UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOLAR ENERGY INDUSTRIES ASSOCIATION, *Petitioner* NEWSUN ENERGY LLC, *Petitioner-Intervenor* v. FEDERAL ENERGY REGULATORY COMMISSION, *Respondent* EDISON ELECTRIC INSTITUTE INC., *Respondent-Intervenor* AMERICAN FOREST & PAPER ASSOCIATION, *Intervenor*	No. 20-72788
SOLAR ENERGY INDUSTRIES ASSOCIATION, *Petitioner* v. FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*	No. 21-70113

MONTANA ENVIRONMENTAL INFORMATION CENTER; et al., *Petitioners* v. FEDERAL ENERGY REGULATORY COMMISSION, *Respondent* AMERICAN PUBLIC POWER ASSOCIATION; LARGE PUBLIC POWER COUNCIL, *Intervenors* AMERICAN FOREST & PAPER ASSOCIATION, *Intervenor*	No. 20-73375
MONTANA ENVIRONMENTAL INFORMATION CENTER; et al., *Petitioners* v. FEDERAL ENERGY REGULATORY COMMISSION *Respondent*	No. 21-70083

ON PETITION FOR REVIEW OF A FINAL ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

PETITIONERS' OPENING BRIEF

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners Montana Environmental Information Center, Sierra Club, Center for Biological Diversity, Vote Solar, Community Renewable Energy Association, Appalachian Voices, Alabama Center for Sustainable Energy d/b/a Energy Alabama, Georgia Interfaith Power & Light Inc., North Carolina Sustainable Energy Association, and Upstate Forever, submit that they have no parent corporations and no publicly issued stock shares or securities. No publicly held corporation holds stock in any of the Petitioners.

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Glossary of Abbreviations

ADD	Addendum of declarations in support of standing
FERC	Federal Energy Regulatory Commission
NEPA	National Environmental Policy Act
NOPR	Notice of Proposed Rulemaking
PIO_ER	Petitioners' (Public Interest Organizations) Excerpts of Record
PURPA	Public Utility Regulatory Policies Act of 1978
QFs	Qualifying Facilities

Preliminary Statement

This proceeding challenges a Federal Energy Regulatory Commission ("FERC" or the "Commission") rulemaking order that revised FERC's longstanding regulations implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA"). PURPA is the sole federal policy requiring monopoly utilities to purchase energy from renewable resources. It also breaks open the utility monopoly to power produced by small-scale, non-polluting, renewable energy sources like wind and solar. Congress required utilities to buy that power at a non-discriminatory price sufficient to encourage development of renewable energy as long as it does not exceed the cost the utility would otherwise incur for power. That goal proved out of reach for decades, until declining costs for renewable energy and rising costs for monopoly utility fossil fuel generation finally made small scale wind and solar under PURPA competitive. But just as Congress's goal was finally within reach, FERC cut it off.

Petitioners challenge four unlawful aspects of FERC's rulemaking that exceed the agency's authority and conflict with Congress's goals. First, FERC failed to undertake the required environmental impact analysis that would have confirmed that undermining renewable energy development by rolling back important aspects of FERC's existing rules has significant environmental impacts. Second, FERC exceeded its narrow scope of authority to determine whether generating facilities are "at the same site" to invent new caps on an entity's total generating capacity across a wide region based on FERC's policy preferences that conflict with Congress's. Third, FERC reversed its longstanding interpretation of PURPA's price cap in favor of a new interpretation that conflicts with Congress's express goals to encourage renewable generation and avoid discrimination. Fourth, FERC shifted the burden of persuasion to determine a utility's alternative power costs despite admitting it was unlawful to do so. Vacating FERC's unlawful revisions will restore Congress's intended purpose; promote non-discriminatory competition with monopoly utilities; and increase renewable energy development across the country.

Statement of Jurisdiction

This Court has exclusive jurisdiction pursuant to 16 U.S.C. § 825*l*(b) to review FERC's final order changing its regulations implementing 16 U.S.C. §§ 796 and 824a-3. *See also Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226, 1232 & n. 26 (1982), *reversed on other grounds*, *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 412 n.7 (1983) (invoking 16 U.S.C. § 825*l* to review FERC's initial avoided cost rules); *Am. Forest & Paper Ass'n v. FERC*, 550 F.3d 1179, 1180 (D.C. Cir. 2008) (reviewing FERC's revised rules).

This is not an enforcement action pursuant to 16 U.S.C. § 824a-3(h)(2), which must be brought in district court. *See Midland Power Coop. v. FERC,* 774 F.3d 1, 3–8 (D.C. Cir. 2014) (explaining that Section 210 of PURPA was not made a part of the Federal Power Act). Instead, this appeal involves direct challenges to FERC's rulemaking to implement the qualification criteria under 16 U.S.C. § 796, which is part of the Federal Power Act, as well as interrelated PURPA provisions in 16 U.S.C. § 824a-3.

This Court reviews actions under the Federal Power Act, 16 U.S.C. § 825*l*, as well as "all relevant arguments" within FERC's interrelated rulemaking, including those that, standing alone, could have been presented in district court. *Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 910–12 (9th Cir. 1989); *accord Williams*

Gas Processing—Gulf Coast Co. L.P. v. FERC, 373 F.3d 1335, 1343–44 (D.C. Cir. 2004); *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192–94 (7th Cir. 1986).

Petitioners preserved their right to review by seeking rehearing of Order 872 on each of the issues raised here. 2-PIO_ER-0209–0434 (reqs. for reh'g of Public Interest Orgs. ("PIO") and Northwest Coal.).

Petitioners satisfy standing on behalf of themselves and their members pursuant to *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Each Petitioner is an organization that represents members injured by FERC's rulemaking, which suppresses renewable energy development and increases utilities' reliance on pollution emitting fossil fuel power plants; those injuries will be redressed by a favorable decision from this Court; the issues in this case do not require individual participation by those members; and representing those members' interests in developing clean, renewable energy is germane to the organizations' purposes.[1] *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S.

[1] One petitioner with standing is sufficient. *See Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 981 (9th Cir. 2013).

167, 181 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); Decls. In Supp. of Pet'rs' Opening Br. Addendum at ADD-001–260.

Venue is proper in this Court because the petition seeking review of the same FERC orders was filed in Case 20-72788 and fixed venue in the Ninth Circuit for all subsequent petitions challenging the same order, including Petitioners'. 16 U.S.C. § 825*l*(b); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 253 F.2d 536, 540 (9th Cir. 1958).

Statement of Issues Presented

1. Did FERC violate the National Environmental Policy Act ("NEPA") by failing to conduct any analysis of the environmental impacts posed by revising significant provisions of its PURPA regulations, thereby undermining renewable energy's ability to compete with fossil fuel generated electricity, despite having concluded that a NEPA analysis was required before adopting its original rules?

2. Did FERC exceed its authority to determine whether generating facilities are "at the same site" by imposing a policy to limit an entity's overall generation capacity in a broad region, rather than applying following the statute's plain meaning?

3. Did FERC err by reversing its longstanding interpretation of PURPA and impose short-run pricing determined the moment energy is delivered, thereby excluding long-term projections, despite a lack of textual support, conflict with statutory context and Congressional policy, and internal inconsistency with other actions within the same rulemaking?

4. Did FERC unlawfully shift the burden of persuasion to prove a utility's alternative cost of energy supply despite acknowledging that doing so is unlawful?

Statutory Addendum

Relevant authorities appear in the addendum to this brief.

Statement of the Case

Petitioners challenge FERC's Order 872 and decision on rehearing, Order 872-A, which in the words of the dissenting Commissioner, "effectively guts the Commission's implementation of" PURPA. Order 872, 85 Fed. Reg. 54,638, 54,736 (Glick, Comm'r, dissenting at P 1) (Sept. 2, 2020) (1-PIO_ER-0201) ("Order 872").

PURPA is the only federal law requiring purchase of electricity generated from renewable sources. Congress adopted PURPA to reduce dependence on fossil fuels and diversify the nation's energy supply by charging FERC with adopting rules necessary to encourage cogeneration and small power production facilities that use renewable energy. H.R. Rep. No. 95-496, pt. IV, at 14 (1978); *FERC v. Mississippi*, 456 U.S. 742, 750–51 (1982); *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861, 863 (9th Cir. 2019). Congress instructed FERC to adopt rules that require utilities to buy power from small renewable and co-generation facilities—called qualifying facilities ("QFs")—at prices that are non-discriminatory, in the public interest, just and reasonable, and not in excess of the cost that the utility would incur for alternative energy. 16 U.S.C. § 824a-3(a), (b); *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 417 (1983) (PURPA's reference to "in the public interest" means the maximum rate allowed in order to "increase the utilization of cogeneration and small power production facilities and to reduce reliance on fossil fuels").

