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Energy ADVISORY ■

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FERC Proposes Rule Revisions Under the Public Utility Regulatory Policies Act of 1978

The Federal Energy Regulatory Commission (FERC) on September 19, 2019, issued a Notice of Proposed Rulemaking (NOPR) addressing its regulations under the Public Utility Regulatory Policies Act of 1978 (PURPA). FERC proposes to revise the PURPA regulations in light of what it deems changed circumstances in the decades since first issuing PURPA regulations. One of the three FERC commissioners dissented from significant aspects of the NOPR. Comments will be due 60 days after the NOPR's publication in the *Federal Register*, likely in late November or early December.

Background

Congress enacted PURPA in an effort reduce U.S. dependence on oil and natural gas during the late 1970s. PURPA was intended to encourage the development of generation resources that do not depend on fossil fuels, in addition to supporting cogeneration facilities that produce electricity in addition to another form of thermal energy such as heat or steam. Since FERC first issued regulations related to PURPA in 1980, the energy industry has undergone many significant changes. For example, natural gas prices have steeply declined due to both technological advances and the discovery of additional natural gas reserves. In addition, the electric utility industry has transformed from consisting mainly of vertically integrated utilities to one in which wholesale electric markets exist in many parts of the country.

In light of these changes, and because Congress directed FERC to periodically update its PURPA regulations, FERC is proposing to rebalance the benefits and obligations of PURPA's regulations. FERC took its first step toward reforming PURPA regulations in 2016, holding a technical conference in Docket No. AD16-16-000 to address PURPA implementation issues. This NOPR was informed by the record of that technical conference.

Qualifying Facility Rates

In the NOPR, FERC proposes to allow states additional flexibility in setting rates for qualifying small power production facilities and qualifying cogeneration facilities under PURPA (QFs). PURPA requires that FERC promulgate rules, implemented by states, that establish rates that utilities will pay for QF energy purchases.

By statute, these rates cannot exceed "the incremental cost to the electric utility of alternative electric energy," otherwise referred to by FERC and the industry as the "avoided cost." Under FERC's current regulations, a QF may sell as much of its energy as it chooses once the energy becomes available, with the rate being calculated at the time of delivery (known as the "as-available" price). Alternatively, a QF may sell pursuant to a contract over a specified term. Under this second option, the QF has the option of receiving either the purchasing electric utility's avoided cost calculated at delivery or the purchasing utility's avoided cost calculated and fixed at the time of the legally enforceable obligation (LEO).

"As-available" rates

The NOPR proposes to modify these rules by allowing states to incorporate market pricing into a QF's avoided cost energy rates. For electric utilities in a regional transmission organization (RTO) or independent system operator (ISO), a state would be able use the locational marginal price (LMP) as a rate for as-available QF energy sales. Alternatively, for utilities outside RTO and ISO markets, states would be permitted to set the as-available energy rate at a competitive price calculated at the time of delivery, defined as energy rates established at liquid hubs or determined based on gas price indices and proxy heat rates for an efficient combined-cycle facility. FERC's rationale for its proposals is, in part, based on its conclusion that competitive wholesale electricity markets have changed rates from cost of service ratemaking to those based on competitive market forces. In addition, FERC stated its belief that competitive bilateral energy markets have grown outside RTO and ISO markets, and these energy market price hubs have energy prices representative of competitive market prices at those locations.

Contract rates

The NOPR proposes that states be permitted to determine the energy rate component of a PURPA contract based on projections on future energy prices. Such forecasts could be calculated at the time a LEO was incurred. FERC also proposes to permit states to require that QF energy rates vary during a contractual term. Under current regulations, if a QF elects to sell energy and/or capacity under a contract, the QF has the option of receiving the avoided cost calculated and fixed at the time the LEO is incurred. FERC states that this is one of the more controversial aspects of PURPA's regulations because energy prices have generally declined over the years, permitting QFs to collect payments well above market prices. This proposal would apply strictly to energy rates and would not cover avoided capacity rates. The NOPR also notes, however, that a QF may not be entitled to capacity payments if a purchasing utility is not avoiding any capacity as a consequence of entering into a contract with the QF.

Competitive solicitations

FERC proposes granting states the option to set avoided energy and/or capacity rates using competitive solicitations. FERC states that establishing QF avoided cost rates through a request for proposal (RFP) process could move the industry toward more competitive QF pricing. While not offering detailed criteria to states governing the use of RFPs, FERC suggests establishing minimum criteria for such processes. These minimum criteria could include the transparency of such a process, opening solicitations to all sources that satisfy the utility's capacity needs, solicitations occurring at regular intervals, appropriate oversight, and a state or nonregulated utility certifying these criteria.

