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Divided FERC Proposes Major Overhaul of PURPA Regulations

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The Notice of Proposed Rulemaking (NOPR) represents the first large-scale overhaul of FERC's PURPA regulations since the Energy Policy Act of 2005 (EPAct 2005). The reforms, if adopted as proposed, would affect how states determine "avoided cost" rates for purchases of QF output, which facilities are eligible for QF status, whether and when certain QFs can force utilities to purchase their output and how parties can contest the eligibility of a generation facility seeking to certify or recertify its QF status.

House Energy and Commerce Committee Chairman Frank Pallone Jr. (D-NJ) was quick to criticize FERC's action as "a senseless, partisan move to gut an absolutely crucial tool for promoting competitiveness and sustainable energy," asserting that "[w]ith this party-line vote, FERC has proposed making qualifying facilities nonfinanceable, throwing up an insurmountable barrier of entry for clean energy generation across the country."[4] Pallone also noted that "serious questions remain as to whether FERC even has the authority to take this action" and that "it is a step toward wholesale elimination of PURPA, which appears to be FERC's goal. The FERC Commissioners need to realize that's a decision for Congress – not them."[5]

Comments, which likely will be numerous and extensive, are due 60 days from publication of the NOPR in the Federal Register.

Brief Background on PURPA

Congress enacted PURPA in 1978 in response to the U.S. energy crisis of the early 1970s, seeking to promote conservation and increased use of domestic renewable energy

resources.[6] Among its means of doing so was opening the traditional, vertically-integrated electric utility monopoly model by requiring utilities, under certain circumstances, to purchase power from certain generating facilities (i.e., qualifying facilities or QFs) that receive special rate and regulatory treatment under PURPA.[7]

PURPA divides QFs into two categories: (i) small power production facilities and (ii) cogeneration facilities. Small power production QFs cannot be larger than 80 MW and must have a primary energy source that is renewable (e.g., water, wind or solar), biomass, waste or geothermal. Cogeneration QFs, on the other hand, sequentially produce electricity and another form of useful thermal energy, such as heat or steam, more efficiently than producing both forms of energy separately. They can use other energy resources and are not subject to a size limit.[8]

A key element of PURPA is the "mandatory purchase obligation"—often called the "PURPA put"—which requires certain electric utilities to purchase the power produced by QFs at the utility's "avoided cost" (i.e., the cost the utility would have incurred to produce the power itself or contract from another source). Under FERC's current regulations, QFs have the option of having the "avoided cost" rate determined at the time the QF delivers electricity to the utility or, alternatively, at the time the QF enters into a power purchase agreement with the utility (which is often before the generation facility is developed). EPAct 2005 amended PURPA to remove utilities' mandatory purchase obligation for most QFs larger than 20 MW if they have nondiscriminatory access to competitive wholesale electricity markets. However, the mandatory purchase obligation remains with respect to QFs smaller than 20 MW.

In recent years, some legislators, regulators, and electric power industry participants have called for updates to PURPA and FERC's regulations in light of the maturation, rapid deployment and declining cost of renewable energy technologies; the expansion of open access to wholesale electricity markets; generally flat demand for electricity; and the abundance of low-cost natural gas.[9] These factors, taken together, have made it easier in some areas of the country for small power production QFs to connect to the grid and access competitive power markets while making the price of the power that they produce less competitive with other resources in certain markets.

While supporters argue that PURPA continues to play an important role in promoting the development and use of renewable energy resources, others argue the statute—in particular,

the mandatory purchase obligation—is dated and no longer in the best interest of energy consumers given the energy market and policy developments that have occurred since 1978.