FERC promulgated its initial PURPA regulations in 1980. *See* 45 Fed. Reg. 12,214 (Feb. 25, 1980); 45 Fed. Reg. 17,959 (Mar. 20, 1980). Relevant to this case, FERC's initial regulations contained several important requirements fulfilling Congress's mandate to encourage QFs and offer non-discriminatory rates:

- FERC required utilities to purchase energy from QF generators at the utility's "avoided cost," which is defined as the incremental cost to the utility of the energy it would otherwise generate itself or purchase from another source. 45 Fed. Reg. at 12,216; *see also* 18 C.F.R. § 292.101(b)(6).

- FERC recognized that in order to obtain financing, QFs require long-term contracts with predetermined pricing, "based, by necessity, on estimates of future avoided costs," which is consistent with PURPA even if such prices diverge from short-run calculations of costs made at the time energy is delivered. 45 Fed. Reg. at 12,224. FERC rejected arguments that a utility's cost of alternative energy must be calculated at the moment energy is delivered. *Id.* Instead, it required states to provide QFs an option to enter long-term contracts with prices "calculated at the time the obligation is incurred." *Id.*; 18 C.F.R. § 292.304(d)(2)(ii) (1980–2010).

- For purposes of applying the 80 megawatt ("MW") limit on qualified small power production facilities "located at the same site", 16 U.S.C. § 796(17)(A)(ii), FERC defined "site" to only include facilities within one-mile. 45 Fed. Reg. at 17,965; 18 C.F.R. §

292.204(a)(2). FERC's "one-mile rule" provided a bright line for developers seeking to qualify multiple facilities at separate sites.

- FERC reviewed the environmental impact from its initial PURPA rules pursuant to NEPA. 45 Fed. Reg. at 17,964–65. That review revealed positive environmental impacts by deferring or cancelling "some eleven 500 MW coal-fired steam plants, one 1,000 MW nuclear plant, a number of 75 MW gas turbines, and certain large scale hydropower and combined cycle [gas-fired] installations." *Id.*

PURPA has always been unpopular with monopoly utilities and their allies. Utilities lobbied for Congressional repeal and weaker FERC rules ever since PURPA broke open the monopoly for power generation and threatened monopoly rents for power. Order 872 (Glick, Comm'r, dissenting at P 4) (1-PIO_ER-0201); Notice of Proposed Rulemaking, 84 Fed. Reg. 53,246 (Oct. 4, 2019) (Glick, Comm'r, dissenting at P 3) (5-PIO_ER-1187) ("NOPR"). FERC finally relented to that lobbying through a Noticed of Proposed Rulemaking in 2019. NOPR (5-PIO_ER-1160–89). FERC proposed eight different changes based on the premise that "discovery of significant new natural gas reserves," "vibrant wholesale electric markets in much of the country," and "federal and state programs that provide further incentives for the development of alternative resources" means that PURPA is no longer needed to promote alternative energy generation. NOPR at PP 3–9, 15, 17, 19–27 (5-PIO_ER-1161–64). Accordingly, FERC sought to upend its PURPA rules to "rebalance" PURPA's policy aims. *Id.* at P 31 (5-PIO_ER-1165).

FERC's final decision adopted nearly all of its proposed changes. However, FERC's justification shifted from its original premise—that PURPA is no longer needed—to a claim that PURPA's text mandated the changes. Order 872 at PP 7, 9, 12, 20 (1-PIO_ER-0106–08).

Petitioners challenge four aspects of FERC's rulemaking order.

First, in contrast to the Environmental Assessment FERC conducted for its original 1980 rulemaking, and despite comments identifying likely environmental impacts from undoing many of those rules, FERC violated NEPA by refusing to analyze the environmental impacts from its rule changes. *Id.* at PP 710–42 (1-PIO_ER-0191–0195).

Second, FERC unlawfully redefined the statutory phrase "at the same site" to mean facilities up to ten miles apart depending on factors unrelated to physical proximity to cap the amount of generation an entity can own across a region, rather than adhering to Congress's decision to only limit the capacity located "at the same site." *Id.* at P 23 (1-PIO_ER-0108).

Third, Order 872 rescinds QFs' right to establish a price for their energy at the time of contract formation. Instead, Order 872 allows states and nonregulated utilities to limit QFs to variable pricing not calculated until the moment future energy is delivered. *Id.* at PP 21–22 (1-PIO_ER-0108); 18 C.F.R. 292.304(d)(2) (2021). Thus, QF developers now cannot know the revenue stream from their energy sales before having to commit to a multi-decade investment. Contrary to FERC's original interpretation in 1980 that predetermined pricing necessary to encourage QF development was appropriate because PURPA does not require calculating a utility's costs for alternative power in real time, FERC now contends that PURPA precludes such cost projections *because* they can diverge from short-run calculations. Order 872 at PP 21–22 (1-PIO_ER-0108).

Fourth, Order 872 shifts the burden from states to establish a purchasing utility's avoided costs to QFs to disprove that a specific price (called an "LMP") *does not reflect* the purchasing electric utility's costs. *Id.* at P 4 (1-PIO_ER-0106).

Standard of Review

This Court reviews FERC's rulemaking decisions under the Administrative Procedures Act and sets aside decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," in violation of required procedures, or "unsupported by substantial evidence." 5 U.S.C. § 706; *Am. Paper Institute, Inc.*, 461 U.S. at 412–13.

FERC's interpretation of PURPA is reviewed de novo applying the familiar two-step process from *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Cal. ex rel. Harris v. FERC*, 784 F.3d 1267, 1272 (9th Cir. 2015). The Court reviews the reasons FERC provided in its orders and the record the agency assembled in support. *Cal. Pub. Util. Comm'n v. FERC*, 879 F.3d 966, 973 (9th Cir. 2018).

Summary of Argument

From Order 872's inception, FERC aimed to roll back policies enabling small renewable energy generation based on the majority's belief that Congress's policy choices were no longer appropriate. Contrary to PURPA's ongoing mandate to "encourage" QFs, 16 U.S.C. §§ 824a, 824a-3(a), each rule change at issue in this case eliminated critical rights that previously encouraged QF development. Not surprisingly, the FERC majority's attempts to undermine PURPA's underlying statutory purpose run headlong into the statutory text in numerous ways.

First, FERC refused to slow down its march to undo important renewable energy policies in order to conduct NEPA's required environmental impact analysis. Second, contrary to the narrow authority provided to determine if facilities are "at the same site" for purposes of PURPA's 80 megawatt ("MW") size limit, FERC invented a new effective cap on generation owned by the same entity within a wide region. Third, FERC reversed its historic interpretation of PURPA's avoided cost cap that provided necessary long-term price certainty and, instead, subject QFs to maximum price uncertainty by not determining price until the future. Lastly, FERC unlawfully shifted the burden from the state regulator to determine a utility's avoided costs to QFs and other litigants to disprove that specific short-run market prices are the utility's avoided cost, even for utilities that self-generate or purchase energy outside that market.

FERC refused to allow statutory text, Congressional policy, or the requirements of reasoned agency decision making to slow its efforts to undermine non-utility, small scale renewable energy. As a result, FERC's decision suffers multiple fatal errors, and the Court should vacate FERC's rulemaking order.

Argument

I. FERC Failed to Conduct the Required Environmental Analysis.

NEPA required FERC to analyze the environmental impacts that will occur from revoking existing supports for clean energy before making those changes. 42 U.S.C. § 4321, *et seq.*; Order 872 at P 710 (1-PIO_ER-0191). FERC did so forty years ago when it created the original PURPA regulations. But it refused to do so before yanking them away. As a result, FERC's final decision is invalid and must be vacated. *See*, *e.g.*, *Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 575 (9th Cir. 2016).

NEPA has "twin aims": (1) "consider[ing] every significant aspect of the environmental impact of a proposed action," and (2) "ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir. 2002) (internal quotation marks and citation omitted). Accordingly, "NEPA requires agencies to take a 'hard look' at the environmental consequences of proposed agency actions before those actions are undertaken." *All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1215 (9th Cir. 2017).

