation and affected the regulatory revision process. The concern about MPSC bias against QFs is not new; back in 2017, suspicion over the motives behind Order 7500

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106. Maintaining regulatory predictability is a major factor in renewable development in the United States and countries around the world. *See, e.g.*, RICHARD BRIDLE ET AL., INT'L INST. FOR SUSTAINABLE DEV., GSO REPORT, MISSING THE 23 PER CENT TARGET: ROADBLOCKS TO THE DEVELOPMENT OF RENEWABLE ENERGY IN INDONESIA 9 (2018), <https://perma.cc/BX2X-XNDN>.

107. For an explanation of cooperative federalism and associated regulatory regimes, see John Milner, *Views from the Chair—Cooperative Federalism: What Is It—Now and in the Future?*, 49 ABA TRENDS, 21, 22 Nov. 2017.

108. *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, No. BDV-17-0776 (Mont. Dist. Ct. Apr. 2, 2019) (order vacating and modifying Montana PSC orders nos. 7500c and 7500d); *see also* Catherine Morehouse, *Montana Judge Rules PSC Intentionally Set PURPA Rates to Kill Solar Projects*, UTIL. DIVE (Apr. 8, 2019), <https://perma.cc/5LUG-ZRYA>.

109. *Vote Solar*, No. BDV-17-0776, slip op. at 2.

had led the Commission to release a “Myth vs. Fact” sheet explaining its position.<sup>110</sup>

NorthWestern, the primary electric utility in Montana, was overwhelmed by the number of QFs requesting purchase agreements, leading to the series of events that gave rise to *Bear Gulch*.<sup>111</sup> By design, PURPA left it up to the states to determine a framework for processing these requests so long as the purchase obligation was enforced.<sup>112</sup> Several states including California have successfully navigated the influx of PURPA QFs to their state utilities, changing contract lengths with sufficient notice to developers and adjusting rates to modulate QF supply while providing alternative ways for renewables to enter the market. Montana should be able to do so as well, or should allow the federal government to step in and implement PURPA as Congress intended.

### B. *Exemptions to the Mootness Doctrine Not Considered*

The doctrine of mootness is intended to prevent frivolous or unnecessary lawsuits and to prevent adjudication of matters that are no longer in dispute.<sup>113</sup> Exceptions to the mootness doctrine are intended to capture the small portion of lawmaking bodies and individuals who manage to avoid litigation by rulemaking their way out of a conflict. The “evading review” exception applied in the district court opinion in *Bear Gulch* turns on whether the action in dispute is (1) brief enough such that its duration is too short to make it to Supreme Court review, and (2) reasonably expected to happen again.<sup>114</sup> While not addressed in the *Bear Gulch* decisions, the apparent bias of state commissioners in Montana against solar QF development raises significant concerns about the future of PURPA implementation in other states. If commissioner bias can lead to regulatory change on a relatively frequent basis, QFs will be unable to rely on PURPA to enter the market.

It is possible that the Ninth Circuit missed an opportunity in *Bear Gulch* to distinguish a more nuanced exception to the mootness doctrine rather than, like the district court, asserting that the MPSC was evading review. A PURPA rule challenge inherently produces several administrative findings at the state PUC

110. Christopher Puyear, *Myth vs. Fact: Setting the Record Straight on the PSC's Solar Contract Decision*, MONT. PUB. SERV. COMM'N, <https://perma.cc/739Y-KS26>.

111. Application for Approval of Avoided Cost Tariff Schedule QF-1 at 1–2, Nw. Energy, Mont. Pub. Serv. Comm'n, No. D2016.5.39 (May 3, 2016).

112. See *FERC v. Mississippi*, 456 U.S. 742, 742–43 (1982) (“Section 210 then requires the state . . . to implement such rules, and authorizes the FERC to exempt cogeneration and small power facilities from certain state and federal regulations. . . . Insofar as § 210 authorizes the FERC to exempt qualified power facilities . . . it does nothing more than pre-empt conflicting state enactments in the traditional way.”).

113. See generally 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3533.1 (3d ed., Aug. 2019 update).

114. See *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

and then at FERC before the case ever goes to a federal court could be distinguished from a traditional facial rule challenge that starts in the District Court. Because of the timing, as Judge Lovell pointed out in the district court opinion, the motivating factor in the LEO standard rule change appeared to be avoiding harmful consequences of the *Bear Gulch* litigation. It is possible the MPSC suspected a negative outcome of the district court case because they had already “lost” on the PURPA-LEO compliance question at FERC. Allowing a rulemaking to moot litigation in the middle of such a drawn-out proceeding is a loophole that the Ninth Circuit has allowed to be exploited to the potential detriment of solar and other renewable energy businesses, just as it was in Montana.

### CONCLUSION

As of this writing, FERC has never brought an enforcement action under PURPA Section 210.<sup>115</sup> The federal commission’s refusal to enforce the statute in court, combined with the lengthy resolution process in administrative proceedings, has hindered QF producers’ ability to check state compliance with the federal mandate and increased the risks they face when entering the market. As the cost of renewable energy continues to drop in the coming years and QFs apply for PURPA contracts in increasing numbers, we will likely see more cases like *Bear Gulch*.<sup>116</sup> As *Bear Gulch* shows, state commissions currently appear to have the ability to water down federal PURPA regulations despite the apparent conflict with the authorizing legislation, creating barriers like restrictive LEOs and prohibitively low avoided cost estimates in order to keep small renewable producers out of the market. Federal action on PURPA to stabilize state regulations, either from FERC or from Congress, could go a long way toward increasing the number of QFs able to take advantage of the provision, increasing the total amount of renewable energy in our electricity supply, just as the drafters of PURPA proposed.

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115. See *supra* note 69 and accompanying text.

116. After the writing of this Comment but prior to its publication, FERC released a Notice of Proposed Rulemaking altering several core components of its PURPA regulations, including decreasing the mandatory assumption of non-competitiveness for QFs from 20 MW capacity to 1 MW and changing guidelines for calculating avoided costs. Qualifying Facility Rates and Requirements Implementation Issues Under PURPA, 168 FERC ¶ 61,184, para. 1, 10, 13, 126 (proposed Sept. 19, 2019). If adopted, these changes will alter which facilities will be able to apply for purchase agreements under Section 210. In dissent, Commissioner Glick protested that the proposed rule “would effectively gut the Public Utility Regulatory Policies Act.” Separate Statement of Comm’r Glick, dissenting in part, at para. 1, *attached to* Qualifying Facility Rates and Requirements Implementation Issues Under PURPA, *supra*.

