

# Legally Enforceable Obligations (LEOs)

Financial Commitments



Missouri Public Service Commission | Jefferson City, MO

Source:

# Disclaimer

- ▶ The views presented here are my own, and not necessarily those of the Commission Staff, Staff Counsel, or the Missouri Public Service Commission

# Legally Enforceable Obligations

- ▶ Legally Enforceable Obligations were promulgated in 1980 to “prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.”
- ▶ “[N]othing in this final rule nothing in this final rule limits a QF developer’s or utility’s ability to negotiate rates, terms or conditions.”

# New CFR Provision:

- ▶ (3) *Obtaining a legally enforceable obligation.* A qualifying facility must demonstrate commercial viability and **financial commitment** to construct its facility pursuant to **criteria determined by the state regulatory authority** or nonregulated electric utility as a prerequisite to a qualifying facility obtaining a legally enforceable obligation. Such criteria must be **objective and reasonable.**

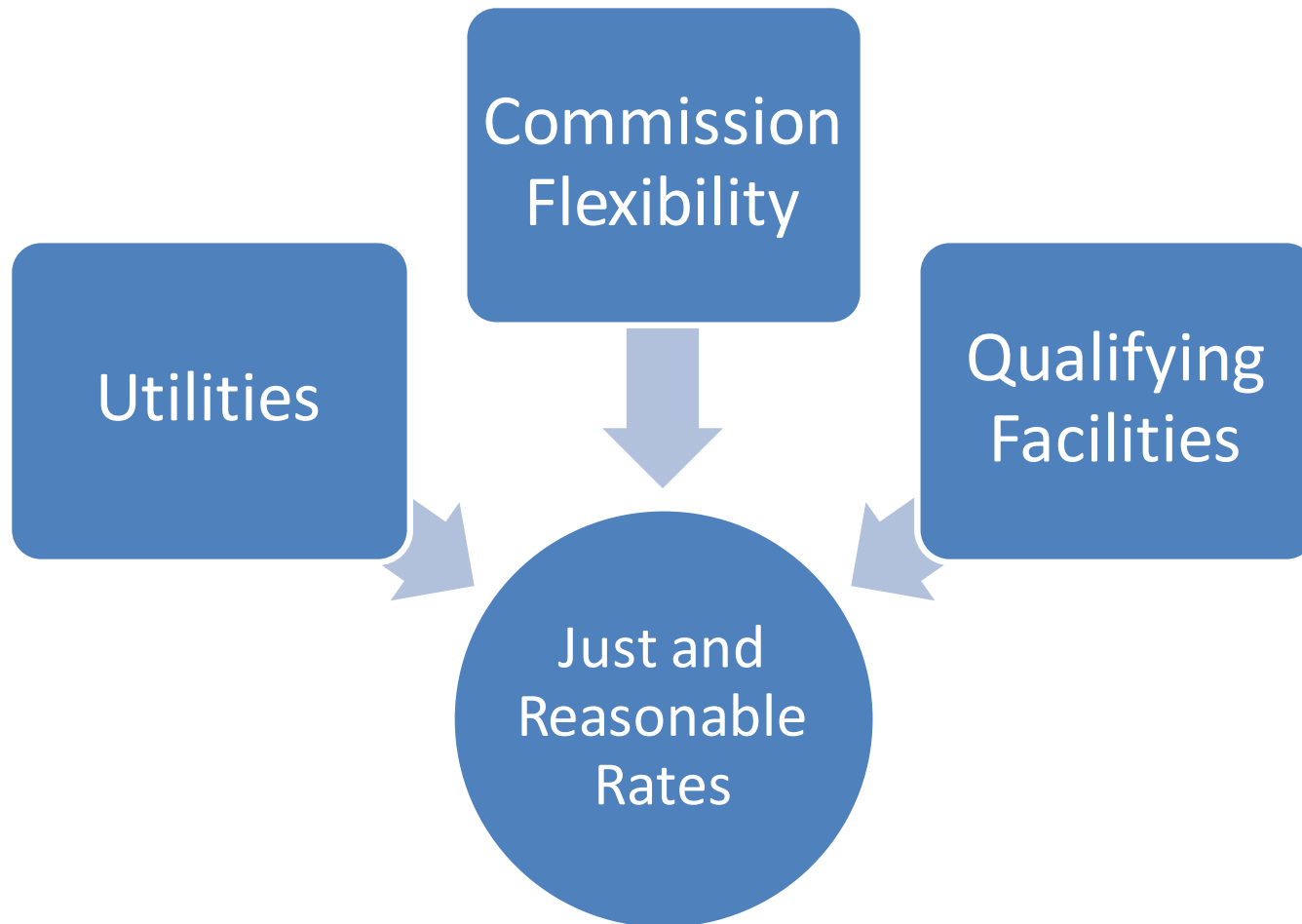
# Look first to the new regulation, 18 CFR Section 292.304(d)(3)

