

July 20, 2018

The Honorable Kevin J. McIntyre, Chairman
The Honorable Cheryl A. LaFleur
The Honorable Neil Chatterjee
The Honorable Robert F. Powelson
The Honorable Richard Glick
Federal Energy Regulatory Commission
888 1st Street, NE
Washington, DC 20426

Re: Implementation Issues under the Public Utility Regulatory Policies Act of 1978 (Docket No. AD16-16-000)

Dear Chairman and Commissioners:

On behalf of the National Association of Regulatory Utility Commissioners (“NARUC”), I am writing to express how pleased we are that Chairman McIntyre announced in May that the Federal Energy Regulatory Commission (“FERC”) would be reviewing its regulations implementing the provisions of the Public Utility Regulatory Policies Act of 1978 (“PURPA”).¹ As the primary point of responsibility for PURPA’s on-the-ground implementation, the States have a strong interest in the reform of PURPA’s associated federal administrative regulations and we hope this reform will continue to be a priority.

As you know, NARUC is seeking three ways to reform PURPA, all of which are documented in the record accumulated in AD16-16-000.² Each of these approaches allows FERC to work within existing law to make meaningful changes to PURPA, while remaining committed to the law’s underlying goals of competition and encouragement of qualifying facility (“QF”) technologies.

The first reform would provide a pathway for States to replace the use of administratively determined avoided costs with a more competitive process. The Commission could use its discretion to update the PURPA regulations to better reflect the current competitive access environment and to clarify the treatment of these alternative options. In 18 CFR 292.309(a)(3), an electric utility can have its obligation to purchase from a QF terminated if the Commission finds that the QF has nondiscriminatory access to “[w]holesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets

¹ 16 U.S.C. § 2601 et seq. (2012).

² FERC accumulated this record largely through submissions made at a Technical Conference titled *Implementation Issues under the Public Utility Regulatory Policies Act of 1978*, held on June 29, 2016 (Docket No. AD16-16-000) (“PURPA Tech. Conf.”), and the associated submissions made afterwards in response to questions from FERC Staff.

described in paragraphs (a)(1) and (a)(2) of this section.”³ Currently, only the Electric Reliability Council of Texas (“ERCOT”) qualifies as a market described in §292.309(a)(3).⁴ In our view, this catch-all administrative rule, which mirrors similar statutory language, suggests the possibility that there should be ways, other than belonging to a regional transmission organization/independent system operator (“RTO/ISO”), that are sufficient to obtain this exemption. Yet this suggestion has not been realized. We propose that the Commission develop a “yardstick” that signals to utilities and States outside of the current RTOs/ISOs what characteristics of a wholesale market would allow them to qualify under §292.309(a)(3).

For a yardstick to address long-term energy and capacity, integrated resource plans (“IRPs”) could identify additional energy and capacity needs and those needs would be filled by conducting competitive solicitations for energy and capacity. These competitive solicitations, or request for proposals (“RFPs”), would be open to all QFs and would be overseen by State commissions or administered independently of any individual market participant to mitigate anti-competitive behavior of the buyer. FERC could adopt guidelines to ensure competitive solicitations are genuinely competitive. Additionally, to determine the competitiveness of the market, FERC could look to whether there was a large number of bilateral agreements for a particular “region” or to the existence of retail competition.

For short-term energy and capacity, NARUC proposes that utilities could demonstrate that transactions routinely occur at one or more liquid trading hubs, and that load-serving entities engage in “off-system” transactions at these hubs. To ensure that QFs have alternatives to their local utility to sell their electric energy, utilities could be made to apply *en bloc* for a particular region and demonstrate that a QF would have the opportunity to sell to multiple utilities, as opposed to only one.

In finding that ERCOT satisfied the requirements of subparagraph (a)(3), the Commission has already signaled that no centralized day-ahead market for energy is necessary and that a forward capacity market is not required.⁵ The Commission discussed that ERCOT does have an

³ 18 CFR 292.309(a)(1) and (a)(2) state:

- (a) After August 8, 2005, an electric utility shall not be required, under this part, to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility if the Commission finds that the qualifying cogeneration facility or qualifying small power facility production has nondiscriminatory access to:
 - (1)(i) Independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and
 - (ii) Wholesale markets for long-term sales of capacity and electric energy; or
 - (2)(i) Transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and
 - (ii) Competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

⁴ 18 CFR 292.309(f).