Order 872 "guts" PURPA's foundational rules supporting renewable energy generation and prevents QF generation from displacing utility-owned, fossil fuel powered generation. Order 872 (Glick, Comm'r, dissenting at P 1) (1-PIO_ER-0201); (3-PIO_ER-0462–63) (comments of PIO); (4-PIO_ER-0945–55) (comments of Northwest Coalition). It undoes most of the environmental benefits that FERC's Environmental Assessment of its original rules projected would occur by displacing dozens of coal and gas-fired power plants. *See* 45 Fed. Reg. at 17,964.

FERC did not take a "hard look" at the environmental impacts from its action. In fact, it took no look. Instead, FERC contends that no analysis was required for two reasons. First, that "there is no way to determine whether issuance of the rule will significantly affect the quality of the human environment." Order 872 at PP 702, 711 (1-PIO_ER-0190–91). Second, that Order 872's rule changes are categorically excluded from NEPA analysis because they are merely "clarifying" or "corrective in nature." *Id.* at PP 711, 722–26 (1-PIO_ER-0191, -0193). FERC is wrong on both counts. Undermining the landmark federal clean energy policy constitutes a major action requiring FERC to "consider every significant aspect of the environmental impact of a proposed action," *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983), in order to take the required "hard look at the environmental consequences of their actions," *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 639–40 (9th Cir. 2004).

A. FERC Cannot Avoid Completing an Environmental Assessment Based on Claims that Impacts from Systematic Changes are Uncertain.

FERC contends that its rule changes are exempt from NEPA's requirement to analyze environmental impacts because the rules "do[ ] not authorize the development or construction of any facilities," "environmental effects on resources such as land use, vegetation, and water quality are all dependent on location, which is unknown at this time and could be anywhere in the United States," and it is "not possible to predict how the states will exercise the increased flexibilities provided by the final rule." Order 872 at P 718 (1-PIO_ER-0192); Order 872-A, 85 Fed. Reg. 86,656, 86,718 (Dec. 30, 2020) ("Order 872-A"). There are three fundamental problems with FERC's reasoning.

First, FERC's current rule changes only some of the provisions contained in its original 1980 rule, and that rule was not too difficult, complex, or speculative to analyze. *Compare* Order 872-A at P 435 (1-PIO_ER-0068) *with* 45 Fed. Reg. at 17,964–65. Nor were other national rules impacting the potential mix of energy resources. *See* 3-PIO_ER-0462 (noting FERC conducted an environmental assessment under NEPA for its proposed rule authorizing competitive bidding to establish avoided costs, Regulations Governing Bidding Programs, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,455 at 32,047 (1988), 2015 WL 8610975 (Mar. 16, 1988)) (comments of PIO); 4-PIO_ER-0955 (explaining that FERC conducted a full environmental impact statement in support of its landmark open-access transmission policies adopted in Order 888) (comments of Northwest Coalition).

FERC's original PURPA rulemaking included an environmental assessment despite noting "a great number of uncertainties" because FERC acknowledged at the time that such review "is required under NEPA to assess these effects to the fullest extent possible." 45 Fed. Reg. at 17,965. FERC determined which generation technologies would be economic in different regions of the country based on PURPA's pricing requirements, predicted the "market penetration" of each technology displacing utility-owned generation, and then quantified the environmental impacts of each based on the resulting fuel savings. *Id.* at 17,964. FERC's 1980 Environmental Assessment revealed that while some of the technologies induced by FERC's rules produce air or water pollution, they would also avoid the greater environmental impacts from deferred or cancelled utility-owned generation, including "some eleven 500 MW coal-fired steam plants, one 1,000 MW nuclear plant, a number of 75 MW gas turbines, and certain large scale hydropower and combined cycle installations." *Id.* And yet, no similar analysis accompanied FERC's rule changes at issue here.

Second, contrary to FERC's assertion that the agency is not required to speculate about uncertain future events, Order 872-A at P 425 (1-PIO_ER-0066), NEPA requires analysis even where effects of agency action may be "uncertain." *See Oregon Nat. Res. Council v. Brong*, 492 F.3d 1120, 1134 (9th Cir. 2007). "The government's inability to fully ascertain the precise extent of the effects" of an action is not "a justification for failing to estimate what those effects might be before irrevocably committing to the activity." *Conner v. Burford*, 848 F.2d 1441, 1450 (9th Cir. 1988).

In fact, the entire purpose of NEPA is to require agencies to analyze possible future impacts prior to making decisions, which means "speculation is [] implicit in NEPA." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011). It would defeat that purpose if agencies could simply "shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry." *Id.* (internal quotation marks and citation omitted). Nor can the agency defer the analysis. To wait "and ask questions later is precisely the type of environmentally blind decision-making NEPA was designed to avoid." *Conner*, 848 F.2d at 1450–51.

Moreover, NEPA provides a specific procedural mechanism when the significance of environmental effects is unknown: the agency must prepare an Environmental Assessment, which must "[b]riefly provide sufficient evidence and analysis for determining whether" to proceed with a full Environmental Impact Statement ("EIS"), or issue a finding of no significant impact. 40 C.F.R. § 1501.5(c)(1). FERC failed to even undertake that process before declaring that the effects of its rule changes are too unknown to analyze.

Third, NEPA requires an analysis of programmatic changes and secondary effects, not merely for agency decisions that approve a specific construction project as FERC suggests. *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1094 (9th Cir. 2006); *Kern*, 284 F.3d at 1072–

73; *Scientists' Institute for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079,1088–89 (D.C. Cir. 1973). Federal agencies must prepare an EIS for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Such "actions" are not limited to constructing particular facilities, but also include adopting "regulations, policy statements, or expansion or revision of ongoing programs." *Scientists' Inst.*, 481 F.2d at 1088–89 (citations omitted). FERC's own NEPA regulations state that FERC must conduct an environmental assessment for "regulations or proposals for legislation not included" under a categorical exclusion. 18 C.F.R. § 380.5(b)(12); *see also Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1033–34 (D.C. Cir. 2008) (vacating the Federal Communication Commission's decision not to prepare an environmental analysis required by its own NEPA regulations). There is no basis for FERC's contention that NEPA does not apply because the impacts from Order 872 are uncertain and do not involve construction of specific projects.

B. FERC Cannot Skirt NEPA by Claiming Categorical Exclusion.

There is also no basis for FERC's "alternative" argument that Order 872's rule changes are categorically excluded from NEPA's requirements as clarifications or corrections mandated by PURPA's plain text. Order 872 at P 711, 720–727 (1-PIO_ER-0191–0193); Order 872-A at P 436 (1-PIO_ER-0068). As further explained below, PURPA does not require—and in many cases precludes—Order 872's changes. Indeed, Order 872's changes undo regulations that FERC previously adopted to implement the same statutory text.

More generally, FERC misunderstands the limited exceptions for categorical exclusions. NEPA implementation rules provide narrow categories of agency action that "normally do not have a significant effect on the human environment, and therefore do not require preparation of" an Environmental Assessment ("EA") or EIS. 40 C.F.R. § 1501.4(a). Those include "[p]roposals for legislation and promulgation of rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or regulations being amended." 18 C.F.R. § 380.4(a)(2)(ii). Those categories do not exclude analysis of shifts in longstanding policies by conveniently characterizing them as "clarifying" or "correcting" prior statutory interpretations. As the dissenting Commissioner noted, if the significant changes FERC made here are exempt from NEPA as mere clarifications or corrections, almost nothing agencies do are subject to because every agency action can be characterized as clarifying or correcting its interpretation of the agency's enabling legislation. Order 872 (Glick, Comm'r, dissenting at P 27) (1-PIO_ER-0205).

FERC cites no authority for Order 872's the sweeping interpretation of narrow exclusions for clarification and correction to cover broad policy changes that reinterpret the agency's authorizing statute. No such authority exists. Instead, courts consistently reject categorical exclusions where "there is the possibility that an action may have a significant environmental effect." *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 481 F. Supp. 2d 1059, 1087 (N.D. Cal. 2007). "No Ninth Circuit case involving invocation of a [categorical exclusion], that was upheld on appeal, involved broad, far-reaching programmatic actions…." *Id.*

Moreover, categorical exclusions are not blanket exemptions. They act as presumptions that are negated where the record shows—as it does here—that an environmental impact will occur from an otherwise excluded type of action. As FERC's own regulations recognize, the agency "will independently evaluate environmental information" to determine whether the action is "a major Federal action significantly affecting the quality of the human environment" requiring additional analysis in the form of an EA or an EIS despite a categorical exclusion. 18 C.F.R. § 380.4(b)(1).

The record in this case includes substantial public comments demonstrating the "impacts of removing major incentives for emissions-free renewable resources . . . from impacts on local air and water quality to increased emissions of greenhouse gases." 3-PIO_ER-0462–63 (comments of PIO). Rather than conducting an independent analysis, as its rules require, FERC unlawfully brushed those comments aside as speculative and impossible to evaluate.

