



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

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On September 19, 2019, the Federal Energy Regulatory Commission (FERC) issued a notice of proposed rulemaking (NOPR) to revise its regulations implementing the Public Utility Regulatory Policies Act of 1978 (PURPA). The NOPR proposes to grant 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). States would also establish criteria that QFs must meet prior to obtaining a contract or other legally enforceable obligation (LEO) for the sale of power to utilities. In addition, the NOPR proposes revisions to 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.

The proposed changes 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. Comments on the NOPR are due 60 days after publication in the Federal Register.

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 NOPR proposes to provide 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 NOPR would allow state regulatory authorities to set the rates for “as-available” QF energy at the locational marginal price in effect at the time of delivery. For QFs located outside of organized markets, the NOPR would allow 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.
- Rates for Energy Sold under Contracts or LEOs: Although the NOPR does not change the existing payment options under the regulations, it would give state regulatory authorities the ability to eliminate the 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 could retain the 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 proposed changes would not apply to the rates for QF capacity sold under a contract or a LEO.
- Competitive Solicitations for Avoided Cost Rates: The NOPR would permit 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 NOPR proposes some minimum criteria that the RFP process should meet to ensure it is conducted in a transparent and non-discriminatory manner.

Legally Enforceable Obligation

The NOPR proposes to clarify when and how a LEO is established. The proposed regulations will require 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 will be a prerequisite to the QF's ability to obtain a LEO. The NOPR 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.

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's regulations currently include a rebuttable presumption that QFs with a capacity of 20 MW or less do not have non-discriminatory access to wholesale markets.

The NOPR proposes to reduce the rebuttable presumption of lack of non-discriminatory market access for small power production QFs to 1 MW or less. The change would allow utilities to terminate their mandatory purchase obligation from small power production QFs with a capacity between 20 MW and 1 MW. For cogeneration QFs, the NOPR proposes to retain the existing presumption that QFs with a capacity of 20 MW or less lack non-discriminatory access to wholesale markets.

The NOPR also proposes that, in states with retail choice, a utility's mandatory purchase obligation may be reduced as a result of changes in the utility's overall supply obligations. This would allow state regulatory authorities, for example, to reduce a utility's obligation to purchase QF capacity if retail choice reduces the utility's supply obligations or to match the term of a PURPA contract with the term of the utility's procurement contract as provider of last resort.

One-Mile Rule and Procedures to Protest Self-Certifications

Small power production QFs are subject to an 80 MW size limit. Under the "one-mile rule," affiliated QFs located within one mile that use the same power source are aggregated and treated as a single facility for purposes of the 80 MW size limit and other thresholds. Currently, FERC's regulations do not provide guidance on measuring the one mile. In addition, FERC's regulations do not contemplate a specific process for challenging the self-certification of QF status for 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 \$28,990.

The NOPR proposes to continue to treat QFs located within one mile or less of each other as the same facility. However, the NOPR would allow 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 mile apart are separate facilities. FERC seeks comments on the physical characteristics and ownership factors that could be used to defend or rebut this presumption. FERC proposes criteria such as common ownership of infrastructures, off-take arrangements, and common debt and financing arrangements. For QFs located 10 miles or more apart, the NOPR would adopt an irrebuttable presumption that such facilities are separate. The NOPR also proposes that the distance between QFs should be measured based on the closest electrical generating equipment of each facility.

The NOPR would adopt a new process that facilitates challenges to QF self-certifications. The proposed regulations provide that parties may protest a QF self-certification within 30 days of the date of filing. The generator's QF status would remain effective during the pendency of a protest. FERC would 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.

FOR MORE INFORMATION

If you are interested in additional information regarding the NOPR discussed above, or would like to discuss the implications of FERC's proposed regulations, please contact Vincenzo Franco, Jessica Friedman, Haley Franco 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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