IECA Meetings
Arlington, VA
November 12, 2019

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FERC's Proposed Changes to PURPA Rules: How Will They Effect Industrial QFs?

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Public Utilities Regulatory Policy Act of 1978 ("PURPA")

The Purchase Obligation:

Unless exempt, electric utilities must purchase the output of QFs (Qualifying Facilities) at just and reasonable rates that do not exceed the buyer's "avoided cost."

- "Avoided Cost" generally defined as the cost the utility would incur to either generate or buy power itself.
- FERC Order No. 69 defined avoided cost as "full" avoided cost for new facilities.

- **Application:** All FERC regulated and otherwise non-FERC jurisdictional utilities are "electric utilities" subject to the purchase obligation.

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Who are QFs under PURPA?

QFs are either small power production or cogeneration facilities

"**Small power production facility**" means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which—

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is **not greater than 80 megawatts**;

(Section 3(17) of the Federal Power Act)

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Cogeneration Facilities

(A) "**cogeneration facility**" means a facility which produces—

(i) electric energy, and

(ii)steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes (hence, cogeneration);

(B) "qualifying cogeneration facility" must also meet FERC rules governing fuel use, and fuel efficiency

Note: QFs must be self-certified (electronic form 556) or secure affirmative FERC certification (amended regulation)

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Energy Policy Act of 2005 and related changes to PURPA Regulations

- EPAct 2005 excuses utilities from purchase obligation if FERC determines that the QFs have access to organized markets (independently administered, auction based day ahead and real time wholesale energy markets and wholesale markets for long-term sales of capacity and energy")
  - FERC determined by rule that MISO, PJM, ISO-NE, NYISO, ERCOT, CAISO meet the market definition, and established rebuttable presumption that QFs behind utilities in those RTOs have market access. 18 C.F.R 292.309
  - Utilities outside of organized markets may also petition FERC for exemption case-by-case.

5

Energy Policy Act of 2005 and related changes to PURPA Regulations (cont'd)

- **QF Safe Harbor**: FERC's current rules contain a rebuttable presumption that even in organized markets, full non-discriminatory access to the market is not available to QFs 20 MW and smaller. 18 C.F.R. 292.309.

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PURPA In The CROSSHAIRS: *QF Rates and Requirements, Implementation Issues Under PURPA*, 168 FERC ¶ 61,184 (September 19, 2019)

- "Circumstances have changed considerably since the Commission implemented its PURPA Regulations in 1980."
- "There are a number of federal and state programs that provide further incentives for the development of alternative resources, such as renewable resources. Consequently, the majority of renewable resources in operation today do not rely on PURPA."
- **Comments due**: December 3, 2019, Docket No. RM19-15-000

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Proposed PURPA Changes

- Avoided Costs/ Rates: 4 changes to how states may set avoided costs:
  - Tying "as available" avoided cost rates to LMPs or to gas prices
  - Setting energy rates (but not capacity rates) that vary in accordance with changes in the purchasing utility's avoided costs at the time the energy is delivered.
  - Setting fixed energy rate based on estimated value at the time of delivery
  - Requiring capacity rates to be determined through a competitive bidding process.

Proposed PURPA Rule Changes – Avoided Cost Calculation – Avoided energy costs

States may set "as available" energy rates:

- at the locational marginal price (LMP) in organize markets and
- at "competitive prices from liquid market hubs or calculated from a formula based on natural gas price indices and specified heat rates" outside organized markets

Proposed PURPA Rule Changes – Avoided Cost Calculation – Avoided energy costs – (cont'd)

States may set energy rates (but not capacity rates) in QF power sales contracts and other legally enforceable obligations (LEOs) that vary in accordance with changes in the purchasing utility's avoided costs at the time the energy is delivered.

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Proposed PURPA Rule Changes – Avoided Cost Calculation – Avoided energy costs – (cont'd)

States in an RTO/ISO market could require the fixed energy rate be calculated on an estimate of the value at the time of delivery (forward price curve).