FERC's failure to comply with NEPA's basic but important requirement to analyze the environmental impacts from potential agency action requires the Court to vacate Order 872. *Oregon Nat. Desert Ass'n*, 840 F.3d at 575 (vacatur required except in "rare circumstances"). While the potential environmental impact was demonstrated here, vacatur would be required even if it was not because the lack of an EA in this case requires vacatur "even if the court thinks that the proposed action would have no significant impact." *Citizens for Better Forestry*, 481 F. Supp. 2d at 1082.

II. Order 872's Revised Definition of "At The Same Site" is Unlawful.

Order 872 ignores the plain meaning of the word "site" in order to impose a PURPA limitation that Congress never included or intended. PURPA provides important rights to small power production facilities, which use certain renewable resources and have "a power production capacity which, together with any other facilities *located at the same site* (as determined by the Commission) . . . not greater than 80 megawatts." 16 U.S.C. § 796(17)(A)(ii) (emphasis added). Congress only delegated the narrow authority to determine whether facilities are at the same site. It did not authorize FERC to invent additional limitations for which facilities can qualify under PURPA by ignoring the plain meaning of "site."

FERC's longstanding regulations since 1980 defined a facility's "site" as the area within a geographic boundary of one-mile. 45 Fed. Reg. at 17,972; 18 C.F.R. § 292.204(a). This bright-line test became known as the "one-mile rule" that America's clean-energy developers relied on for forty years.

That changed with Order 872. FERC replaced the one-mile rule with a complex formula containing three concentric zones and a non-exclusive list of qualitative factors. In the first zone, within one-mile, affiliated QFs are irrebuttably at the same "site." Order 872 at P 232 (1-PIO_ER-0134). In the second, "the less clear, grey zone where affiliated facilities are more than one mile apart but less than 10 miles apart," QFs can be at the same site, or separate sites, based on FERC's ad hoc weighing of various factors from a non-exclusive list. Order 872-A at PP 232, 244, 261–62 (1-PIO_ER-0037–38, -0041–42). Only in the third zone, where affiliated facilities are more than ten miles apart, are they definitively at separate sites. *Id.* at P 232 (1-PIO_ER-0037). As a practical matter, the uncertainty of the second zone and potential for litigation each time any change is made to the QF's certification means most QFs will avoid it. Thus, Order 872 effectively creates a *de facto* "ten-mile rule."

The Commission's new definition of "site" is unlawful because: (1) it conflicts with the plain meaning of the statute; (2) it arbitrarily and capriciously attempts to impose additional limitations on QF development that Congress did not intend or authorize; (3) FERC arbitrarily and capriciously ignored serious reliance interests; and (4) it unlawfully applies retroactively to existing QFs.

A. FERC's Definition of "Site" Conflicts with the Plain Meaning of the Statute.

Congress delegated authority to FERC to "determine" whether two QFs are "at the same site," 16 U.S.C. § 796(17)(A), not to redefine "site" beyond its plain meaning. Yet, Order 872 exceeds FERC's narrow scope of authority and creates a new limit on the number of QFs a single owner can acquire within a region that Congress never authorized.

The Court should refuse to accept FERC's new definition because the term "site" is clear and unambiguous. *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 914 (9th Cir. 2005). "Site" is a geographic term, meaning a "place or location; esp., a piece of property set aside for a specific use." SITE, Black's Law Dictionary (11th ed. 2019); *see also Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 933 F.3d 1088, 1093 (9th Cir. 2019) (stating Court consults dictionary definitions for undefined term's ordinary meaning). The statute's grammatical structure further confirms the word site's plain, geographic meaning by making it the subject of the preposition "located at." 16 U.S.C. § 796(17)(A); *see U.S. v. Ermoian*, 752 F.3d 1165, 1169–71 (9th Cir. 2013) (plain meaning of statute can be determined by grammatical structure, including placement of prepositions); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) (words of statute must be read in context).

Rather than determining whether multiple QFs are "at the same site" based on their physical, geographic co-location, FERC's three-zone, multi-factor test attempts to redefine "site" by using "factors the Commission may consider on a case-by-case basis," including:

> whether the facilities in question are owned or controlled by the same person(s) or affiliated persons(s), operated and maintained by the same or affiliated entity(ies), selling to the same electric utility, using common debt or equity financing, constructed by the same entity within 12 months, managing a power sales agreement executed within 12 months of a similar and affiliated small power production qualifying facility in the same location, placed into service within 12 months of an affiliated small power production QF project's commercial operation date as specified in the power sales agreement, or sharing engineering or procurement contracts.

Order 872-A at PP 262, 264, 277, 319 (1-PIO_ER-0042, -0044, -0050).

Under FERC's new definition, facilities on separate parcels of property, separated by up to ten miles can be "at the same site," while some located much closer are not. Moreover, whether two pairs of physically indistinguishable facilities, located the same distance apart, are "at the same site" can turn entirely on factors unrelated to their physical locations, like common financing or whether they share an engineering or construction firm.

There is no basis for FERC's three-zone, non-exclusive factors unrelated to physical co-location, and applied in ad hoc determinations in the plain meaning of the word "site." The Court should vacate FERC's definition. 5 U.S.C. § 706(2)(A), (C).

B. The "Ten-Mile Rule" is Arbitrary and Capricious Because it is Designed it to Disqualify More Facilities, Not to Define "Site."

The "ten-mile rule" is also unlawfully arbitrary and capricious because it is a Trojan Horse for a policy that Congress did not authorize or intend. FERC cannot rewrite the statute to accommodate its policy preferences. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

The "ten-mile rule" is designed to disqualify QFs that FERC believed should be "aggregated" into larger "facilities" because of their relationships and concentration in a broad region. *See* Order 872A at PP 245, 318 (1-PIO_ER-0038, -0050). FERC intended the rule to satisfy certain vocal PURPA critics who argued that PURPA development should be further constrained and that having too many QFs owned by related entities violates the critics' view of the "spirit of PURPA." *See id.* at PP 239, 245, 306 (1-PIO_ER-0038–39, 0048). In fact, FERC's original proposal described the ten-mile rule as aggregating generation to apply PURPA's 80 MW limit to generators groupings that FERC believed should be considered "a single facility," rather than defining the term "site." NOPR at P 9 (5-PIO_ER-1161). FERC only pivoted to justifying its rule change as defining the term "site" after acknowledging it has no other authority for the ten-mile rule. Order 872 at PP 476, 508 (1-PIO_ER-0162–0166).

That FERC designed the "ten-mile rule" to impose limits on PURPA development beyond those authorized by Congress is further evidenced by the fact that FERC's proffered basis does not support its conclusions. FERC provides one reason for replacing the prior one-mile rule with the ten-mile rule: a purported "sufficient possibility" that QFs at the same site were circumventing the statute's 80 MW limit under the one-mile rule. *Id.* at P 472 (1-PIO_ER-0162). When challenged to provide an example, FERC cited examples that do not withstand minimal scrutiny. *See* Order 872-A at PP 239–43 (1-PIO_ER-0038).[2] One example involved "183 MW of power from four developers that were broken up into 16 projects." *Id.* at P 240 (1-PIO_ER-0038). However, there is no basis to assume that 16 projects totaling 183 MW—with no reference to their physical locations other than in the same utility's service territory—includes even a *single* instance where more than 80 MW is located "at the same site." Another example involved "six PURPA projects that require[d] Idaho Power to take 60 MW of power from six solar projects." *Id.* at P 240 (1-PIO_ER-0038). Even assuming those six projects were on the same site (which there is also no evidence of), the projects together do not exceed 80 MW so

[2] It is also not clear that all of the facilities in FERC's examples were actually constructed and produced energy. The 80 MW cap does not apply to proposals, but only to facilities that "produce" energy, 16 U.S.C. § 796(17)(A)(i); *CMS Midland, Inc.*, 50 FERC ¶ 61,098, 61,277–61,278, 61,280 (1990).

cannot "circumvent" the 80 MW statutory cap. FERC grasped for straws that do not exist and cannot support its purported basis for changing the one-mile rule.

