

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Proposed Amendments to)	
4 CSR 240-20.060, Filing Requirements for)	<u>File No. EX-2020-0006</u>
Electric Utility Cogeneration)	

RESPONSE TO ORDER AND STAFF COMMENTS TO PROPOSED AMENDMENTS

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and for its *Response to Order and Staff Comments to Proposed Amendments* states:

1. On July 16, 2020 the Federal Energy Regulatory Commission (“FERC”) issued Order 872, *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978* (“Order 872”), approving revisions to its regulations implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (“PURPA”).¹

2. On July 24, 2020 the Commission directed Staff to state whether it supports continuing with this rulemaking docket in light of the FERC’s issuance of Order 872.

3. Staff supports continuing with the rulemaking in this docket, because (1) FERC’s proposed rulemaking will not go into effect until November, 2020, at the earliest and may continue for years through appeals, and (2) the proposed new federal rule provides additional flexibility for states in implementing PURPA, diminishing the possibility that the Commission’s proposed rules will conflict

¹ *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order 872, 172 FERC ¶ 61,041 (Jul 16, 2020).

with FERC's. Furthermore, PURPA and its regulations do not address net metering, so there is no reason why the Commission's proposed net metering rules should not continue.

4. By its own terms, Order 872 will take effect 120 days after being published in the Federal Register.² As of July 29, 2020, Order 872 has not been published in the Federal Register.

5. Order 872 is still subject to applications for rehearing and appeal. Applications for rehearing may be filed within thirty days, through August 15, 2020.³ FERC could then grant rehearing or abrogate or modify its order.⁴ FERC could also deny the application for rehearing, at which point a party has sixty days to file a petition for judicial review.⁵ Finally, either the Commission or a court may stay the Commission's order while the order is reviewed on appeal.⁶

6. Order 872 does not justify discontinuing the Commission's current rulemaking because Order 872 is not yet effective and still subject to revision and appeal. Meanwhile, the Commission's rulemaking process has travelled through four dockets, and stakeholders have had the several opportunities to review draft rules. The process began with file number EW-2017-0245 as a working case to

² *Id.* at P. 1.

³ 16 USC § 825/(a) (2018).

⁴ *Id.*

⁵ 16 USC § 825/(b) (2018). The application for rehearing may be deemed denied if FERC does not grant or deny rehearing or abrogate or modify its order within thirty days of the application for rehearing. *Id.*

⁶ 16 USC § 825/(c) (2018).

review the Commission's cogeneration and net metering rules. After reviewing stakeholders' comments and hosting a workshop, Staff recommended potential revisions. The Commission opened a separate working file (file number EW-2018-0078) to discuss Staff's recommendations and review its regulations consistent with Governor Greitens' Executive Order 17-03 directing state agencies to streamline and eliminate redundant regulations. Staff filed a *Notice of Draft Rule for Comment* on May 22, 2018 suggesting revisions, to which stakeholders filed comments. On June 3, 2019 Renew Missouri Advocates filed a rulemaking petition (file number EX-2019-0378) requesting Commission amendment of the cogeneration rules. The Commission invited comments, and Staff filed a report. The Commission opened the instant docket on July 15, 2019, directing Staff to begin the formal rulemaking process and submit a revised rule. Staff filed the draft rules which are the basis for this rulemaking.⁷ They have been published in the Missouri Register⁸ and a rulemaking hearing is scheduled for August 11, 2020.

7. In summary, the federal rulemaking process may continue for years after FERC's final rule is published. The Commission's rulemaking process has been a collaborative process between the Commission, Staff, and stakeholders over the course of four Commission dockets. There is no reason for the Commission's rulemaking process to stall while waiting for the ultimate form that

⁷ This history is more thoroughly explained in *Staff's Proposed Draft Rules*, EX-2020-0006 (Aug 23, 2019).

⁸ *Missouri Register*, Vol. 45, No. 13, P. 1005 (Jul 1, 2020).

Order 872 may or may not take while it awaits further consideration and appeal before taking effect.

8. Furthermore, Order 872 generally grants the states increased flexibility, which reduces the possibility that the Commission's proposed rulemaking will conflict with FERC's. This is illustrated by the proposed federal rate setting provisions. FERC's and the Commission's regulations currently provide that a qualifying facility ("QF") may sell its energy on either an "as-available" basis, or pursuant to a contract or a legally enforceable obligation ("LEO") at rates based upon either the purchasing utility's avoided cost calculated at the time of delivery or on the avoided cost calculated at the time the contract or LEO is incurred.⁹ The prospective rule provides flexibility by allowing states to require that energy rates vary over the life of the LEO to reflect the purchasing utility's avoided cost at the time of delivery.¹⁰ But states also would have the flexibility to not require variable energy pricing. The Commission need not change its proposed rule to be in compliance with the proposed federal rule. At a later date, after receiving input from stakeholders, the Commission may decide to exercise its discretion granted in the proposed federal rule and allow QFs to enter into LEO's with variable rate pricing.

⁹ 18 CFR § 292.304(d) and 20 CSR § 4240-20.060(10)(C).

¹⁰ See also Order 872 at ¶ 36: "The NOPR proposal (which we adopt in this final rule) gave states the flexibility, should they choose to take advantage of this flexibility, to require that the avoided cost *energy* rates in QF contracts must vary depending on avoided costs at the time of delivery (rather than being fixed at the time a LEO is incurred). (Emphasis in original.)

9. Some Commission amendments explicitly adopt the federal rules, eliminating the need to align the Missouri rule with the federal rule. For example, one of the principal amendments to the federal regulations, the “one-mile” rule, would be automatically adopted in the Commission’s rules, because the Commission’s current and proposed rules adopt the federal definition of a QF.¹¹ Current federal regulations provide an irrebuttable presumption that affiliated facilities that use the same energy resource and are located more than one mile apart are separately certifiable QFs.¹² The proposed federal regulation would establish a three-tiered system stating that affiliated facilities that are one mile or less apart are irrebuttably presumed to be located at the same site, affiliated facilities more than one mile apart are rebuttably presumed to be located at separate sites, and affiliated facilities at least ten miles apart are irrebuttably presumed to be located at separate sites.¹³ This provision would be automatically adopted in the Commission’s rules because 20 CSR § 4240-20.065(1)(A) states that terms in this rule have the same meaning as they do in PURPA.

10. Staff supports the proposed amendments to 20 CSR § 4240-3.155, CSR § 4240-20.060, and 20 CSR § 4240-20.065 published in the Missouri Register on July 1, 2020.¹⁴ The proposed amendment to 20 CSR § 4240-3.155 would rescind this rule in its entirety and incorporate its provisions in the cogeneration and small power

¹¹ 20 CSR § 4240-20.060(1)(G)

¹² 18 CFR § 292.204(a).

¹³ Order 872 at ¶ 459.

¹⁴ *Missouri Register*, Vol. 45, No. 13, P. 1005 (Jul 1, 2020).

production regulations of 20 CSR § 4240-20.060. The proposed amendment to 20 CSR § 4240-20.060 amends the rule to expand the use of standard contracts and rate for purchases from QFs and removes unnecessary language. The proposed amendment to 20 CSR § 4240-20.065 simplifies and improves the rules by streamlining and eliminating duplicative requirements and provides clarifying language.

WHEREFORE, Staff responds to the Commission's Order stating that it supports continuation of the rulemaking process and supports the proposed amendments to 20 CSR § 4240-3.155, CSR § 4240-20.060, and 20 CSR § 4240-20.065.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all counsel of record on this 29th day of July, 2020.

/s/ Karen E. Bretz