- ▶ The plain language of the regulation controls.

# Look to Order 872 to answer any questions not answered by the plain language of the regulation

- ▶ Courts will defer to an agency's interpretation of its own regulations only if the regulation is genuinely ambiguous
- ▶ The agency's interpretation must:
  - Be reasonable
  - Be the agency's "authoritative" or "official position," not an ad hoc statement
  - In some way implicate the agency's substantive expertise
  - Reflect "fair and considered judgment"

# Order 872 and 18 CFR 292.304(d)(3) strike a balance



# PURPA requires just and reasonable rates

- Rules promulgated under PURPA “shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase”:-
  - **(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and**
  - **(2) shall not discriminate** against qualifying cogenerators or qualifying small power producers.

• 16 U.S.C.A. § 824a-3 (West)



# Orders and Decisions



# FERC says multiple times: financial commitment is not demonstrated by obtaining financing

- ▶ “[D]emonstrating the required financial commitment does not require a demonstration of having obtained financing.”
- ▶ “Obtaining a PPA or financing cannot be required to show proof of financial commitment.”

# Order 872 does prohibit some criteria

- ▶ Execution of PPA or interconnection agreements
- ▶ Filing formal complaint with State Commission
- ▶ Requirement to provide firm power
- ▶ Requirement to deliver power in 90 days

# Great Divide Wind Farm 2, LLC v . Aguilar, 414 F.Supp.3d 1369 (D.N.M. 2019) (appealed)

- ▶ District Court affirmed New Mexico's requirement that QF be ready to interconnect before it obtains LEO with a utility
- ▶ The District Court looked at the Notice of Proposed Rulemaking (NOPR) leading to Order 872, but did not use the NOPR in reaching its decision

# Order 872 proposes, but does not require, specific criteria

- ▶ Meaningful steps to obtain site control to commence construction
- ▶ Application fees for local permitting and zoning and state permitting processes
- ▶ System impact study requested (or one year after tendering interconnection request to host utility)
- ▶ Submitted interconnection request and associated study deposit

# South River Power Partners, LP v. PA Public Util. Comm'n, 696 A.2d 926 (Pa. Commw. Ct. 1997)

- ▶ LEO not created when QF tendered a contract
- ▶ QF had only held discussions with investment bankers. No financing obtained.
- ▶ QF had:
  - no assets, liabilities, or net worth
  - no written partnership or LP agreement
  - no current or past employees
  - no association with any other power production project
  - no applications for governmental permits
  - no consultants to prepare permits or approvals

# Cube Yadkin Generation LLC v. Duke Energy Progress, LLC, 269 N.C. App. 1 (N. Car. Ct. Apl. 2019)

- ▶ Upheld North Carolina test for establishing an LEO:
  - Self-certify with FERC as a QF
  - Obtain a CPCN
  - Make commitment to sell output to a utility under PURPA via use of NOC form

# MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation, --- P.3d --- (Mont Sep. 22, 2020)

- ▶ Utility refusal to negotiate, without more, is insufficient to establish that QF has committed itself to a project
- ▶ QF “did not take action that exposed it to liability if it abandoned the proposed project, such as avian studies, obtaining permits, or having actual site control over proposed areas.”



# Order 872

- ▶ Financial Commitment Criteria must be within the control of the qualifying facility

# Questions or Comments

