ELLEN F. ROSENBLUM
Attorney General

MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

August 2, 2012

Susan Ackerman
Commission Chair
Public Utility Commission of Oregon
550 Capitol St NE #215
PO Box 2148
Salem OR 97308-2148

Stephen Bloom
Commissioner
Public Utility Commission of Oregon
550 Capitol St NE #215
PO Box 2148
Salem OR 97308-2148

John Savage
Commissioner
Public Utility Commission of Oregon
550 Capitol St NE #215
PO Box 2148
Salem OR 97308-2148

Re: Opinion Request OP-2012-2

Dear Ms. Ackerman & Messrs. Bloom and Savage:

Oregon's Legislative Assembly has delegated certain administrative responsibilities pertaining to alternative energy production to the Public Utility Commission of Oregon (OPUC). The responsibilities delegated to OPUC include the exercise of authority arising under both state and federal law. Both state and federal statutes encourage the production of energy from alternative sources. The means employed by the relevant state and federal laws differ. Those differences have prompted OPUC to pose the following question.

QUESTION PRESENTED

Does the Public Utility Regulatory Policies Act of 1978 (PURPA) preempt the provision of alternative energy subsidies to a "qualifying facility" that sells electric energy to a utility under PURPA's mandatory purchase provisions if those subsidies are funded by the three percent public purpose charge imposed on ratepayers by ORS 757.612?

SHORT ANSWER

No.

DISCUSSION

I. Background

A. PURPA

The sale of electricity is regulated by both federal and state governments. The Federal Power Act (FPA) grants the federal government jurisdiction to regulate the "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 USC § 824(a). The wholesale sale of electric energy is defined as the sale of electric energy for resale. 16 USC § 824(d). The FPA expressly limits federal regulation of the energy industry to only "those matters which are not subject to regulation by the states." 16 USC § 824(a). States generally retain regulatory authority over sales of energy to ultimate consumers.

In enacting PURPA, Congress amended the FPA with the goal of reducing the nation's reliance on oil and gas and encouraging the development of alternative energy sources. *See, e.g.*, *New York State Electric and Gas Corporation v. Saranac Power Partners*, 117 F Supp 2d 211, 216 (NDNY 2000) (discussing enactment of PURPA). The relevant portion of PURPA requires electric utilities to offer to purchase electric energy from energy producers that satisfy specified criteria. 16 USC § 824a-3(a)(2). An energy producer that meets those criteria is commonly described as a "qualifying facility" (QF).

PURPA requires utilities to make these purchases at rates established through the application of rules adopted by the Federal Energy Regulatory Commission (FERC). 16 USC § 824a-3(b). PURPA mandates that FERC's rules must ensure that the rates are "just and reasonable to the electric consumers of the electric utility and in the public interest," and provides that the rates "shall not discriminate against [QFs]." *Id.*

PURPA also prohibits rules that would "provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." *Id.* PURPA defines "incremental cost of electric energy" to mean "the cost to the electric utility of the electric energy which, but for the purchase from [a QF], such utility would generate or purchase from another source." 16 USC § 824a-3(d). The phrase "avoided cost" is commonly employed to describe this congressional limitation. The United States Court of Appeals for the Ninth Circuit has observed that PURPA's structure reflects "Congress's desire to promote cogeneration while not burdening ratepayers." *Independent Energy Producers Ass'n, Inc. v. California Public Utilities Comm'n*, 36 F3d 848, 858 (9^{th} Cir Cal, 1994).

FERC's rules that implement PURPA generally require utilities to purchase power from QFs at rates that reflect the utility's "full" avoided cost, which must be determined in a manner specified by rule. 18 CFR 292.304. In promulgating this requirement, FERC rejected arguments that rates should be set at a lower level in order to pass cost savings to ratepayers. FERC acknowledged that requiring utilities to pay QFs at rates reflecting the utilities' full avoided costs would not result in savings to ratepayers. But FERC noted that such rates would cost ratepayers no more than if the utilities did not purchase energy from a QF, and would provide a potentially significant incentive for cogeneration and small power production. FERC concluded that "ratepayers and the nation as a whole will benefit from the decreased reliance on scarce fossil fuels, such as oil and gas, and the more efficient use of energy." *See generally, American Paper Institute v. American Electric Power Service Corp.*, 461 US 402, 406, 103 S Ct 1921, 76 L Ed2d 22 (1983) (discussing history of FERC's promulgation of rules under PURPA and citing relevant provisions of the commentary published in the Federal Register).