Summary of Proposed Reforms

1. Increasing State Flexibility in Determining QF Rates

PURPA requires FERC to "promulgate rules, to be implemented by the states, establishing the rates electric utilities pay for purchases of QF energy."[10] FERC's current regulations give QFs a choice in the pricing and delivery options for their PURPA sales. Specifically, QFs have the option to (i) provide "as-available" energy and receive a rate based on the purchasing utility's "avoided cost"[11] calculated at the time of delivery (the "as-available option"); or (ii) provide energy pursuant to a "legally enforceable obligation," or "LEO," over a specified term, in which case the rate is based on either avoided cost calculated at the time of delivery or avoided cost calculated when the obligation is incurred (the "contract option").[12]

The NOPR proposes several changes to how rates for purchases of QF output are determined and would significantly expand state discretion in setting PURPA rates. In general, the proposed changes would permit states to set QF rates using any of the following options:

- **Competitive Pricing for Certain "As-Available" QF Sales.** For QFs selling to utilities in organized wholesale power markets, states could set QF rates using the applicable "locational marginal price" or "LMP."[13] For QFs selling to utilities outside of organized wholesale power markets, states could use "competitive prices from liquid market hubs or calculated from a formula based on natural gas price indices and heat rates."[14]
- **Competitive Solicitations**. The NOPR would "[a]llow states to set energy and capacity rates based on competitive solicitations (such as requests for proposals) conducted in a transparent and nondiscriminatory manner."[15] Notably, FERC asks for "comment[s] on whether it should provide further guidance on whether, and under what circumstances, an RFP can be used as a utility's exclusive vehicle for acquiring QF capacity"—a question recently addressed in litigation concerning California's Re-Mat program.
- **Variable and Forecasted Energy Rates in QF Contracts**. The NOPR would permit states to "require that energy rates (but not capacity rates) in QF power sales contracts and other [LEOs] vary in accordance with changes in the purchasing utility's avoided

costs at the time the energy is delivered."[16] The Commission seeks comment on this proposed reform, and is particularly interested in "independently owned projects (QF and non-QF) that required a fixed energy rate in addition to a fixed capacity rate to obtain financing and [those] that were able to obtain financing without a fixed energy rate."[17] States also would have "additional flexibility to allow QFs to retain their rights to fixed energy rates, but to base them on projections of what energy prices will be at the time of delivery during the term of a QF's contract."[18]

While such changes might reduce utility (and, thus, consumer) costs for QF output, changes to how states establish QF rates could severely limit the financeability of certain projects. As Commissioner Glick notes in his dissent, the "fixed-price contract option" has been critical for certain small power production QFs to obtain financing, and introducing energy price variability into the QF contracting regime could reduce, or even eliminate, financing opportunities. In the NOPR, however, the majority disagrees, noting that it "does not view the proposed modification" allowing states to require variable rates "as materially affecting the ability of QFs to obtain financing."[19]

2. Replacement of the Bright-Line "One-Mile Rule" with a Tiered Approach for Evaluating Whether Facilities are Separate

The NOPR proposes to modify FERC's so-called "one-mile rule" for determining whether affiliated small power production facilities that use the same energy resource are considered separate facilities or a single facility.[20] This proximity analysis determines whether a facility is eligible for small power production QF status as well as for certain legal and regulatory exemptions attached to small power production QF status.

Under FERC's current regulations, the net power production capacity of a small power production QF, "together with the power production capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site," may not exceed 80 MW.[21] For non-hydroelectric small power production facilities, FERC considers a facility to be "located at the same site" as another facility if any part of the "electrical generating equipment" of one facility (e.g., a wind turbine) is within one mile of any part of the "electrical generating equipment" of the other facility.[22] This is commonly known as the "one-mile rule," which FERC has repeatedly held to be a bright-line rule, rather than a rebuttable presumption.[23]

The NOPR proposes to replace the current "one-mile rule" with a "tiered approach under which facilities one mile or less apart would be treated as the same facility, facilities more than one mile but less than 10 miles apart would be presumed to be different facilities, which could be rebutted, and facilities 10 or more miles apart would be treated as separate facilities."[24] The NOPR also proposes "allowing an entity seeking QF status to provide further information in its certification (both self-certification and Commission certification), to preemptively defend against rebuttal by asserting factors that affirmatively show that two facilities are indeed separate facilities at separate sites,"[25] and proposes various physical and ownership factors that could be used to rebut or defend against rebuttal of separateness.[26]