Fundamentally, the new "ten-mile rule" is unlawfully arbitrary and capricious because it aims to impose broader limits on PURPA development than Congress intended. The ten-mile rule seeks to cap the total number of related QFs within a region. *See id.* at PP 238–45, 318 (explaining the purpose to address "disaggregated" facilities) (1-PIO_ER-0038–39, -0050). Congress's limitation is much narrower: the capacity that can qualify at a single site. Congress elected not to limit the number of related QFs in a region, as long as no more than 80 MW are at the same site. FERC's attempt to impose new limits that Congress did not intend constitutes arbitrary and capricious decisionmaking and requires the Court vacate Order 872. 5 U.S.C. § 706(2)(A); *MCI Telecomms. Corp.*, 512 U.S. at 229; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency cannot rely on factors Congress did not intend).

C. The Ten-Mile Rule is Arbitrary and Capricious Because FERC Dismissed Serious Reliance Interests.

FERC's decision to adopt the ten-mile rule is also unlawfully arbitrary and capricious because it failed to account for the serious reliance interests its prior rule engendered. When a prior policy has "engendered serious reliance interests" an agency must (1) "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns," *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (citations omitted); and (2) give "better" reasons for a new rule than it had for adopting the prior rule and "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). FERC did neither.

The "ten-mile rule" affects every person who owns facilities within ten miles of one another—even those who previously sited their generating facilities more than one-mile apart to comply with FERC's erstwhile rule. Every QF located within ten miles of another can expect burdensome (and potentially frivolous) protests of their qualifying status. Order 872 at PP 469 n.733, 550 n.874 (1-PIO_ER-

0161, -0171–72). Worse, if the aggregate capacity of existing facilities within a ten-mile radius exceeds 80 MW, they can be disqualified retroactively. *See id.* at P 534 (1-PIO_ER-0169).

FERC acknowledged reliance on its prior one-mile rule, but insisted that its new ten-mile rule only applies when QFs undergo "substantive changes." Order 872-A at PP 316–18 (1-PIO_ER-0049–50); Order 872 at PP 530–35, 547–50 (1-PIO_ER-0169–70, -0171–72). FERC refused to define the "substantive changes" that subject an existing QF to challenge. Order 872 at P 550 (1-PIO_ER-0171–72); Order 872-A at PP 316–17, 326 (1-PIO_ER-0049). FERC also improperly dismissed concerns of retroactive impacts on QFs that relied on FERC's prior rule by stating that "rules can and do change." Order 872-A at P 318 (1-PIO_ER-0050). FERC's dismissal of retroactive impacts fails to satisfy the requirement that FERC balance new policies against reliance on its prior one-mile rule and provide a "better" or "more detailed" explanation for changing to a ten-mile rule. *Dep't of Homeland Sec.*, 140 S. Ct. at 1915; *Fox Television Stations Inc.*, 556 U.S. at 515. Accordingly, the Court should vacate FERC's decision. 5 U.S.C. § 706(2)(A).

D. The "Ten-Mile Rule" Unlawfully Applies Retroactively.

The "ten-mile rule" also strips certification from existing QFs, which violates the prohibition on retroactive rulemaking absent explicit statutory authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (explaining that authority to issue retroactive rules must be explicit); *see also* 5 U.S.C. § 706(2)(C); Order 872-A at PP 300–01 (reviewing issue) (1-PIO_ER-0047). PURPA does not convey express authority to issue retroactive rules, 16 U.S.C. § 824a-3(a), nor does the Administrative Procedure Act. *Bowen*, 488 U.S. at 208.[3] Therefore, FERC cannot impose a retroactive PURPA rule.

The ten-mile rule is unlawfully retroactive because it "attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). For example, a QF owner seeking to sell an investment interest of as little as ten percent, but making no physical changes (much less changing its

[3] FERC abided the prohibition on retroactive PURPA rulemaking in the past when it applied new qualification criteria to only entirely new facilities, *not* to existing facilities seeking recertification. *See* Order 872-A at P 325 (discussing new qualification criteria for cogeneration QFs required by Congress in the Energy Policies Act of 2005 and the Commission's subsequent rules only for *new* facilities) (1-PIO_ER-0050–51); 18 C.F.R. § 292.205(d).

location relative to any other facilities), is now subject to Order 872's new test that could disqualify it. Order 872 at P 550 (1-PIO_ER-0171–72).

Commenters pointed out these retroactive effects. Order 872-A at P 300 (1-PIO_ER-0047); Order 872 at PP 530–534 (1-PIO_ER-0169)[4]; 4-PIO_ER-0934 (comments of Northwest Coalition); 2-PIO_ER-0421–22 (comments of PIO). However, FERC's only substantive response was to merely state that "[w]hen the existing QF makes a change to the material facts and circumstances of its certification, it very well may no longer be the same facility it was when originally certified. Due to the change in material facts, the new regulations should apply." Order 872-A at P 324 (1-PIO_ER-0050). Thus, according to FERC, "the rule is prospective, and applied only if and when new facts have prompted a recertification." *Id.*

FERC's response is incorrect. First, as explained above, the relevant query is not whether the QF is "the same facility" but whether

[4] FERC inexplicably claimed that "no commenter has explained how and why applying the new rules to new recertifications make them retroactive rules," while also describing public comments doing exactly that. Order 872-A at P 324 n. 603 (1-PIO_ER-0050).

it is at the same "site" as another facility. FERC's new rule does not apply only in instances of changed physical location, but to many relatively minor changes to the facility or its ownership. Second, even if "same facility," rather than "same site" was the applicable criterion, a minor change such as the sale of a minority ownership interests does not effectively make an existing and previously certified QF a new facility. *Id.* In fact, FERC itself agrees that an existing facility does not become a "new" facility simply because it applies for recertification. Order 671, 71 Fed. Reg. 7,852, 7,865 (Feb. 15, 2006).

For these reasons, FERC violated the prohibition on retroactive rulemaking, *Bowen*, 488 U.S. at 208, and its order should be vacated. 5 U.S.C. § 706(2)(A).

III. FERC Erroneously Interprets PURPA as Requiring it to Rescind a Right to Contract Energy Prices Determined at the Time of Contract Formation.

FERC reversed its own prior interpretation of PURPA and adopted a previously rejected roadblock to renewable energy development. FERC now insists it *must* deny QFs the right to long-term pricing established at contract formation in order to comply "with PURPA's statutory mandates," not because "the encouragement directed by PURPA is no longer needed." However, there is no statutory text requiring it to repeal its original rule. Order 872 at PP 22, 25 (1-PIO_ER-0108). In fact, FERC's current interpretation of the statute creates avoidable conflict with PURPA's overall goals, conflicts with FERC's own prior interpretation, and is internally inconsistent.

A. PURPA's Text Does Not Mandate FERC's Interpretation Equating Short-Run Instantaneous Pricing with Avoided Utility Cost Calculations.

There is no statutory basis for FERC's premise that compliance with PURPA's avoided cost cap is measured exclusively through short-run costs calculated at the time of delivery. *Id.* at PP 21–22, 25, 43, 70, 73, 76–77, 82, 233 and n.362, 253–256 n.403, 258, 283, 287, 722–723 (1-PIO_ER-0108, -0111, -0115, -0116, -0134, -0137–38, -0141, -0193); Order 872-A at PP 76–78, 84, 172, 175 (1-PIO_ER-0016–17, -0029, -0030). Order 872 offers no textual analysis of PURPA's phrase "the incremental cost to the electric utility of alternative electric energy," 16 U.S.C. § 824a-3(b), to support that interpretation. As evidenced by FERC's own prior interpretation, the text simply does not compel FERC's current interpretation.

Prior to Order 872, FERC consistently interpreted PURPA to "reconcile" PURPA's avoided cost price cap with the need to provide QFs with "certainty with regard to return on investments," based, "by necessity, on estimates of future avoided costs" in order to calculate return on investments "to attract capital from potential investors." 45 Fed. Reg. at 12,224; *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at P 8 (2016).

Unlike its current interpretation equating alternative energy cost calculations with short-run costs calculated at the moment of delivery, FERC previously rejected that exact interpretation as neither compelled by the statute, nor consistent with the need for long-term revenue certainty. FERC's original rulemaking specifically addressed arguments that PURPA prohibits FERC from providing long-term fixed prices based on cost projections because projected prices may turn out—in hindsight—to be higher than if prices were calculated only at the moment energy is delivered. 45 Fed. Reg. at 12,224. FERC stated that it "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." *Id.*

Thus, as evidenced by FERC's longstanding prior interpretation, compliance with PURPA's avoided cost price cap is not measured exclusively through short-run calculations at the time of delivery. Order 872's incurred premise that it does as the basis to rescind its original rule must be reversed. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 944 (D.C. Cir. 2021) (regulation must be declared invalid if based on incorrect belief of statute's requirement even if agency could have adopted the policy in the exercise of its discretion); *Yepes–Prado v. U.S. I.N.S.,* 10 F.3d 1363, 1366 (9th Cir. 1993) (an error of law constitutes an abuse of discretion).