B. Oregon public purpose charge subsidies

The State of Oregon has also enacted laws to promote the development of alternative energy sources. Under ORS 757.612, electric companies must collect a three percent surcharge from their retail customers to fund the "public purpose expenditure standard." Nineteen percent of these ratepayer-funded revenues must be distributed by OPUC as subsidies for "the above-market costs of constructing and operating new renewable energy resources with a nominal electric generating capacity * * * of 20 megawatts or less." ORS 757.612(3)(b)(B). We understand that OPUC distributes the funds raised under ORS 757.612 through Energy Trust of Oregon, Inc. (ETO), a nonprofit corporation. We are informed that many recipients of these subsidies are QFs that may also sell energy to utilities under PURPA's mandatory purchase provisions.

We note that the subsidies established by ORS 757.612(3)(b)(B) are not paid by electric companies to QFs as part of an energy purchase arrangement. Instead they are collected by electric companies from ratepayers and forwarded to ETO at the direction of OPUC. ETO then distributes the funds as required by ORS 757.612, including distribution of the alternative energy subsidies. This opinion addresses whether those distributions are consistent with federal law. It should not be interpreted to require any particular use or distribution of public purpose charge funds.

C. Interplay of PURPA rates and public purpose charge subsidies

As a result of the state and federal laws just discussed, a QF may simultaneously receive (1) a sales contract at a rate equivalent to the purchasing utility's full avoided costs, as determined under FERC's regulations implementing PURPA, and (2) a ratepayer-funded subsidy to defray the "above-market costs" of their "new renewable energy resources." Both of these incentives encourage alternatives to energy generated using fossil fuels, and both are ultimately funded by ratepayers. In other words, a QF receiving both types of incentives would be receiving ratepayer-funded subsidies that, together, exceed the "avoided cost" rates that Congress established as the maximum rates FERC could impose under PURPA's mandatory purchase provisions. A question therefore arises whether the alternative energy subsidies created by ORS 757.612 are inconsistent with, and thus preempted by, PURPA. We conclude, however, that the ratepayer-funded subsidies established by Oregon law are not preempted.

II. Analysis

A. Preemption generally

Article VI, clause 2, of the United States Constitution, commonly referred to as the Supremacy Clause, establishes the primacy of federal law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

As a result of the Supremacy Clause, federal law can preempt state law. Moreover, "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 US 141, 153, 102 S Ct 3014, 73 L Ed2d 664 (1982). Such preemption can arise in a number of circumstances. The circumstance that is most relevant to the question presented is when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 US 52, 67, 61 S Ct 399, 85 L Ed2d 581 (1941). This is commonly referred to as "obstacle preemption."[1/]

B. The public purpose charge subsidies and obstacle preemption

In order for PURPA to preempt the subsidies established by ORS 757.612(3)(b)(B), the fact that retail electricity consumers fund those subsidies would have to "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting PURPA. As noted above, PURPA's provisions indicate that Congress wanted to promote alternative energy and cogeneration. In doing that, Congress wanted to avoid "burdening ratepayers" with costly subsidies. To accomplish those competing goals, Congress required utilities to purchase power from QFs at rates determined pursuant to rules promulgated by FERC, but prohibited FERC from adopting rules that would require a utility to purchase energy from a QF at rates higher than the utility's avoided costs.

Whether consumer-funded state subsidies impede Congress's purpose depends in turn on whether Congress (a) wanted to ensure that consumers would never subsidize alternative energy except as might incidentally occur through PURPA's "avoided cost" rates, or (b) merely wanted to avoid creating a broader subsidy on a nationwide basis through its own enactment of PURPA. On balance, we believe that the latter interpretation of Congressional intent is the better one. We reach that conclusion for four reasons.

1. Presumption against preemption

First, we are mindful that any "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 US 725, 746, 101 S Ct 2114, 68 L Ed2d 576 (1981). The United States Supreme Court has explained at least one reason for this presumption: "'[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" *Gregory v. Ashcroft*, 501 US 452, 464, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 480 (2d ed.1988) (original emphasis omitted)).[2/] The presumption against preemption strongly favors the interpretation that congressional intent was limited to ensuring that its own enactment created only a limited subsidy for QFs. To hold that ratepayer-funded state subsidies are barred because Congress intentionally limited ratepayer-funded federal subsidies would, at best, "give the state-displacing weight of federal law to mere congressional ambiguity."

