PURPA Overview with FERC Staff

Missouri Public Service Commission PURPA Conference

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Disclaimers

- The views expressed are the authors' alone, and do not necessarily represent the views of the Federal Energy Regulatory Commission, individual Commissioners, or other staff
- Some materials have been paraphrased/simplified/omitted to fit the format of the presentation and to ease discussion
- The official rules/regulations are contained in the underlying orders and Title 18, Part 292 of the Code of Federal Regulations

Background

The Public Utility Regulatory Policies Act of 1978 (PURPA) was enacted to encourage generation technologies, including cogeneration and renewables, that were not commercially viable at the time by requiring utilities to purchase them at a rate not exceeding the utility's "incremental cost" to reduce dependence on traditional generation fuels

Benefits of being a qualifying facility (QF) under PURPA include:

- Right to sell energy and capacity to a utility
- Right to purchase certain services from utilities
- Relief from regulatory burdens
  - Various categories of QFs are exempt from:
    - PUHCA
    - Certain state laws and regulations
    - Most sections of the FPA except sections 205 and 206

FERC and State Commission PURPA-Related Roles and Responsibilities

- Congress has directed FERC to promulgate "such rules as [FERC] determines necessary to encourage cogeneration and small power production (PURPA § 210(a), 16 U.S.C. § 824a-3(a)) through, among other things, the so-called mandatory purchase obligation (PURPA § 210(a)(2), 16 U.S.C. § 824a-3(a)(2); 18 C.F.R. § 292.303), and avoided cost rates (PURPA § 210(b), (d), 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. § 292.304) (*American Paper Institute, Inc. v. American Electric Power Service Corp*., 461 U.S. 402, 404-06 (1983); *Allco Renewable Energy Ltd*., 146 FERC ¶ 61,107, at P 9 (2014))

- Congress has directed that State Commissions "shall. . . implement" the rules promulgated by FERC (PURPA § 210(f), 16 U.S.C. § 824a-3(f)(1); *Allco Renewable*, 146 FERC ¶ 61,107 at P 9)

FERC and State Commission PURPA-Related Roles and Responsibilities

FERC Responsibilities

Certification of qualifying facilities (QFs):

- FERC addresses requests for FERC certification of QF status, and accepts filings for self-certification of QF status (FPA § 3(17)-(18), 16 U.S.C. § 796(17)-(18); *see* 18 C.F.R. §§ 292.203-.207)
  - FERC may revoke previously-granted QF status (18 C.F.R. § 292.207(d)(1))
  - FERC addresses requests for recertification of QF status (18 C.F.R. § 292.207(d)(2))

Utility-QF Interactions:

- FERC's rules must ensure that rates for electric utility purchases of energy from QFs:
  - Shall be just and reasonable, and in the public interest
  - Shall not discriminate against QFs, and
  - Do not exceed the cost to the electric utility of the electric energy which, but for the purchase from the QF, such utility would generate itself or purchase from another source (PURPA § 210(b), (d), 16 U.S.C. § 824a-3(b), (d))
  - The Commission has chosen to adopt so-called "full avoided cost" rates – i.e., equal to the incremental cost of the electric energy/capacity which, but for the purchase from the QF, such utility would generate itself or purchase from another source (*see* 18 C.F.R. §§ 292.304(b)(2), 292.101(b)(6); *American Paper Institute, Inc. v. American Electric Power Service Corp*., 461 U.S. 402 (1983))
- FERC addresses requests for relief from, and reinstatement of, an electric utility's mandatory obligation to purchase from QFs (PURPA § 210(m), 16 U.S.C. § 824a-3(m); *see* 18 C.F.R. §§ 292.309-314)
- FERC may enforce State Commission implementation of FERC rules promulgated under PURPA, and thus FERC addresses electric utility- and QF-filed enforcement petitions seeking review of State Commission implementation of FERC rules promulgated under PURPA (PURPA § 210(h)(2)(A)-(B), 16 U.S.C. § 824a-3(h)(2)(A)-(B); *see* PURPA § 210(f), 16 U.S.C. § 824a-3(f))
- FERC's rules cannot authorize QFs to make sales of electric energy "for purposes other than resale" (PURPA § 210(a), 16 U.S.C. § 824a-3(a))
- FERC's rules must largely exempt QFs from federal and state laws regarding rates, as well as financial and organizational regulation, to the extent necessary to encourage cogeneration and small power production (PURPA § 210(e), 16 U.S.C. § 824a-3(e); *see* 18 C.F.R. §§ 292.601-602)