⁵ “ERCOT does not administer a centralized day-ahead market for energy, but Reliant submitted testimony that ERCOT’s real-time market has been sufficient to support a robust market-based (as opposed to administratively-created) day-ahead market for sale of electricity.” Order 688 at P 177.

independently operated market mechanism with a robust bilateral market, which could be considered necessary characteristics in developing a yardstick.⁶ In the ERCOT determination, the Commission also noted that ERCOT had the support of the Public Utilities Commission of Texas. In this case, NARUC on behalf of the public utilities commissions is affirmatively seeking a pathway for utilities outside of the seven RTO/ISOs to be eligible for the market exemption.

Using such a yardstick would allow FERC to erase the false dichotomy between RTO/ISOs regions, and those regions without such an RTO/ISO, but where each public utility nevertheless has an Open Access Transmission Tariff (“OATT”)⁷ and where States oversee utility procurement and require the use of competitive solicitations. In addition to facilitating PURPA implementation and easing the onerous administrative burdens on State Commissions, this would promote competition in areas that are not in RTOs/ISOs, which allows for better price formation and clearer market signals.

Another important reform that would increase competition and reduce transaction costs to State Commissions would be to lower or eliminate the 20 MW threshold for the rebuttable presumption that QFs with a capacity at or below that size do not have nondiscriminatory access to the market.⁸ This threshold is outdated, given the amount of time FERC has spent on ensuring that still smaller resources are able, and expected to, participate in the wholesale markets. In keeping with the goal that FERC should better align PURPA implementation with modern realities, this threshold should be lowered to whatever the minimum capacity requirement is for a resource to participate in an RTO/ISO.

Finally, NARUC supports the Commission’s stated interest in addressing the disaggregation problem by making changes to the one-mile rule and other related reforms. There are a number of well-documented incidents where projects have forgone economies of scale to qualify themselves as individual QFs and evade other regulations; for instance, State Commissions requirements for competitive solicitations. The Commission should not encourage this form of regulatory arbitrage.

In contemplating changes to address the disaggregation issue, we request that the Commission consider carefully the testimony of Commissioner Paul Kjellander, Idaho Public Utilities Commission. Specifically, Commissioner Kjellander offers potential criteria that could be used to determine whether a single project has been disaggregated for the purposes of creating multiple QFs under the generation size limit.⁹ Such reforms would enable State Commissions the ability to improve PURPA implementation by being better able to balance the PURPA goals of rates that are just and reasonable for electric consumers and in the public interest and that do not discriminate against QFs.¹⁰

⁶ Order 688 at P 174 and P 176.

⁷ *Transmission Open Access. Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Final Rule, Docket Nos. RM95-8-000 and RM94-7-001, Order No. 888 (April 24, 1996).

⁸ 18 CFR 292.309(d)(1).

⁹ PURPA Tech. Conf. Submittal of Commissioner Paul Kjellander at 6-7.

¹⁰ 16 U.S.C. § 824a-3(c) (2012).

We appreciate the Commission turning its attention to PURPA reform amidst all the other issues that are before the Commission. The reforms we have proposed are important and necessary at this time and we respectfully request that the Commission carefully consider them as it develops changes to the regulations. We look forward to working with you on advancing these measures because they will help FERC achieve its goal of better aligning PURPA implementation with modern realities.¹¹

Thank you for your attention to these matters and for your consideration.

Sincerely,

John Betkoski III
of Connecticut
NARUC President

¹¹ Many States incur significant transaction costs administering PURPA pursuant to the law's arcane, twentieth-century mandates. For example, PURPA issues consume more than one-quarter of the time that the Montana Public Service Commission commits to matters of electric utility regulation. PURPA Tech. Conf. Submittal of Commissioner Travis Kavulla ("Kavulla") at 1.

Document Content(s)

NARUC PURPA reform letter to FERC - 2018-07-20.PDF.....1-4