In addition, the NOPR proposes to "add a definition of the term 'electrical generating equipment'" to FERC's regulations[27] and clarify "how to measure the distance between facilities that have multiple separate sets of 'electrical generating equipment' such as wind farms and solar facilities."[28] Specifically, the NOPR proposes that, for these types of "facilities to be considered irrebuttably separate, all such [electrical generating] equipment of one QF must be at least ten miles away from all such equipment of another [affiliated] QF."[29] On these topics, the Commission seeks comment "on what – if not individual wind turbines and solar panels – should be considered 'electrical generating equipment' for wind and solar plants"[30] and "whether alternative approaches" of measurement, such as a weighted geographic center methodology, "would be more appropriate."[31]

Making the "middle tier" of the proximity analysis into a rebuttable presumption would open small power production facilities seeking QF status to challenges by purchasing utilities and others, even where no part of the electrical generating equipment of one facility is within a mile of any electrical generating equipment of another facility. (Importantly, however, FERC notes that "this change would be effective as of the date of a final rule, which means that such challenges could only be made to QF certifications and recertifications that are submitted after the effective date of the final rule in this proceeding."[32]) In addition, because FERC uses the proximity analysis for making QF-size determinations beyond the 80-MW maximum size determination,[33] the ability to challenge whether facilities are "located at the same site" could affect whether certain facilities require market-based rate authority from FERC or are exempt from regulation under the Public Utility Holding Company Act of 2005.[34]

This change could also affect the way that renewable energy project developers—particularly those developing projects with multiple pieces of "electrical generating equipment"—perform due diligence on property selection and equipment siting when planning multiple projects, which could increase regulatory uncertainty and development costs, and could even make some projects economically unviable.

3. Reducing the 20 MW Threshold for Termination of the Mandatory Purchase Obligation

In EPAct 2005, Congress amended PURPA to provide for the termination of a utility's mandatory purchase obligation where QFs have nondiscriminatory access to markets that meet certain criteria in FERC's regulations.[35] FERC subsequently created a rebuttable presumption that QFs larger than 20 MW have nondiscriminatory market access if they are eligible for interconnection service under a FERC-approved open access transmission tariff and interconnection rules in markets with certain characteristics.[36] For QFs at or below 20 MW, there is a rebuttable presumption that the QF ***does not*** have nondiscriminatory market access.[37] In such markets, utilities can terminate their obligation to purchase output from QFs larger than 20 MWs, but must continue purchasing output from smaller QFs unless the utility can demonstrate that such QFs have nondiscriminatory access to transmission and a wholesale market.[38]

The NOPR proposes to reduce this 20 MW size threshold to 1 MW.[39] This would relieve most utilities in organized wholesale markets from the mandatory purchase obligation for any QF larger than 1 MW on the theory that such QFs have nondiscriminatory access to such markets.[40] QFs larger than 1 MW would no longer be presumed to lack nondiscriminatory access to markets and would not be able to take advantage of the mandatory purchase obligation to obtain contracts for their output. In describing the NOPR, FERC staff noted that this proposed reform "recognizes that competitive markets have matured since the Commission first implemented [PURPA's provisions regarding termination of the mandatory purchase obligation] and the mechanics of participation in such markets are improved and better understood."[41] For cogeneration QFs, the 20 MW rebuttable presumption would remain because new cogeneration facilities are statutorily required to demonstrate that they are intended primarily to generate useful thermal output, rather than electricity for sale to a utility, and so might be less familiar with accessing wholesale markets.[42]

Because many small power production QFs are between 1 MW and 20 MW, this change likely would materially reduce the overall number of small power production QFs able to take advantage of the mandatory purchase obligation.

4. Implementing New Criteria for Formation of LEOs

FERC's current regulations provide that a QF "can choose to have its rates based on the avoided cost calculated at the time of delivery or at the time a LEO is incurred," but "do not specify when or how a LEO is established" and FERC "has not identified specific criteria that states must follow in determining when a LEO is established."[43]

The NOPR proposes "to require that a QF demonstrate its commercial viability and financial commitment to construct its facility through objective and reasonable state-determined criteria before being entitled to a LEO,"[44] and includes a nonexhaustive list of potential criteria for comment.[45] This proposed requirement, the Commission explains, is intended to "ensure that no electric utility obligation is triggered for those QF projects that are not sufficiently advanced in their development and, therefore, for which it would be unreasonable for a utility to include in its resource planning, while at the same time ensuring that the purchasing utility does not unilaterally and unreasonably decide when its obligation arises."[46]