FERC and State Commission PURPA-Related Roles and Responsibilities

State Commission Responsibilities - Generally

- State commissions "shall. . . implement" rules promulgated by FERC regarding QFs (PURPA § 210(f), 16 U.S.C. § 824a-3(f)(1)). Implementation may be through:
  - Enactment of laws or regulations at the state level
  - Application of rules adopted by FERC on case-by-case basis, or
  - Any other action reasonably designed to implement FERC rules (*See Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,891-93 (1980), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part*, *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983); *Allco Renewable*, 146 FERC ¶ 61,107 at n.15)
- State implementation may be challenged:
  - In state court, by a petition seeking review of a State Commission's implementation of a rule promulgated by FERC under PURPA (PURPA § 210(g)(1), 16 U.S.C. § 824a-3(g)(1))
  - In federal court, by a petition seeking enforcement of a rule promulgated by FERC under PURPA (PURPA § 210(h)(1)-(2), 16 U.S.C. § 824a-3(h)(1)-(2)). If FERC chooses not to initiate an enforcement proceeding, the petitioner itself may do so. In any such proceeding, however, FERC may intervene as a matter of right.

State Commission Responsibilities – Rates. . .

- State Commissions establish rates for electric utility purchases of energy and capacity from QFs consistent with FERC's standards (18 C.F.R. § 292.304)

- 18 C.F.R. § 292.304(e) provides that a state regulatory authority or nonregulated electric utility may establish rates for purchases of energy from a qualifying facility based on a purchasing electric utility's locational marginal price calculated by the applicable market defined in § 292.309(e), (f), or (g), or the purchasing electric utility's applicable Competitive Price

    - Alternatively, a state regulatory authority or nonregulated electric utility may establish rates for purchases of energy and/or capacity from a qualifying facility based on a Competitive Solicitation Price

- To the extent that a state regulatory authority or nonregulated electric utility does not set energy and/or capacity rates pursuant to the above, 18 C.F.R. § 292.304(e) provides factors that shall, to the extent practicable, be taken into account in determining rates for purchases from a qualifying facility

FERC and State Commission PURPA-Related Roles and Responsibilities

State Commission Responsibilities – Rates. . . (cont'd)

- FERC is reluctant to second-guess a state commission's determination of avoided cost (*California PUC*, 133 FERC ¶ 61,059, at P 24 (2010), *reh'g denied*, 134 FERC ¶ 61,044 (2011))
- QF rates can be resource-specific, upon an appropriate showing of procurement requirements and resulting costs, (*California PUC,* 133 FERC ¶ 61,059 at PP 20, 26-30, *reh'g denied*, 134 FERC ¶ 61,044 at PP 30-34)
- Rates agreed to between a QF and an electric utility are allowed, even if they differ from the rates which would otherwise be required (18 C.F.R. § 292.301(b); *Otter Creek Solar LLC*, 143 FERC ¶ 61,282, at P 4 (2013), *reconsid. denied*, 146 FERC ¶ 61,192, at P 8 (2014))
- Rates for electric utility purchases from QFs satisfy FERC's standards if the rates equal avoided costs determined after consideration of the FERC-specified factors noted on the prior slide (18 C.F.R. § 292.304(b)(2))

FERC and State Commission PURPA-Related Roles and Responsibilities

State Commission Responsibilities – Interconnection

- Electric utilities are obligated to interconnect with QFs as necessary to permit purchases from QFs, and State Commissions must enforce this obligation as part of their implementation of rules promulgated by FERC under PURPA (18 C.F.R. § 292.303(c); *see* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,874; *cf*. 18 C.F.R. § 292.306 (QF shall pay the interconnection costs which a State Commission determines may be assessed to the QF))
    - State Commission-jurisdictional - Interconnections between an electric utility and a QF, when the QF sells only to the directly interconnected utility
    - FERC-jurisdictional - Interconnections between an electric utility and a QF, when that QF either sells or plans to sell any of its output to a utility other than the directly interconnected utility
    - *See Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at PP 813-14 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008); *accord Florida Power & Light Co*., 133 FERC ¶ 61,121, at PP 19-23 (2010)
- State Commissions establish the manner of payments for interconnection costs, e.g., reimbursement over a reasonable period of time (18 C.F.R. § 292.306(b))

