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FERC Revises PURPA Regulations to Increase State Flexibility, Modify the Mandatory Purchase Obligation, and Reform the “One-Mile Rule”

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On July 16, 2020, the Federal Energy Regulatory Commission (FERC) issued a Final Rule revising its regulations implementing the Public Utility Regulatory Policies Act of 1978 (PURPA). With limited exceptions, the Final Rule largely adopts the proposals in FERC’s September 2019 Notice of Proposed Rulemaking (NOPR). Specifically, the Final Rule:

- Grants state regulatory authorities more flexibility in setting the avoided cost rates utilities must pay to small power production—which includes renewables—and cogeneration qualifying facilities (QFs).
- Establishes criteria that QFs must meet prior to obtaining a contract or other legally enforceable obligation (LEO) for the sale of power to utilities.
- Revises the mandatory purchase obligation from small power production QFs under 20 MW, the “one-mile rule” used to determine whether small power production QFs meet the 80 MW size limit and other thresholds, and the process for challenging a QF self-certification.
- Modifies rooftop solar developers’ obligations to recertify their facilities.

The changes in the Final Rule are likely to have significant implications for utilities required to purchase the output of QFs and for developers and generators that rely on PURPA rates and obligations for the commercial viability of their projects. These changes will be effective 120 days after the Final Rule’s publication in the Federal Register. FERC emphasized that the changes adopted in the Final Rule are effective prospectively and are not intended to affect existing contracts or LEOs or existing facility certifications.

Rates for QF Power Sales

QFs that sell their output under PURPA may sell energy on an “as available” basis, or energy and/or capacity under a contract or a LEO for a specified term. QF sales of energy on an “as available” basis are compensated at the utility’s avoided costs calculated at the time of delivery. For sales under a contract or a LEO, FERC’s regulations currently provide that a QF may elect to receive payment based on the utility’s avoided cost calculated either at the time of delivery or at the time the LEO is incurred. As described below, the Final Rule provides state regulatory authorities the flexibility to incorporate market pricing in avoided cost rates for both “as available” and contract sales.

- **Rates for “As Available” Energy:** For QFs located within the footprint of independent system operators or regional transmission organizations, the Final Rule establishes a rebuttable presumption that a state regulatory authority may use the locational marginal price (LMP) in effect at the time of delivery as a rate for “as available” QF energy. This is a departure from FERC’s proposal in the NOPR, which permitted states to set the LMP as the appropriate measure of the rate for such energy. The rebuttable presumption allows QFs to challenge a state’s decision to rely on LMP to set rates for “as available” QF energy. The Final Rule also includes a similar rebuttable presumption that permits states to use Western Energy Imbalance Market (EIM) prices as a rate for “as available” energy sold to utilities able to participate in the Western EIM market, even when the QF is not an EIM participant. For QFs located outside of organized markets, the Final Rule allows state regulatory authorities to set the rates for “as available” QF energy at a competitive price based on energy prices at liquid trading hubs (e.g., Mid-C, Palo Verde) or on formulas based on natural gas price indices and a proxy heat rate for an efficient natural gas combined-cycle generating facility or other technologies, provided that

states first determine that such rates represent the purchasing electric utilities' avoided costs.

- **Rates for Energy Sold under Contracts or LEOs:** Although the Final Rule does not change the existing payment options under the regulations, it gives state regulatory authorities the ability to eliminate a QF's option to fix energy rates for the term of the contract at the time the obligation is incurred and require instead that energy be compensated at the "as available" variable rate calculated at the time of delivery. Alternatively, state regulatory authorities can retain a QF's ability to fix energy rates for the term of the contract at the time the obligation is incurred but require that such fixed rates be based on estimates of forecasted energy prices at the time of delivery. These changes do not apply to the rates for QF capacity sold under a contract or a LEO.
- **Competitive Solicitations for Avoided Cost Rates:** The Final Rule permits state regulatory authorities to conduct competitive solicitations, such as requests for proposals (RFPs), to set avoided cost rates for QF energy and/or capacity. The Final Rule requires such solicitations to be conducted pursuant to transparent and non-discriminatory procedures and provides that the solicitation process may be subject to challenge on this basis. Further, the Final Rule clarifies that competitive solicitations may be used as an electric utility's exclusive vehicle for acquiring QF capacity. Under such circumstances, QFs that do not receive an award in the competitive solicitation are still entitled to sell energy to the electric utility at an "as available" avoided cost energy rate.

