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FERC Finalizes Pricing and Eligibility Changes to PURPA Regulations

The Federal Energy Regulatory Commission (FERC) has finalized changes to its regulations,[1] making it more difficult for small renewable generators and cogenerators to require utilities to purchase their energy and capacity under the Public Utility Regulatory Policies Act of 1978 (PURPA) and providing states with greater flexibility in setting the rates for those purchases.[2] The changes will take effect 120 days after their publication in the Federal Register.

The changes, which Chairman Neil Chatterjee touted as "modernizing" FERC's implementation of PURPA, largely adopt modifications FERC proposed in its September 2019 Notice of Proposed Rulemaking (NOPR) that we previously described.[3] Specifically, the order, which FERC designated as Order 872, implements the following significant revisions:

- ***State Flexibility in Setting QF Rates***. Previous regulations required that rates paid to qualifying facilities (QFs) under PURPA must be at "avoided costs" of the purchasing utility, with the QF electing whether to accept avoided cost rates that vary over a contract period or a fixed rate for the duration of the contract. Order 872 eliminates that requirement; instead, states will have the option of requiring energy rates (but not capacity rates) in QF power sales contracts to vary with changes in the purchasing utility's "as-available" avoided costs at the time energy is delivered. If a state exercises this option, then a QF cannot elect to fix the energy rate but can continue to receive a fixed capacity rate for the term of its agreement with the purchasing utility.

  In addition, Order 872 allows states in an organized electric market (RTO/ISO) to set the rate for as-available energy at a variable rate equal to the RTO/ISO locational marginal price (LMP), based on a rebuttable presumption (rather than a per se rule as FERC proposed in its NOPR) that the LMP represents the as-available avoided costs of utilities located in that market. States outside of RTO/ISO markets may set the energy rate at a "competitive market price" established by liquid market hubs or calculated from a formula based on natural gas indices and specified heat rates, which can also be a variable rate. In each instance, FERC's new regulations provide greater flexibility to the states in determining whether such rates accurately reflect the purchasing utility's avoided cost at the time of delivery.

  Order 872 also permits states to set energy and capacity rates pursuant to competitive solicitation processes but only so long as those processes are transparent and nondiscriminatory. FERC, however, declined to adopt a NOPR proposal to permit states with retail competition to relieve their utilities from PURPA's mandatory purchase obligation. Instead, FERC clarified that its existing PURPA regulations "already do[] and will continue to allow states," in setting avoided cost rates, to take into account an electric utility's ability to avoid costs. In other words, states will be able to continue to account for reduced loads in a purchasing electric utility's supply obligations in light of retail competition and a purchasing electric utility's Provider of Last Resort obligations under state law when setting QF capacity rates. FERC also made clear that its clarification was not meant to serve as a MW-for-MW reduction (or increase) based on yearly changes in load. Thus, states cannot terminate a purchasing utility's mandatory purchase obligation under PURPA.

- ***Decreased (5 MW) Threshold for Rebuttable Presumption of Access to Nondiscriminatory, Competitive Markets***. PURPA regulations previously provided a rebuttable presumption that certain 20 MW or larger QFs located in RTO/ISO markets had nondiscriminatory access to those markets and exempted utilities from any purchase obligations from such resources. Order 872 reduced the threshold from 20 MW to 5 MW (rather than 1 MW as proposed in the NOPR). As a result, fewer QFs might be able to require a utility to purchase their power. QFs above 5 MW, however, can challenge the

presumption that they have nondiscriminatory access to wholesale markets based on a list of factors specified in Order 872, including barriers to connecting to the transmission grid and lack of affiliation with entities participating in RTO/ISO markets. This modification does not apply to QFs that are cogenerators, which are still subject to the 20 MW threshold.

- ***Updated "One-Mile Rule."*** Under current PURPA regulations, a small power production facility must be 80 MW or less to be eligible for QF treatment. To prevent gaming of that rule (QF certification of multiple projects that, if combined, would otherwise exceed the 80 MW cap), Order 872 establishes two irrebuttable presumptions: (1) facilities under common ownership located less than one mile apart that use the same energy resource will be aggregated into a single project for purposes of QF eligibility; and (2) facilities under common ownership located more than 10 miles apart that use the same energy resource will be presumed to be separate projects for QF eligibility. Order 872 also establishes a rebuttable presumption that facilities under common ownership located more than one mile apart but less than 10 miles apart are located on a separate site and are not aggregated in determining whether they fall below the 80 MW cap. FERC explained that this rule also will be applied to QFs developed by unaffiliated developers and later acquired by a single entity.

- ***Establishing Entitlement to a Purchase Obligation From a QF***. Order 872 requires a utility to purchase the power only from QFs that can demonstrate commercial viability and a financial commitment pursuant to objective and reasonable state-defined criteria. FERC clarified that to the extent that a permitting factor is relied upon, a QF need only show that it has applied for all required permits and paid all applicable fees but not that it has obtained such permits or has a reasonable likelihood of obtaining such permits.

- ***Certification Challenges***. Order 872 provides that interested stakeholders may challenge a QF self-certification or self-recertification without having to file a petition for declaratory order and pay the filing fee for petitions. Challenges to recertifications, however, will be limited to those QFs making substantive changes (e.g., a change in electrical generating equipment that increases power production capacity by the greater of 1 MW or 5 percent of the previously certified capacity, or a change in ownership in which an owner increases its equity interest by at least 10 percent from the equity interest previously reported).

Implementation and Further Modification

Order 872 may be challenged through a request for rehearing on or before August 17, 2020. FERC will have 30 days to rule on such request, and a final order on rehearing is subject to potential appeal to the federal courts. Commissioner Richard Glick dissented in part from Order 872, opining that the order "administratively gut[s] PURPA." His partial dissent presages likely grounds to challenge Order 872 that FERC may need to address more fully on rehearing and on appeal.

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[1] *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041 (July 2020).

[2] 16 U.S.C. § 2601 et seq. (2018). PURPA was enacted to help lessen the dependence on fossil fuels and promote the development of power generation from nonutility power producers.

[3] For a summary of FERC's NOPR, please click here.

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