July 2020 PURPA Reform – Order No. 872

- Covered topics such as
  - QF rates
  - Competitive solicitations
  - 20MW/5MW “must-purchase” threshold
  - Legally enforceable obligations (LEOs)
  - Definition of “facility” (one-mile rule/1-to-10-mile rule)

QF Rates – Previous Rules

- Under FERC's previous regulations, a QF could (at its option) sell its electric energy as the QF determines such energy to be available ("as-available" energy sales) or pursuant to a contract or a legally enforceable obligation ("LEO")
  - Rates for sales of as-available energy were based on the purchasing electric utility's avoided cost of energy calculated at the time of delivery
  - Rates for sales of energy and capacity pursuant to a contract or LEO were, at the QF 's option, based either on the purchasing electric utility's avoided cost calculated at the time of delivery or on the avoided cost calculated at the time the contract or LEO was incurred

As-Available QF Rates

- Order No. 872 added or made explicit state flexibility in setting QF rates for sales of "as-available" energy. Among other things, Order No. 872:
  - Established rebuttable presumption that locational marginal price (LMP) can be a rate for as-available QF energy within RTOs/ISOs
  - Provided clarifications about the use of competitive prices (such as price indices) in setting QF rates where applicable outside of RTOs/ISOs

QF Rates in Contracts and LEOs

- Order 872 provides states the flexibility to require that *energy* rates (but not *capacity* rates) in contracts and LEOs vary over the life of the contract or LEO to reflect the purchasing electric utility's avoided costs at the *time of delivery*
- Order 872 also provides states the flexibility to allow QFs to retain the right to fixed energy rates, and that such fixed energy rates could be based on *projections* of energy prices at the time of delivery
- But states also would have the flexibility to not require variable energy pricing
- Order 872-A emphasized that even when a state exercises the right to only permit variable energy rates, firm capacity rates are still available to QFs to the extent they provide capacity service

Capacity Rates

- Order 872 largely leaves the determination of capacity rates unchanged
- But states would now be allowed the flexibility to set capacity rates pursuant to a competitive solicitation process, if conducted pursuant to procedures ensuring that such solicitation is transparent and non-discriminatory
- Order No. 872 clarifies that under the current regulations states already can account for reduced loads in setting capacity rates

Competitive Solicitations (RFPs)

- Under Order 872, states may also now use prices for energy and capacity determined pursuant to a competitive solicitation process, if conducted pursuant to procedures ensuring that such solicitation is transparent and non-discriminatory, including:
  - Open and transparent process
  - Open to all sources
  - Conducted at regular intervals
  - Overseen by independent administrator
  - Certified as fulfilling above criteria through post-solicitation report
  - Solicitations must also satisfy factors in *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082, at P 18 (2004)

Competitive Solicitations (RFPs) (cont.)

- Utility procuring all capacity through competitive solicitation will be presumed to have zero *capacity* costs beyond what was procured through the auction, but must still purchase *energy* from QFs
- Utility not procuring all capacity through competitive solicitation will not be presumed to have zero additional capacity costs, and may be required to pay a rate for avoided capacity

5 MW Rule

- Order No. 872 revised regulations implementing PURPA section 210(m), which provide for the termination of an electric utility's obligation to purchase from a QF with nondiscriminatory access to certain markets
- Under the previous rule, there was a rebuttable presumption that QFs with a net capacity at or below *20 MW* do not have nondiscriminatory access to such markets
- Order No. 872 lowered the rebuttable presumption for small power production facilities (but not cogeneration facilities) from 20 MW to 5 MW

When Does a LEO Arise?