Legally Enforceable Obligation

The Final Rule clarifies when and how a LEO is established. Specifically, the Final Rule requires a QF to demonstrate commercial viability and financial commitment to construct the project, pursuant to criteria determined by the state regulatory authority. Meeting those criteria is a prerequisite to a QF's ability to obtain a LEO. The Final Rule requires that such criteria be objective and reasonable. Examples of criteria that could be used to establish commercial viability or financial commitment include site control, filing an interconnection application, or securing local permitting and zoning. In a change from the NOPR, the Final Rule states that a QF relying on permitting to support the establishment of a LEO need only show that it has applied for all required permits and paid all applicable fees, and not that it has obtained such permits.

Mandatory Purchase Obligation

PURPA requires that utilities purchase power from QFs directly or indirectly interconnected to their system. Utilities may seek to terminate their mandatory purchase obligation by demonstrating that QFs have non-discriminatory access to wholesale markets. FERC had so far relied on a rebuttable presumption that QFs with a capacity of 20 MW or less do not have non-discriminatory access to wholesale markets. The NOPR proposed drastically limiting application of this rebuttable presumption to small power production QFs with a capacity of 1 MW or less.

Although more generous than the NOPR, the Final Rule still significantly limits application of the rebuttable presumption to small power production QFs with a capacity of 5 MW or less. This change will allow utilities to terminate their mandatory purchase obligation from small power production QFs with a capacity between 20 MW and 5 MW. Such QFs can challenge the presumption that they have nondiscriminatory access to wholesale markets, and the Final Rule includes factors QFs can point to, including specific barriers to connecting to the transmission grid, the time of interconnection studies and length of the interconnection queue, a lack of affiliation with entities participating in RTO/ISO markets, a predominant purpose other than selling electricity, operational characteristics that prevent participation in a market, and transmission constraints. For cogeneration QFs, the Final Rule retains the existing presumption that QFs with a capacity of 20 MW or less lack non-discriminatory access to wholesale markets.

Finally, the Final Rule does not adopt the NOPR proposal to reduce a utility's mandatory purchase obligation in states with retail choice as a result of changes in the utility's overall supply obligations. Instead, the Final Rule clarifies that FERC's existing PURPA regulations already require that states, to the extent practicable, must account for reduced loads in setting QF capacity rates.

One-Mile Rule and Procedures to Protest Self-Certifications

Small power production QFs are subject to an 80 MW size limit. Under the current “one-mile rule,” affiliated QFs located within one mile that use the same power source are aggregated and considered to be at the same site for purposes of the 80 MW size limit and other thresholds. FERC’s existing regulations do not provide guidance on measuring the one mile. In addition, FERC’s existing regulations do not contemplate a specific process for challenging the QF status of generation facilities, including facilities developed near each other. In the past, parties have challenged QF self-certifications by filing petitions for declaratory order and paying the applicable filing fee, currently \$30,060.

The Final Rule provides that the distance between QFs should be measured based on the closest electrical generating equipment of each facility.