B. FERC's Current Interpretation Violates Rules of Statutory Construction by Creating Conflict, Rather Than Reconciling PURPA's Avoided Cost Cap with PURPA's Goals to Encourage QF Development and Avoid Discrimination.

FERC's current interpretation of PURPA's avoided cost cap also violates cardinal rules of statutory construction by creating avoidable conflict with the statute's overall structure and purpose. QFs' ability to know the price for their energy prior to contract formation was critical to fulfilling PURPA's mandates to "encourage" QFs and to provide non-discriminatory treatment by approximating the revenue stability states provide to monopoly utilities. 16 U.S.C. § 824a-3(a), (b)(2); *Am. Paper Inst., Inc.*, 461 U.S. at 417 (PURPA's requirement to ensure QF prices are "in the public interest" means "to increase the utilization of" QFs); 45 Fed. Reg. at 12,224; Order 872 (Glick, Comm'r, dissenting at PP 9–10 and n.19, 14) (1-PIO_ER-0202, -0203); *Windham Solar & Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at PP 5, 8. Thus, FERC's original rule reconciled the avoided cost cap on prices with the need for long-term price certainty to promote PURPA's goals of encouraging QFs and avoiding discriminatory treatment compared to utilities and non-QF generation by recognizing the ability to determine avoided costs based on long-term projections regardless of whether short-run calculations done in the future are higher or lower. 45 Fed. Reg. at 12,224; *Windham Solar*, 157 FERC ¶ 61,134 at P 8.

Rather than continuing to reconcile those statutory provisions, Order 872 reinterprets the avoided cost cap to preclude long-term projected cost calculations and, therefore, to "limit[ ] the … ability to encourage QFs" or "address … claims of discrimination." Order 872 at P 82 (1-PIO_ER-0116); *see also id.* at PP 11–12 (avoided cost cap limits

FERC's ability to encourage QFs), 84, 121, 257–258 (claiming that FERC does not have discretion to minimize QF price risk to avoid discrimination because of the avoided cost cap), 296, 335, 344 (1-PIO_ER-0106–07, -0116, -0121, -0138, -0142–43, -0146, -0147); Order 872-A at P 40 (rejecting request to retain fixed price contract option to encourage QFs because "PURPA also requires that the Commission prescribe no rule requiring that states set payments to QFs that exceed avoided costs…") (1-PIO_ER-0011). That is, FERC's new interpretation requires it to choose between PURPA's avoided cost cap or PURPA's requirements to encourage QFs and avoid discrimination. It cannot do both.

FERC's new interpretation that puts PURPA's provisions at odds with each other violates cardinal rules of statutory construction. FERC is required to adopt an interpretation that construes the entire statute in context, rather than elevating isolated provisions, *Tovar v. Sessions*, 882 F.3d 895, 901 (9th Cir. 2018), are compatible "with the substance of Congress' regulatory scheme", *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321–22 (2014), and does not "prevents consideration of a factor that Congress stated was relevant," *Davis v. EPA*, 348 F.3d 772, 783–

84 (9th Cir. 2003), to "produce[ ] a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). FERC's new interpretation does none of those things.

FERC was correct in 1980 to reconcile PURPA's avoided cost cap with PUPRA's other policies of encouraging non-utility renewable generation and avoiding discrimination through long-term revenue stability. Order 872's opposite interpretation is neither compelled by the statutory text nor consistent with PURPA's goals. The Court should reject and reverse Order 872's erroneous interpretation.

C. FERC Failed to Acknowledge and Explain its Decision to Reverse its Interpretation of PURPA's Avoided Cost Cap.

As explained above, Order 872 reversed FERC's longstanding interpretation that PURPA's avoided cost cap was not measured exclusively by short-run costs, calculated at the moment of delivery. FERC now contends that short-run pricing at the moment energy is delivered is the single correct measure of avoided cost, and projected prices violate the statute anytime they exceed the short-run calculation. Order 872 at PP 16, 36, 55, 57, 99, 235, 254, 283–293 and nn.450, 454 (1-PIO_ER-0107, -0110, -0113, -0118, -0135, -0137, -0141–

42); *id.* at PP 710, 722–23 (claiming that no environmental analysis was required under NEPA because its rule rescinding QF's price certainty was mandated by PURPA) (1-PIO_ER-0191, -0193); Order 872-A at P 49 (1-PIO_ER-0012).

FERC does not acknowledge its reversal. Instead, Order 872 incorrectly interprets FERC's original 1980 rulemaking as accepting long-term pricing only based on a factual presumption that such prices would exactly "balance out" against short-run calculations. Order 872 at PP 16, 99, 286 (1-PIO_ER-0107, -0118, -0141); Order 872-A at P 49 (1-PIO_ER-0012); Order 872 at PP 21–22, 25, 43, 70, 73, 76–77, 82, 233 and n.362, 253–256 and n.403, 258, 283, 287, 722–723 (1-PIO_ER-0108, -0111, -0115, -0116, -0134, -0137–38, -0141, -0193); Order 872-A at PP 76–78, 84, 172, 175 (1-PIO_ER-0016–17, -0029, - 0030). That was not FERC's interpretation in 1980, or during the 40 years since. Instead, FERC said the statute *does not require* "minute-by-minute evaluation of costs which would be checked against rates established in long term contracts…." 45 Fed. Reg. at 12,214; *Windham Solar & Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at P 8. And, in fact, some of FERC's current rules still say that as well. 18 C.F.R. § 292.304(b)(5) (2021) (providing, even after FERC's repeal of the right to long-term pre-established pricing, that such prices "do not violate" PURPA even "if the rates… differ from avoided costs at the time of delivery").

Because Order 872 fails to correctly recognize FERC's prior interpretation of PURPA's avoided cost cap, it fails to "display awareness that it *is* changing position," much less explain its reasons for change as required for a lawful change in statutory interpretation. *Cal. Pub. Utils. Comm'n*, 879 F.3d at 977 (emphasis in original); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (unexplained inconsistencies in policy render statutory interpretations arbitrary and capricious); *Fox Television Stations, Inc.*, 556 U.S. at 515–16; *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015). That lack of awareness (and outright denial) requires reversal. *Cal. Pub. Utils. Comm'n*, 879 F.3d at 977.

D. Order 872's Interpretation is Internally Inconsistent and Illogical.

Order 872 also undermines it's fundamental legal premise for repealing QFs' long-term pricing right by acknowledging that PURPA's avoided cost cap might not mandate short-run pricing. That internal inconsistency also makes FERC's interpretation unlawful. *Nat'l Parks*

Conservation Ass'n v. EPA, 788 F.3d 1134, 1141 (9th Cir. 2015) ("an internally inconsistent analysis is arbitrary and capricious") (*citing Gen. Chem. Corp. v. United States,* 817 F.2d 844, 857 (D.C. Cir. 1987)).

Order 872 simultaneously contends that PURPA's avoided cost cap requires FERC to repeal the long-term pricing right for QFs because such prices may exceed short-run instantaneous price calculations, while also providing individual states with "flexibility" to use long-term pricing that can "differ from avoided costs at the time of delivery." Order 872 at PP 227–231 and n.356, 746 (1-PIO_ER-0133–0134, -0196); Order 872-A at P 109 (1-PIO_ER-0021); 18 C.F.R. § 292.304(b)(5) (2021) (as amended, still provides that predetermined avoided costs remain lawful even if different from avoided costs at the time of delivery). FERC may not grant "flexibility" to exceed the statute's avoided-cost cap. *Conn. Light & Power Co.*, 70 FERC ¶ 61,012, 61,027–28 (Jan. 11, 1995) (states must set prices consistent with FERC's rules, which may not provide for a rate in excess of avoided costs). Therefore, it cannot be correct that PURPA compelled FERC to rescind QFs' right long-term pricing because such prices differ from short-run calculations, while also allowing states to utilize long-term pricing even though different from short-run calculations. FERC's inconsistency about whether long-term price calculations that differ from short-run calculations violate PURPA's avoided cost cap is further evidence that FERC's lacks a coherent and lawful rationale for Order 872. The Court should accordingly vacate Order 872.