5. Facilitating Challenges to Self-Certifications and Self-Recertifications of QF Status

Under FERC's current regulations, one method of obtaining QF status is "self-certification," whereby an entity certifies using FERC Form No. 566 that its facility satisfies the requirements for QF status.[47] While under the other method—filing an application for FERC determination of QF status by way of an order—involves notice in the Federal Register and a comment period, the self-certification procedure for most QFs does not.[48] Thus, "to challenge the self-certification of a QF" under current practices, "an entity must file a petition for declaratory order and pay the associated filing fee" currently set at $28,990.[49]

To reduce the burden on potential challengers, the NOPR proposes to "allow a party to intervene and to file a protest of a self-certification or self-recertification of a facility without the necessity of filing a separate petition for declaratory order" and paying the associated filing fee.[50] Such a protest would be due within 30 days of the relevant QF filing and the

protesting entity "would have the burden of specifying facts that make a prima facie demonstration that the facility described in the [QF filing] does not satisfy the requirements for QF status."[51] If the protestor meets this burden, "then the burden would shift to the applicant . . . to demonstrate that the claims raised in the protest are incorrect and that certification is, in fact, warranted."[52] FERC notes that it "believes these procedures will allow for timely but thorough review of protested self-certifications and re-certifications" and "seeks comment on whether these procedures impose an undue burden on the QF even though the QF remains certified pending the review."[53]

Potential Implications of the Proposed Reforms

FERC's proposed reforms likely would (i) reduce the number of renewable energy projects eligible for small power production QF status; (ii) limit the number of projects deemed to have nondiscriminatory access to markets; (iii) restrict the availability of the mandatory purchase obligation benefits set forth in PURPA; (iv) increase regulatory uncertainty and costs for project developers; and (v) slow the development of small renewable energy projects in many markets. In addition, because FERC uses the "one-mile rule" for more than just determining whether a facility exceeds the maximum small power production QF size limit, the "tiered approach" to making the "located at the same site" determination subject to challenge could result in a sharp increase in litigation over a variety of other issues potentially not intended to be affected by the change. In any event, renewable energy project developers would need to adjust their approach to developing and siting projects for which small power production QF status is important. However, even if they do so effectively, reduced access to PURPA contracts or markets or the threat of difficult competitive procurement processes could increase risk enough to preclude development of projects that are relatively low-risk today.

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[1] FERC, Notice of Proposed Rulemaking: Qualifying Facility Rates and Requirements Fact Sheet (Sept. 19, 2019) ("NOPR Fact Sheet"), https://www.ferc.gov/calendarfles/20190919134405-E-1-facts.pdf; Press Release, FERC Proposes to Modernize PURPA Regulations (Sept. 19, 2019) ("NOPR Press Release"), https://www.ferc.gov/media/news-releases/2019/2019-3/09-19-19-E-1.pdf.

[2] See, e.g., NOPR Press Release; Commissioner Bernard L. McNamee Statement Regarding FERC's Notice of Proposed Rulemaking to Update PURPA Regulations (Sept. 19, 2019),

https://www.ferc.gov/calendarfiles/20190919134850-mcnamee-statement.pdf.

[3] *Qualifying Facility Rates & Requirements; Implementation Issues Under the Pub. Util. Regulatory Policies Act of 1978*, 168 FERC ¶ 61,184 (2019) ("NOPR") (Comm'r Glick, dissenting).

[4] Press Release, Rep. Frank Pallone Jr., Pallone Condemns Partisan Action by FERC to Gut PURPA (Sept. 19, 2019), https://energycommerce.house.gov/newsroom/press-releases/pallone-condemns-partisan-action-by-ferc-to-gut-purpa.

[5] Id.

[6] See, e.g., FERC, What is a Qualifying Facility?, https://www.ferc.gov/industries/electric/gen-info/qual-fac/what-is.asp (last visited Sept. 20, 2019) ("FERC QF Website").