- FERC's previous regulations did not specify when, or under what circumstances, a LEO arises
- Order 872 provides that, for a LEO to arise, a QF must demonstrate its commercial viability and a financial commitment to construct its facility
  - Relevant criteria for making such a determination would be state-set, but must be objective and reasonable, such as:
    - Taking meaningful steps to obtain site control adequate to commence construction of the project at the proposed location
    - Filing an interconnection application with the appropriate entity
    - Submitting all other required applications
- Order 872 reaffirms FERC precedent finding that certain prerequisites to QFs obtaining a LEO imposed previously by some states are unreasonable

Effective Date and Impact to Existing Contracts, LEOs, and Certifications

- The changes adopted in Order 872 became effective December 31, 2020
- Changes in Order 872 are effective prospectively for new contracts or legally enforceable obligations and for new facility certifications and recertifications filed on or after the effective date of this final rule
- Order 872 does not permit disturbance of existing contracts or LEOs or existing facility certifications

Order No. 872

Definition of "Facility"

(One Mile Rule/1-to-10-Mile Rule)

- PURPA states that small power production QFs can be no greater than 80 MW. In evaluating whether a QF is within that limit, FERC's previous regulations, 18 CFR 292.204(a), provided an irrebuttable presumption that affiliated facilities that use the same energy resource and that are more than one mile apart are located at different sites that are separately certifiable as QFs.
- In response to concerns raised with that policy, Order 872 established a new three-tiered system:
  - Facilities located ≤ 1 mile apart: continue to be irrebuttably presumed to be located at the same site
  - Facilities located > 1 mile but < 10 miles apart: *rebuttably* presumed to be located at separate sites
  - Facilities located ≥ 10 miles apart: continue to be irrebuttably presumed to be located at separate sites
- Order 872 also specifies that the measurement will be by reference to the location of the nearest pieces of electrical generating equipment (e.g., individual solar panels or wind turbines)
- Within 1-to-10-mile distances, various characteristics of the facilities, their ownership, and their commercial arrangements may be considered in determining if facilities are separate or the same

Form 556

Obtaining QF Status/Certification Process

Two paths to QF status: self-certification and Commission certification.

Self-certification (or self-recertification)

- The vast majority of QFs self-certify. No filing fee required.
- Applicant files a Form 556. Applicant must also notify the interconnected utility and state commission
- Staff reviews self-certifications for obvious errors, inconsistencies and omissions; if necessary, requests the QF to resubmit a corrected version
- Once the form is accepted into our system, the applicant receives an automated e-mail providing the QF docket number for the facility, and that facility has QF status

Form 556

Obtaining QF Status/Certification Process (cont.)

Commission certification (or Commission recertification)

- A formal review that is available to seek assurance of a facility's QF status
- Typically, applicant files a Form 556 as well as an application describing the project and why it meets the criteria to be a qualifying facility
- Requires filing fee
- Results in Commission order certifying (or denying) QF status

Note that certification is not an indication that the QF was built or put into operation

QF's may be decertified upon the Commission's own motion, or the motion of another entity (such as an electric utility) seeking revocation of QF status, or by request of the QF

Form 556

- First introduced in 1995 as a means of providing a standardized form to save developers from having to examine the Commission's regulations and precedent to certify
- Prior to 2006, QFs qualify for PURPA benefits without making any filing with the Commission
- In 2006, Order No. 671 required all facilities claiming to be a QF to file a Form 556
- In 2010, Order No. 732 updated the Form 556, required electronic filing, and adopted an exemption for generating facilities 1 MW or less
- In 2020, the Commission received 4,011 self-certification and self-recertification filings

Form 556

Protests of Self-Certifications

- FERC's previous regulations did not spell out a process for challenging a QF's self-certification, but FERC's practice had been to allow a petition for declaratory order seeking a determination that a self-certified facility is not a QF (with the specified filing fee for a declaratory order)
- Order 872 allows challenges – i.e., protests – to QF self-certifications and self-recertifications, without having to pay the filing fee for a declaratory order. New 18 CFR 292.207(c)
- Order 872 allows such no-fee protests to new certifications (both new self-certifications and new applications for Commission certification), but to only self-recertifications and applications for Commission recertifications that make substantive changes to the existing certification

Thank you.