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Proposed PURPA Rule Changes – Avoided Cost Calculation – Avoided capacity costs

The rule codifies the existing practice in many states that allows avoided capacity costs to be determined through a competitive bidding RFP process, provided that:

(a) The process is "open and transparent"

(b) solicitations are open to all sources satisfying the utility's capacity needs,

(c) solicitations conducted at regular intervals;

(d) there is oversight by an independent administrator; and

(e) The results are certified by the state regulator or nonregulated electric utility

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Proposed PURPA Rule Changes(cont'd)

Rebuttable Presumption:

Going forward the rebuttable presumption that QFs at or below 20 MW lack nondiscriminatory access to markets will apply only to cogenerators.

For all other QFs (i.e., small power producers) the rebuttable presumption will only apply to QFs 1 MW or smaller.

Proposed PURPA Rule Changes (cont'd)

One Mile Rule: FERC proposes to modify its "one-mile rule" test for determining whether small power producers are located at separate sites.

Small power production (SPP) facilities located between one and ten miles apart will be presumed to be separate facilities for purposes of determining whether the 80 MW cap on the size of an SPP has been exceeded.

But because the presumption is rebuttable, parties will be allowed to challenge the presumption and to show that "affiliated small power production facilities more than one mile apart and less than ten miles apart, are actually part of a single facility, and not separate facilities." NOPR P 94.

Proposed PURPA Rule Changes(cont'd)

Legally Enforceable Obligation (LEO):

States already have delegated authority to determine when LEOs are established

But FERC's proposed rule would require QFs to demonstrate commercial viability based on "objective, reasonable, state-determined criteria."

Proposed PURPA Rule Changes(cont'd)

Challenges to QF self-certifications: FERC proposes to establish a simplified process to challenge a project's QF status.

- QFs file FERC Form 556 to self-certify or self-re-certify for QF status. FERC proposes to allow a party to protest a QF's self-certification without filing a petition for a declaratory order. NOPR, P 148.

Potential impacts on IECA members

Changes to the Rebuttable Presumption

FERC's retention of the 20 MW rebuttable presumption for cogenerators rests on its findings that "unlike small power production facilities" :

(1) cogenerators create electricity as a "byproduct" of their industrial, commercial, residential and institutional processes and

(2) "might not be as familiar with energy markets and the technical requirements for [ ] sales [into those markets]." NOPR, P 130.

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Potential impacts on IECA members (cont'd)

Many IECA members operate cogeneration facilities. They will not be affected by the rule change.

But FERC is incorrect in assuming that small power production facilities – *for which the rebuttable presumption would change significantly* - "are constructed *solely* to produce and sell electricity."

Many IECA members operate small power production facilities that produce electricity, not for sale, but primarily to support their manufacturing operations. The electricity that is sold from these facilities is excess to the member's needs and typically sold on an as available basis. FERC's rationale for retaining the 20 MW presumption for cogenerators logically applies to these types of small power production facilities, too.

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Potential impacts on IECA members (cont'd)

Changes to the One Mile Rule

Both existing and proposed § 292.204(a)(1) apply only to the combined capacity of "small power production facilities that use **the same energy resource, are owned by the same person(s) or its affiliates**, and are located at the same site."

But proposed § 292.204(a)(2) creates two problems for IECA members with small power production facilities that may be more than one, but less than 10 miles apart.

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Potential impacts on IECA members (cont'd)
Changes to one mile rule (cont'd)

First, the proposed rule – as drafted – conflicts with §292.204(a)(1). It would allow parties to challenge the presumption that facilities less than 10 miles apart are separate even where the facility for which qualification is sought did *not* use the same energy source or was not owned by the same person or its affiliate as other small power production facilities less than ten miles away.

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Potential impacts on IECA members (cont'd)
Changes to one mile rule (cont'd)

Second, the proposed rule does not distinguish between small power production facilities built to sell electricity to third parties and small power production facilities built primarily to support manufacturing or industrial processes.

Suppose, for example, that a manufacturer owns a small power production facility 20 MW in size used to support its industrial operations. If, less than 10 miles away, an affiliate were to begin operating a 70 MW small power production facility built to sell electricity to third parties, the manufacturer would be at risk of losing the QF status of its existing plant - even though the two facilities were built to serve two very distinct purposes.

Any Questions?

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