2. Language of PURPA

The second of our reasons makes the presumption against preemption particularly appropriate in this context. Specifically, we perceive nothing in the language of PURPA suggesting that the Congressional intent to protect ratepayers went beyond assuring that the federal scheme created by PURPA would not cost ratepayers any more than it would cost if a utility obtained the energy from another source. To the contrary, the statutory language expressly states that the limitation is applicable to "rules requiring any electric utility to offer to purchase electric energy from any [QF.]" By its terms, this limitation deals only with wholesale power transactions between a utility and a QF. The ETO's distribution of ratepayer funded subsidies to help QFs defray above-market costs for the development of renewable energy resources does not relate, directly or indirectly, to a wholesale electricity transaction between a utility and a QF. The ETO is not a utility. The ETO is not purchasing the output of the QF. And the subsidies are not tied to power purchase contracts between a utility and QF.

3. No preemption of state retail rate authority

The fact that Congress has expressly declined to directly preempt state authority over retail rates is the third of our reasons for concluding that the subsidies created by ORS 757.612(3)(b)(B) are not preempted. We think this reservation of state control over retail rates is consistent with the notion that a retail surcharge does not impede the will of Congress simply because one of its purposes is to provide alternative energy subsidies.

As noted above, the FPA expressly limits federal regulation of the energy industry to "those matters which are not subject to regulation by the states." 16 USC § 824(a). Congress has enacted laws outside of PURPA pertaining directly to retail electricity rates, codified at 16 USC §§ 2601 – 2645. By their express terms, those laws do not preempt state laws with regard to retail rates:

> Nothing in this chapter prohibits any State regulatory authority or nonregulated electric utility from adopting, pursuant to State law, any standard or rule affecting electric utilities which is different from any standard established by this subchapter.

16 USC § 2627. The United States Supreme Court has noted that these provisions "require only *consideration* of federal standards" and "allowed the States to continue regulating in the area" after giving the federal standards the required consideration. *FERC v. Mississippi*, 456 US 742, 764-765, 102 S Ct 2126, 72 L Ed2d 532 (1982) (emphasis in original). Thus the Court concluded that the federal laws directly governing retail rates "simply establish requirements for continued state activity in an otherwise preemptible field." *Id.* at 769.

We acknowledge that FERC's authority over *wholesale* power rates places some limits on states' general authority over retail rates. For example, in two cases considering the preemptive effect of FERC's approval of wholesale transactions under the FPA, the United States Supreme Court held that states could not "trap" the cost of FERC-approved wholesale energy transactions by establishing retail rates based on assumptions that the FERC-approved sales were more favorable to the affected utility than was actually the case.[3/]

We further recognize that Congress's intent to limit the impact of PURPA on ratepayers may constrain a state's retail authority in some circumstances. For example, any state action that would require a utility to purchase power at a price in excess of the "avoided cost" rate,[4/] and then pass that cost through to ratepayers, would raise preemption issues under PURPA. It is unnecessary, however, to precisely delineate all of PURPA's potential constraints on the states' retail authority in order to answer the question presented. The reason is simple: Oregon's public purpose charge does not affect any transaction governed by PURPA. The subsidies created by ORS 757.612(3)(b)(B) do not implicitly or explicitly conflict with FERC's approval of any wholesale transaction. Nor do they have the effect of trapping the costs of a FERC-approved transaction within any utility.

4. Consistency with FERC rules

Although federal agency action can also preempt state laws, the pertinent FERC regulations are consistent with our understanding of PURPA's scope. Specifically, 18 CFR § 292.301 provides that the regulations implementing the avoided cost rate authorized by PURPA "appl[y] to the regulation of sales and purchases between qualifying facilities and electric utilities." Moreover, for purposes of those regulations, both "purchase" and "sale" are defined in a way that limits those terms to transactions between utilities and QFs. 18 CFR § 292.101(b)(2); 18 CFR § 292.101(b)(3). Thus, FERC's regulations do not purport to govern rates for the retail sale of energy.