IV. Order 872 Unlawfully Discriminates Against QFs.

By revoking QF's right to long-term energy price stability, FERC revoked QFs' ability to realize similar investment risk that states guarantee for utility-owned generation. That violates PURPA's non-discrimination provision, which requires that FERC's rule ensure comparable treatment for QFs and utilities. 16 U.S.C. § 824a-3(b)(2) (requiring that "rates . . . shall not discriminate against [QFs]"); *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215 at P 37 and n.72 (2013); Order 872 (Glick, Comm'r, dissenting at P 14 n.32) (1-PIO_ER-0203).

States effectively guarantee vertically integrated utilities the same benefits that non-utilities receive through fixed-price contracts by guaranteeing that utilities recoup all of their costs plus a return on investment. Order 872 at P 40 and Glick, Comm'r, dissenting at P 14 (1-PIO_ER-0111, -0203); Order 872-A (Glick, Comm'r, dissenting at P

15) (1-PIO_ER-0100); 5-PIO_ER-1191 (comments by the Honorable Travis Kavulla President, National Association of Regulatory Utility Commissioners, and Vice Chairman, Montana Public Service Commission); 2-PIO_ER-0409–10, -0417–18 (req. for reh'g of Northwest Coalition). Utility cost recoupment is not limited by prevailing short-term market prices. *See*, *e.g.*, *In re Application of Nw. Energy for Hydro Assets Purchase*, Order 7323k, 2014 WL 4925276, at *41–*42 (Mont. Pub. Serv. Comm'n, Sept. 26, 2014) (Kavulla, Comm'r, dissenting) (state allows utilities to socialize their price risk and divest the utility of almost all responsibility to cover differences between projected future costs when investments are made and later market prices); *see also In re Application of Nw. Energy for Hydro Assets Purchase*, Order 7323l, 2016 WL 278738 (Mont. Pub. Serv. Comm'n, Jan. 20, 2016) (authorizing an increase in authorized revenue to account for lower market prices than assumed by the utility when it purchased the generating resource rather than capping at market prices); 5-PIO_ER-1013) (comments of the Electric Power Supply Association); 5-PIO_ER-1042 (comments of the Electricity Consumers Resource Council, American Chemistry Council and American Forest &

Paper Association); 5-PIO_ER-1070 (comments of the South Carolina Solar Business Alliance); 5-PIO_ER-109 (comments of sPower Development Company).

FERC's original rule provided QFs a path to comparable investment risk as states provide to utilities through guaranteed cost recovery and return on investment. 45 Fed. Reg. at 12,224; *Vote Solar v. Mont. Dep't of Pub. Serv. Regul.*, 473 P.3d 963 at P 70 (Mont. 2020) (long term contract certainty for QFs provides similar treatment to guaranteed rate recovery for utility-owned generation); *In the Matter of the Petition of Crazy Mountain Wind for the Comm'n to Set Certain Terms & Conditions of Cont. Between Nw. Energy & Crazy Mountain Wind, LLC.*, Order 7505b, at P 74, 2017 WL 67612 (Mont. Pub. Serv. Comm'n, Jan. 5, 2017); Order 872-A (Glick, Comm'r, dissenting at PP 10, 14) (1-PIO_ER-0099–0100); 5-PIO_ER-1158 (comments of FTC Commissioner Rebecca Kelly Slaughter); 5-PIO_ER-1191 (comments of National Association of Regulatory Commissioners). Order 872 removed that comparable treatment for QFs and, therefore, violated PURPA's nondiscrimination provision. 16 U.S.C. § 824a-3(b)(2).

Order 872 discriminates by authorizing states and non-regulated utilities to only provide QFs with energy prices that fluctuate and are not determined until the moment of delivery, which imposes all of the price risk from fluctuating market prices on QFs, while states continue to guarantee utility-owned and contracted generation effectively risk-free guaranteed returns not capped at the short-run market price. Order 872 at PP 257–258 (announcing FERC's intent to shift risk of price changes over the course of an energy supply contract to "QFs and their investors and lenders") (1-PIO_ER-0138); *In the Matter of Nw. Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase*, Order 7500d, at P 83, 2017 WL 5714688 (Mont. Pub. Serv. Comm'n, Nov. 24, 2017) (utilities shift price risk onto customers when preapproved generating assets are added to revenue requirement over a long period of time regardless of prevailing market prices).

FERC makes various misplaced arguments that Order 872 does not discriminate. For example, FERC contends that because it still uses the phrase "full avoided cost" to describe the price QFs receive, even after rescinding the right to long-term pricing, the new rules fall within the Supreme Court's 1983 determination that "full-avoided-cost" ensures non-discriminatory treatment. Order 872 at P 83 (*citing Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 413 (1983)) (1-PIO_ER-0116). That reasoning elevates terminology over substance. Order 872 fundamentally changed the pricing scheme that the Supreme Court reviewed in 1983 so that QFs no longer receive symmetrical price risk as utilities. The Supreme Court upheld FERC's original rules because they avoided discrimination, not because of the label FERC used. *Am. Paper Inst., Inc.*, 461 U.S. at 413, 417. Order 872 changed how QFs are treated relative to utilities, but kept the terminology "full-avoided-costs." There is no basis in the Supreme Court's *American Paper Institute* decision to support FERC's reasoning that terminology, rather than price risk parity, ensures non-discrimination.

FERC also erroneously contends that it need not treat QFs and utilities similarly because they are not "similarly situated." Order 872-A at P 142 (1-PIO_ER-0026). That argument ignores the fact that while "similarly situated" is a factor for whether discrimination is "undue" under a separate provision of the Federal Power Act, it is not a factor under PURPA's more stringent prohibition against *any* discrimination. *Compare* 16 U.S.C. § 824d(b) (Federal Power Act prohibition on "undue prejudice or disadvantage") and *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010) (under the Federal Power Act, "[t]he court will not find a Commission determination to be *unduly discriminatory* if the entity claiming discrimination is not similarly situated to others." (emphasis added)) *to* 16 U.S.C. § 824a-3(b)(2) (PURPA's requirement that rates "shall not discriminate"). As Order 872 acknowledges elsewhere, PURPA's anti-discrimination provision "is more restrictive than the FPA's prohibition against 'unduly discriminatory' rates." Order 872 at P 82 (1-PIO_ER-0116). FERC's reliance on an inapplicable "similarly situated" analysis is baseless.

Moreover, the fact that QFs and utilities are not "similarly situated" is a reason to require similar treatment, not to excuse different treatment. Congress intended PURPA's non-discrimination provision to counteract the inherent structural advantages of utilities. *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1232 (D.C. Cir. 1995) ("Section 210 of the PURPA was enacted, in part, to address discrimination by electric utilities in the availability and price of power that they sell to and buy from cogeneration facilities for resale"). Order 872's argument that QFs can be afforded less favorable treatment because they lack those inherent structural advantages—i.e., they are not "similarly situated"—turns Congress's intent on its head.

Order 872 also mistakenly suggests that utilities are exposed to the same price risk that Order 872 now imposes on QFs because utility rates change as utility costs change. Order 872 at PP 40, 122, 288 (1-PIO_ER-0111, -0121, -0141); Order 872-A at PP 113 n.212, 116 (1-PIO_ER-0021–22). That false equivalency ignores the key difference between utility-incurred costs and market price. As explained above, states set utility rates to ensure utilities recoup all of their costs (plus a return); utility rates are not capped at the short-run market price. *See*, *e.g.*, Order 872 (Glick, Comm'r, dissenting at PP 14–15) (1-PIO_ER-0203). Thus utilities' rates fluctuate in order to protect utilities' guaranteed returns from long-term price risk as their input costs change, rather than expose utilities to price risk based on short-run market price fluctuations as Order 872 does to QFs. Thus, FERC's attempt to superficially equate changes to utility rates with fluctuating

QF pricing ignores the critical fact that they fluctuate for different reasons and produce opposite effects. In the words of the dissenting Commissioner, FERC's attempt to equate utility rate adjustments for fuel cost changes with exposing QFs' entire revenue to short-run market conditions "is hogwash." *Id.* at P 15 (1-PIO_ER-0203).

Order 872 also contends that FERC cannot "subject[ ] QFs to the same rate structures and procedures as utilities," Order 872-A at P 136 (1-PIO_ER-0025), and therefore cannot use cost-of-service ratemaking to "guarantee[ ] recovery of a QF's own costs" in the same way that state regulation does for utilities. Order 872 at PP 85–88 (1-PIO_ER-0116–17). That strawman argument conflates a specific regulatory mechanism—cost-of-service-ratemaking—with Order 872's decision to impose asymmetrical long-term price risk for QFs compared to state regulated utilities. Without the right to a fixed-price contract that Order 872 rescinded, QFs have no path to similar protection from long-term price risk that states provide to monopoly utilities. That is discrimination.