Further, the Final Rule continues to consider QFs located within one mile or less of each other to be at the same site, and QFs located 10 miles or more apart to be at separate sites. However, the Final Rule allows parties to challenge the QF status of generators developed near each other by creating a new rebuttable presumption that QFs located more than one mile but less than 10 miles apart are not located “at the same site.” Pursuant to the Final Rule, FERC will consider the following physical characteristics and ownership factors that can be used to defend or rebut the presumption:

- **Physical Characteristics**, including common characteristics such as infrastructure, property ownership, property leases, control facilities, access and easements, interconnection agreements, interconnection facilities up to the point of interconnection to the distribution or transmission system, collector systems or facilities, points of interconnection, motive force or fuel source, off-take arrangements, connections to the electrical grid, evidence of shared control systems, common permitting and land leasing, and shared step-up transformers; and
- **Ownership or Other Characteristics**, including whether the QFs are owned or controlled by the same person(s) or affiliated person(s), operated and maintained by the same or affiliated entities, selling to the same electric utility, using common debt or equity financing, constructed by the same entity within 12 months, managing a power sales agreement executed within 12 months of a similar and affiliated small power production qualifying facility in the same location, placed into service within 12 months of an affiliated small power production QF project’s commercial operation date as specified in the power sales agreement, or sharing engineering or procurement contracts.

The Final Rule also adopts a new process to challenge QF self-certifications that allows parties to protest a QF self-certification, or recertification that makes substantive changes, within 30 days of the date of filing. Substantive changes include a change in electrical generating equipment that increases a QF’s power production capacity by more than 1 MW or 5 percent of its previously certified capacity or a change in ownership in which an owner increases its equity interest by at least 10%. Pursuant to the Final Rule, a generator’s QF status will remain effective during the pendency of a protest. FERC must act within 90 days of any protest being filed, subject to a 60-day extension if additional information is required, or a further 60-day extension if more time is necessary to rule on the protest. A protest will be deemed denied if FERC does not act by the expiration of the tolling period. Once FERC has affirmatively certified an applicant’s QF status in response to a protest, any later protest to a recertification making substantive changes must demonstrate changed circumstances that call into question the continued validity of earlier certifications.

Rooftop Solar PV Developers

The Final Rule recognizes that rooftop solar developers frequently finance the initial development of rooftop solar photovoltaic (PV) systems, and then retain ownership of such PV systems for extended periods of time. As a result, rooftop solar developers often find themselves technically owning multiple facilities within a mile of each other and may frequently exceed the 1 MW threshold for filing QF certifications and recertifications as facilities are added or transferred. The Final Rule recognizes that frequency of such certifications and recertifications can be burdensome. Accordingly, the Final Rule allows rooftop solar developers to recertify their facilities on a quarterly basis and relieves such

developers of the obligation to recertify if they have no changes or only have changes of power production capacity of 1 MW or less in any quarter.

Implications

Developers and generators that rely on PURPA rates should prepare for the possibility that states will take advantage of the flexibility provided in the Final Rule to establish new avoided cost rates for “as available” energy and energy sold under new contracts or LEOs. Further, utilities may seek to terminate mandatory purchase obligations from facilities between 20 MW and 5 MW, and both utilities and generators that rely on PURPA rates and obligations will want to consider how to use the criteria in FERC’s regulations to build arguments defending or challenging the presumption that such facilities have nondiscriminatory access to wholesale markets.

The Final Rule will also have implications for the regulatory treatment of small power production QFs at FERC. Developers, generators and utilities should be aware of the new procedures the Final Rule establishes to challenge certifications and substantive recertifications, and cognizant of the fact that only certifications and substantive recertifications filed after the rule takes effect will be subject to challenge. Owners of QFs located near each other should also audit their portfolios to determine which facilities in their portfolios are located within 10 miles of each other and should consider whether to preemptively defend the presumption that the facilities are located at separate sites in any certifications or substantive recertifications filed for such facilities after the Final Rule takes effect. Such owners should also preemptively consider whether the Final Rule may jeopardize their eligibility for the exemptions from federal and state regulation afforded to small power production QFs.

FOR MORE INFORMATION

If you are interested in additional information regarding the Final Rule discussed above, or would like to discuss the implications of FERC’s revised regulations, please contact [Vincenzo Franco](#), [Jessica Friedman](#), [Haley Franco](#), [Whitney Gallagher](#) or any member of the firm’s [Electric Practice](#) at (202) 298-1800 in Washington, D.C. or in Seattle at (206) 623-9372.

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