III. Conclusion

In sum, we accept that Congress did not want PURPA to create a consumer-funded federal subsidy for QFs in excess of a purchasing utility's avoided costs. The subsidies created by ORS 757.612(3)(b)(B) do not conflict with that congressional intent, because the Oregon Legislative Assembly – not Congress – imposes that burden on consumers. Moreover, that imposition does not interfere with the wholesale relationships governed by PURPA. And it is consistent with the congressional determination that control over retail rates for energy should generally rest with the states. Accordingly, we conclude that the subsidies created by ORS 757.612(3)(b)(B) are not preempted by PURPA.

Sincerely,

Steven A. Wolf
Chief Counsel
General Counsel Division

SAW:nog/Justice #3470679-v2.doc

[1/] Other circumstances in which state law will be preempted by federal law are inapplicable here. Express preemption occurs when a congressional enactment includes a specific statement that state law is preempted. Because the relevant portions of PURPA contain no such language, the doctrine of express preemption does not invalidate the subsidies established by ORS 757.612(3)(b)(B).

"Field" preemption occurs when a federal regulatory scheme is so pervasive that it can be said to "occupy the field," leaving no room for state laws to supplement the federal. *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230, 67 S Ct 1146, 91 L Ed2d 1447 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.") Here, the United States Supreme Court has observed the latitude left to states under PURPA. *FERC v. Mississippi*, 456 US 742, 102 S Ct 2126, 72 LEd2d 532 (1982). As this opinion discusses, the laws Congress has enacted pertaining to retail energy prices expressly reserve state authority. Because the ratepayer funded subsidies at issue here are collected and administered under Oregon's regulatory authority over retail rates, and are not related to wholesale energy transactions between a utility and a QF, we see no basis for concluding that the doctrine of field preemption invalidates the ORS 757.612(3)(b)(B) subsidies.

Preemption also can occur by implication when "compliance with both federal and state regulations is a physical impossibility." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 US 132, 142-43, 83 S Ct 1210, 10 L Ed2d 248 (1963). We readily conclude that it is not impossible for utilities to pay the rates mandated by PURPA while OPUC distributes the subsidies established by state law.

[2/] In *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 US 528, 105 S Ct 1005, 83 L Ed2d 1016 (1985), the Supreme Court abandoned a judicial rule that Commerce Clause legislation does not apply to the conduct of states when performing traditional governmental functions. Although states had previously been determined to be exempt from the wage requirements of the Fair Labor Standards Act with regard to such functions, *Garcia* determined that such exemption from Commerce Clause legislation was neither workable nor constitutionally required. Instead, *Garcia* indicated that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process, rather than one of result." *Id.* at 554. The point made by Professor Tribe, and noted with apparent approval by the Supreme Court in *Gregory v. Ashcroft*, *supra*, is that the procedural protections provided by the lawmaking process would be significantly diminished if state laws could be undone by "mere ambiguity" in a congressional enactment.

[3] *Nantahala Power & Light Co. v. Thornburg*, 476 US 953, 106 S Ct 2349, 90 L Ed2d 943 (1986); *Mississippi Power & Light Co. v. Mississippi*, 487 US 354, 108 S Ct 2428, 101 L Ed2d 322 (1988). In *Nantahala*, for example, a FERC-approved wholesale agreement allocated 22.5 percent of an inexpensive energy supply to a utility. The Utilities Commission of North Carolina (NCUC), however, required that utility to calculate its retail rates as though approximately 24.5 percent of the inexpensive energy had been allocated to it; NCUC essentially determined that a higher allocation than the one approved by FERC would be fairer to ratepayers. The Court noted that the state's determination was inconsistent with FERC's determination that the lower allocation was "just and reasonable," and would have the effect of trapping the costs of the actual wholesale transaction within the utility.

[4] The federal courts have recognized and accepted that, in any given circumstance, there may be some slippage between the actual "avoided cost" at the time of payment, and the "avoided cost" rate established pursuant to FERC's rules implementing PURPA. *See, for example, Independent Energy Producers' Ass'n, Inc. v. California Public Utilities Comm'n*, 36 F3d 848, 858 (Ninth Circuit, 1994) (concluding that "the fact that prices for fuel, and therefore the Utilities' avoided costs, are lower than estimated, does not give the state and the Utilities the right unilaterally to modify the terms of the standard offer contract" and quoting FERC guidance in 45 Fed Reg 12214, 12224 (1980) indicating FERC's belief "that, in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out.")