Ultimately, none of Order 872's various arguments negate the simple fact that revoking the fixed-price contract right for QFs results in discriminatory treatment of QFs compared to monopoly utility-owned generation because QFs are forced to shoulder all risk from variable, instantaneously calculated, short-run pricing, while utilities' guaranteed returns are shielded from that risk. That discrimination is unlawful. 16 U.S.C. § 824a-3(b)(2). Order 872's rescission of the right to long-term pricing should be vacated.

V. Order 872's Locational Marginal Price Presumption Is Unlawful.

Order 872 unlawfully allows a state or non-regulated utility to assume a particular short-run market price—the LMP, in certain organized markets—reflects the but-for cost of energy for every utility within that region until proven otherwise. Order 872 at PP 151–159 (1-PIO_ER-0124–25); 18 C.F.R. § 292.304(b)(6) (2021).[5] That shifts the

[5] The LMP is a value set in certain organized day-ahead and real-time auction-based markets used to dispatch resources by an independent system operator. NOPR at PP 43–44 (5-PIO_ER-1166–67). The independent system operator is one of the entities identified in 18 C.F.R. § 292.309(e), (f) and (g), which operate transmission systems and operate bid-based systems to economically dispatch generation resources electing to be dispatched by the system operator rather than by the owner or utility. The marginal price derived for purposes of dispatching generation does not necessarily reflect the cost of power to a utility. *See, e.g.*, *Exelon Wind 1, LLC*, 140 FERC ¶ 61,152 at P 52 (2012) (price a QF would receive if it sold energy through an independent system operator market is not necessarily "what the costs

burden of persuasion, which FERC admits it cannot do. States are no longer required to determine a utility's cost of energy. Instead, challengers must prove that the LMP is *not* the utility's cost of energy. Moreover, the rule change assumes a connection between the LMP and utility costs that the record does not substantiate, especially for utilities that self-generate or procure energy outside of that market.

States and unregulated utilities must ensure that the price for QF generation is set at the utility's full-avoided-cost. 16 U.S.C. § 824a-3(f); *Re S. Cal. Edison Co.*, 70 FERC ¶ 61,215, 61,676–77 (1995) (state's obligation includes ensuring that the per-unit charge for QF generation complies with FERC's rules). Order 872 flips that burden and allows states to presume that the short-run LMP in specific market constitutes every utility's cost of alternative energy unless "an aggrieved entity (such as a QF)" rebuts that presumption by proving otherwise. Order 872 at P 152 (1-PIO_ER-0124–25).

FERC cannot create a presumption unless it "(1) shift[s] the burden of production and not the burden of persuasion . . . and (2) [is]

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to the utility would have been for self-supplied, or purchased, energy 'but for' the presence of the QF…").

rational." *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011) (internal citations omitted). Order 872 fails both requirements.

A. The LMP Presumption Unlawfully Shifts the Burden of Persuasion.

The LMP presumption shifts the burden of persuasion because a challenging party must persuade a regulator or court that the LMP is *not* the purchasing utility's but-for cost of energy. Failure to do so means the LMP remains the presumptive avoided cost rate. That constitutes a burden of persuasion, not merely burden of production.

The burden of persuasion is "the obligation to persuade the trier of fact of the truth of [the] proposition" with sufficient evidence and to bear the risk of insufficient or inconclusive evidence. *Director, Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 268 (1994) (defining burden of persuasion); *Overman v. Loesser*, 205 F.2d 521, 523 (9th Cir. 1953) (party who bears the burden of persuasion is the party who runs "the risk of non-persuasion."). In contrast, a shift in burden of production only shifts an obligation to introduce a minimal quantum of evidence to put an issue into controversy, which then imposes on the original party the obligation to prove the contested facts and to bear the risk of insufficient or inconclusive evidence. *In re Garvida*, 347 B.R. 697, 706 (B.A.P. 9th Cir. 2006) (contrasting a shift in burden of proof, which "is often outcome determinative" while the burden of going forward (production) is primarily a procedural matter pertaining to the order of presenting evidence); *In re Bryan*, 261 B.R. 240, 245 (B.A.P. 9th Cir. 2001).

Despite FERC's insistence that it only shifted the burden of production, Order 872 shifts the burden of persuasion by requiring a challenger to be the proponent of an LMP alternative, petition a court for judicial review, or bring an original enforcement action in United States District Court under 16 U.S.C. § 824a-3(h)(2)(B). Order 872 at P 152 (1-PIO_ER-0124–25). The challenger has the burden of persuasion—not merely the burden of production–in each of those proceedings. *See*, *e.g.*, *Appl. of S. California Edison Co. (U338e) for Approval of Energy Efficiency Rolling Portfolio Bus. Plan & Related Matters*, 2018 WL 555610 *1 (Cal. P.U.C., Jan. 11, 2018); *Toward Utility Rate Normalization v. P.U.C.*, 22 Cal.3d 529, 537–538 (1978); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (the "ordinary default rule that plaintiffs bear the risk of failing to prove their claims"); Nev. Rev. Stat. § 233B.135(2).

Thus, Order 872 shifts the burden of persuasion to "entities seeking to rebut the presumption, rather than on the states who wish to rely on LMP for setting avoided cost rates" and assumes the LMP reflects a utility's cost "[s]o long as this presumption is not rebutted" by an aggrieved party. Order 872 at PP 59, 159 (1-PIO_ER-0113–14, -0125). As FERC admits, shifting the burden of persuasion exceeds FERC's authority. Accordingly, the Court should vacate.

B. The LMP Presumption is Not Rational.

The LMP presumption also fails the requirement that presumptions be rational, including that the presumed fact be the only possible outcome in all but "extraordinary circumstances." *Holland Livestock Ranch v. United States*, 714 F.2d 90, 92 (9th Cir. 1983); *United Scenic Artists v. NLRB*, 762 F.2d 1027, 1035 (D.C. Cir. 1985).

FERC does not demonstrate that the LMP reflects the incremental cost of energy for all utilities, especially for utilities that do not rely exclusively on short-run market purchases for their energy needs. The LMP reflects a value calculated from bids within a specific auction conducted for purposes of scheduling generation resources utilizing the independent system operator to make dispatch decisions.

See Federal Energy Regulatory Commission, *Energy Primer*, at 59 (Nov. 2015), https://www.ferc.gov/sites/default/files/2020-05/energy-primer.pdf. The LMP is calculated for purposes of scheduling generation. It only reflects a cost of energy to a particular utility *if* the utility's own generation is bid at its full cost of production and the utility's marginal (most expensive) energy is purchased through the market.

In reality, however, many utilities utilize the independent system operator to make scheduling decisions but incur costs of energy through investments and transactions outside the short-term market by self-generating or through long-term supply contracts. Order 872-A at P 18 (1-PIO_ER-0008); 2-PIO_ER-0227–279 (req. for reh'g of PIO); 3-PIO_ER-0484–91 (comments of PIO). For those utilities, the LMP does not reflect the utility's cost of energy.

FERC admits that "an LMP selected by a state… might not always reflect a purchasing utility's actual avoided energy costs" so reliance on the LMP as avoided cost may be "challenge[d]." Order 872 at P 152 (1-PIO_ER-0123–24); Order 872-A at P 64 (1-PIO_ER-0014). In fact, FERC correctly abandoned its original proposal to create a "per se rule" that the LMP reflects avoided costs in all instances because of evidence that the LMP does not always reflect the purchasing utility's but-for cost of energy. Order 872 at P 3 (1-PIO_ER-0106). However, it erred by nevertheless creating a rebuttable presumption without evidence that the LMP reflects the but-for energy cost of every utility (including those who self-generate or purchase outside the short-run market) in all but "extraordinary circumstances." *Sec'y of Labor v. Keystone Coal Mining, Corp.*, 151 F.3d 1096, 1101 (D.C. Cir. 1998); *Holland Livestock Ranch*, 714 F.2d at 92.

Therefore, even if FERC's burden shift were limited to production rather than persuasion, it is still unlawful because it lacks the requisite rational basis.

Conclusion

Petitioners respectfully request that this Court grant the petition for review, vacate FERC's rulemaking orders, reinstating FERC's prior rules.

Dated: May 27, 2021.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases other than those consolidated in this matter.

Dated: May 27, 2021.

/s/ David Bender
David Bender

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s):
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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2021, I caused the foregoing to be electronically filed through this Court's CM/ECF system, which will send notice of filing to all registered users. Counsel for all parties to this matter will be served by the CM/ECF system.

Dated: May 27, 2021.

/s/ David Bender
David Bender