[7] See, e.g., Memorandum from Comm. Majority and Minority Staff to Members of the H. Subcomm. on Energy 2 (Aug. 31, 2017), http://docs.house.gov/meetings/IF/IF03/20170906/106362/HHRG-115-IF03-20170906-SD003.pdf.

[8] See, e.g., FERC QF Website.

[9] See, e.g., Letter from Neil Chatterjee, Chairman, FERC, to Rep. Tim Walberg (Nov. 29, 2017), https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14769654.

[10] NOPR at P 36 (footnote omitted).

[11] "Avoided cost" is shorthand for the cost that would have been paid by the electric utility either to generate the electricity itself or purchase it from another source.

[12] See 18 C.F.R. § 292.304(d) (2019).

[13] See NOPR at PP 43-50.

[14] NOPR Fact Sheet at 1. See also NOPR at PP 55-59.

[15] NOPR Fact Sheet at 1. See also NOPR at PP 82-88.

[16] NOPR Fact Sheet at 1. See also NOPR at PP 63-78.

[17] NOPR at P 78.

[18] NOPR Fact Sheet at 1. See also NOPR at PP 61-62.

[19] Id. P 69.

[20] See id. PP 9, 93-117.

[21] 18 C.F.R. § 292.204(a)(1).

[22] Id. § 292.204(a)(2). However, FERC's current PURPA regulations "do not define what constitutes electrical generating equipment or explain how to measure the distance between facilities." NOPR at P 93.

[23] See, e.g., *N. Laramie Range Alliance*, 139 FERC ¶ 61,190, at PP 22-25 (2012).

[24] FERC Staff Presentation on Item E-1, at 2 (Sept. 19, 2019) ("Staff Presentation"), http://www.ferc.gov/CalendarFiles/20190919134440-E-1-Discussion-item.pdf.

[25] NOPR at P 103.

[26] Id. P 105.

[27] Id. PP 9, 108. Specifically, the NOPR proposes defining "electrical generating equipment" as "all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar panels and/or inverters, fuel cell equipment and/or other primary power generation equipment used in the facility, excluding equipment for gathering energy to be used in the facility," with the Commission "expect[ing] that each wind turbine on a wind farm and each solar panel in a solar facility would be considered 'electrical generating equipment' because each wind turbine and each solar panel is independently capable of producing electric energy." Id. P 108.

[28] Id. PP 9, 108-110.

[29] Id. P 109.

[30] Id. P 108.

[31] Id. P 110.

[32] Id. P 100.

[33] See *SunE B9 Holdings, LLC*, 157 FERC ¶ 61,044, at P 16 (2016) ("[T]he one-mile rule . . . is a size determination which the Commission has consistently applied generally to the regulations pursuant to PURPA, and which [also] applies . . . to determining the applicability of the less-than-1-MW exemption of [18 C.F.R. §] 292.203(d).").

[34] See 18 C.F.R. Part 292, Subpart F (providing exemptions for certain small power production facilities, based on size, from certain federal and state laws and regulations).

[35] See Memorandum from Comm. Majority and Minority Staff to Members of the H. Subcomm. on Energy at 3 (Aug. 31, 2017) ("PURPA Hearing Background Memo") (citing 18 C.F.R. § 292.309), http://docs.house.gov/meetings/IF/IF03/20170906/106362/HHRG-115-IF03-20170906-SD003.pdf. See also NOPR at PP 118-125.

[36] 18 C.F.R. § 292.309(c).

[37] Id. § 292.309(d)(1).

[38] PURPA Hearing Background Memo at 3.

[39] See NOPR at PP 126-130.

[40] See Glick Dissent at P 14.

[41] Staff Presentation at 2.

[42] See NOPR at P 130.

[43] Id. P 134 (emphasis in original removed) (citations omitted).

[44] Id. P 136. See also id. PP 140-142.

[45] Id. P 141.

[46] Id.

[47] Id. P 143.

[48] Id. PP 144-45.

[49] Id. P 146.

[50] Id. P 148.

[51] Id. PP 148, 149.

[52] Id. P 149.

[53] Id. P 152.

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