One-Mile Rule

The NOPR offers a suggested modification to the so-called "one-mile" rule. Under PURPA, a small power production facility must not, among other requirements, be located at the same site of other utilities whose combined generation is greater than 80 megawatts (MW). Under relevant PURPA regulations previously developed by FERC, small power production facilities are currently considered to be located at the same site if they are within one mile of each other, use the same energy resource, and are owned by the same person or affiliates. This constitutes the "one-mile" rule, and it is used both to calculate the size of a facility and distinguish what is a separate facility. The rule carries with it the irrebuttable presumption that facilities within one mile are part of "the same site," while facilities greater than one mile apart are not.

The NOPR proposes continuing the irrebuttable presumption that facilities one mile apart or closer are considered to be a single facility, along with an irrebuttable presumption that facilities 10 miles apart or more qualify as separate facilities. But if affiliated facilities are between one and 10 miles apart, there would be a rebuttable presumption that they are separate facilities at separate sites. A challenger to this presumption would need to file a protest making a prima facie demonstration that the facility described in a self-certification, self-recertification, or FERC certification does not satisfy the requirements for QF status. This change in the one-mile rule would go into effect 60 days after publication of a final rule in the *Federal Register*.

The NOPR also proposes defining "electrical equipment" relevant to the one-mile rule to cover each wind turbine on a wind farm and each solar panel in a solar facility, on the basis that each is independently capable of producing electric energy. FERC suggests incorporating modifications to FERC Form No. 556 corresponding to the proposed change in the "one-mile" rule.

Rebuttable Presumption of Nondiscriminatory Market Access

The NOPR proposes regulatory revisions that would lower capacity levels associated with a rebuttable presumption of nondiscriminatory market access. This modification would not affect cogeneration facilities. Under current PURPA regulations implementing a 2005 congressional amendment to PURPA, a utility may file an application with FERC requesting relief from purchasing electricity from a QF if the QF has nondiscriminatory access to certain markets. If a QF has a net capacity at or below 20 MW, there is a rebuttable presumption that it lacks nondiscriminatory access to markets. In the NOPR, FERC states its belief that due to the growth of organized electric markets, a reduction from 20 MW to 1 MW would be consistent with congressional intent that electric utilities should not be obligated to purchase electricity from QFs with sufficient access to markets. But although FERC believes that a small power production facility (e.g., a renewable generator) above 1 MW can acquire the administrative and technical expertise to obtain nondiscriminatory market access, cogeneration facilities may not have the ability to do so. FERC thus proposes to justify keeping the existing 20 MW level for the presumption of market access for cogeneration facilities.

Additional Proposals

Other proposals in the NOPR include a requirement that a QF demonstrate its commercial viability and financial commitment to construct its facility before being entitled to a LEO. FERC contends that this will ensure that an electric utility obligation is not triggered for a QF project insufficiently advanced in its development.

Furthermore, FERC proposes to permit a party to intervene and file a protest against the self-certification or self-recertification of a facility. Currently, to challenge the self-certification of a QF, an entity must file a petition for declaratory order and pay an associated filing fee, which is currently $28,990. The proposal would remove that requirement for protestors to object to a self-certification.

Statements by Commissioners

Commissioners Richard Glick and Bernard McNamee issued separate statements on the NOPR. Glick dissents in part, claiming that the NOPR would "effectively gut" PURPA. He suggests that it appears that through these actions, FERC no longer believes PURPA is necessary. Glick further states that in suggesting modifications to PURPA's rules in this fashion, FERC "seiz[ed] the reins from Congress" on a national debate on national energy policy. Glick specifically disagrees with the proposals relating to changing the methods for calculating avoided cost and related contract options available to QFs and reducing the rebuttal presumption of nondiscriminatory access to markets for small power production facilities from 20 MW to 1 MW, though he does support addressing the one-mile rule, requiring QFs to demonstrate commercial viability before securing a LEO with a relevant utility, and permitting stakeholders to protest a QF self-certification. McNamee takes a contrary position. In his statement, he discusses what he believes are changed circumstances relating to natural gas production, competition driven by PURPA relating to independent renewable energy resources and cogeneration facilities, and open access policy for electricity transmission. Reflecting on these issues, along with FERC's statutory obligation to revisit its PURPA implementing regulations "from time to time," McNamee believes that it is now appropriate for FERC to propose to update its PURPA regulations.

Comment Deadline

Comments on the NOPR will be due 60 days from the date of publication in the *Federal Register*.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any member of our Energy Group.

Sean Atkins
202.239.3072
sean.atkins@alston.com

Kenneth Jaffe
202.239.3154
kenneth.jaffe@alston.com

Michael Kunselman
202.239.3395
michael.kunselman@alston.com

Andrea Wolfman
202.239.3943
andrea.wolfman@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Ave. ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LONDON: 5th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA ■ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 950 Page Mill Road ■ Palo Alto, California, USA, 94304-1012 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333