UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Qualifying Facility Rates and Requirements	)	**Docket Nos.**	**RM19-15-000**
	)		
Implementation Issues Under the Public Utility Regulatory Policies Act of 1978	))		**AD16-16-000**

COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners ("NARUC") appreciates the opportunity to provide comments to the Federal Energy Regulatory Commission ("FERC" or "Commission") in response to the September 19, 2019 Notice of Proposed Rulemaking[1] ("NOPR"). The NOPR proposes to revise FERC regulations[2] implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA") in light of changes in the energy industry since 1978.[3] Specifically, the NOPR seeks comments on a series of proposed reforms, including changes to the calculation of energy rates, modifications to the "one-mile rule," reduction of the size threshold for the rebuttable presumption of nondiscriminatory access to certain markets for qualifying facilities ("QFs"), and the criteria for the establishment of legal enforceable obligations ("LEOs").

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1 Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, 84 Fed. Reg. 53246 (October 4, 2019) ("NOPR").

2 18 CFR Part 292.

3 16 U.S.C. §§ 796(17)-(18), 824a-3.

I. COMMUNICATIONS

All pleadings, correspondence, and other communications related to this proceeding should be addressed to the following person:

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II. COMMENTS

NARUC is uniquely positioned to offer valuable input on the proposed changes because Congress charged state public service commissions with implementing FERC's PURPA regulations and approving QF contracts. State commissions are also obliged to ensure reliable service and reasonable rates for consumers. The PURPA statute and FERC's implementing regulations recognize the need to balance the impact on consumers and the public interest with promoting QF development – specifying that avoided costs must be "just and reasonable to the electric consumers . . . and in the public interest" and "shall not discriminate against [QFs]."[4] At times, these obligations can conflict. Some states find that the current regulations implementing PURPA's goal of promoting QF development are out of balance with the charge to ensure that consumers pay rates that are just and reasonable.

Fortunately, the NOPR's proposals target some of the regulations that have created this imbalance. The NOPR addresses many of the implementation issues that states face, but not all. For example, FERC included NARUC's proposal regarding the termination of the must purchase

[4] 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304.

obligation under section 210(m). We genuinely appreciate the NOPR requesting comments regarding the proposal.[5] We look forward to reviewing the comments and to continued discussions about PURPA regulations and their necessary evolution to assure a proper balance of PURPA's goals.

NARUC offers comments on four of the NOPR's areas of proposed changes: calculation of avoided cost rates; the one-mile rule; the rebuttable presumption of nondiscriminatory access to markets; and the establishment of LEOs.

A. Calculation of Avoided Cost Rates

The NOPR proposes

> to allow states flexibility to ensure that the rates for energy sold by QFs to electric utilities more accurately reflect PURPA's requirement that the rates for purchases of energy from QFs not exceed 'the cost to the electric utility of the electric energy, but for the purchase from such [QF], such utility would generate or purchase from another source' at the time of delivery.[6]

NARUC generally supports the added flexibility in the NOPR for states to develop individual avoided cost-based rates for QFs, including allowing states to use competitive solicitation processes for determining avoided cost-based rates. While it may not be appropriate for some states given their particular circumstances to apply variable energy rates to a QF's contract term, as NARUC concluded in its 2016 *Resolution Regarding the Enforcement of PURPA Standards and Regulations,* states should continue to be afforded the authority to select the appropriate methodologies for calculating avoided costs.[7] Recognizing that not all regional transmission

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5 NOPR at P 131-133.

6 NOPR at P 31 (citing 16 U.S.C. 824a-3(b), (d)).

7 NARUC 2016 *Resolution Regarding the Enforcement of PURPA Standards and Regulations,* FERC Docket No. AD16-16-000 (Jan. 5, 2017) ("NARUC 2016 Resolution").

organizations (“RTOs) and independent system operators (“ISOs”) have wholesale capacity markets and that there are variations in how RTO/ISO capacity markets work, the Commission should clarify specifically that the wholesale market prices for capacity are appropriate avoided cost rates in states within market areas that have such established wholesale capacity markets. States recognize that a key consideration in determining the appropriate methodologies for setting avoided cost rates in their particular circumstances will be whether QFs have nondiscriminatory access to wholesale markets.

B. One-Mile Rule

The one-mile rule is a reference to Section 292.204(a) of the Commission’s current regulations. It states that small power production facilities are considered to be at the same site if they are located within one mile of each other, share the same energy resource, and are owned by the same person(s) or its affiliates.[8] If small power production facilities are more than one mile apart, then they are presumed to be separate QFs and this presumption cannot be challenged.[9]

The NOPR recognizes that several parties, including NARUC, pointed out that some QF developers have been circumventing this rule so proposed projects will be considered separate facilities and therefore each fall below the 80 MW cap for QFs.[10] To address the issue of QF developers disaggregating single facilities into multiple smaller projects under the cap, the NOPR suggests: (1) creating a rebuttable presumption that if QFs are more than one mile, but

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8 18 C.F.R. § 292.204(a) (2015).

9 NOPR at P 96.

10 NOPR at P 97.

less than ten miles apart, then they are separate QFs; and (2) defining "electrical generating equipment."[11]

NARUC supports these changes to the one-mile rule to address the disaggregation issue. NARUC agrees with using a multi-factor approach to rebut the presumption that small power facilities more than a mile apart are separate QFs. The final rule should use factors like the ones included in the NOPR, which reflect expert recommendations from NARUC members and other organizations.[12]

The final rule also should include in the definition of "electrical generating equipment" a requirement that all equipment of one QF be at least ten miles away from all equipment of another QF for the two facilities to be considered "irrebuttably separate." This change in the definition will greatly diminish the possibility of developer manipulation.[13]

A rebuttable presumption for projects within ten miles of one another and a more distinct definition of what constitutes "electrical generating equipment" can only help prevent the disaggregation of large projects. Such disaggregation of projects clearly was not intended when Congress passed PURPA and obviously undermines the statutory scheme. State experiences demonstrate, particularly in the West, that the current one-mile rule can be, and has been, manipulated to the benefit of the QFs and to the detriment of ratepayers. These proposed changes will help the Commission and states implement the original intent of PURPA to promote

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11 NOPR at PP 101, 108

12 NARUC Comments in response to Implementation Issues Under the Public Utility Regulatory Policies Act of 1978; Notice Inviting Post-Technical Conference Comments, 81 Fed. Reg. 64455 (September 20, 2016), FERC Docket No. AD16-16-000, filed on November 7, 2016 at 3; *see e.g.*, speaker materials of Commissioner Paul Kjellander, Idaho Public Utilities Commission, at the June 29, 2016 PURPA Technical Conference at 4-5, FERC Docket No. AD16-16-000 (June 29, 2016).

13 NOPR at P 108-110.

the development of small renewable power projects while protecting electric customers and the public interest.

C. Rebuttable Presumption of Nondiscriminatory Access to Markets

In its regulations implementing PURPA, the Commission established a rebuttable presumption that QFs with a generating capacity of 20 MW or below lacked the nondiscriminatory access to markets that relieved electric utilities of their obligation to purchase from certain QFs under section 210(m) of PURPA.[14] The NOPR proposes to reduce the threshold for this rebuttable presumption from 20 MW to 1 MW.[15]

NARUC has been advocating for a reduction in this size threshold for several years because of changes to the energy landscape since the Commission established this rebuttable presumption. We appreciate FERC's attention to the obvious need to lower the threshold. NARUC's position remains that the threshold should be lowered to the specific minimum capacity requirement level at which a resource is required to participate in a particular RTO/ISO market.[16] Given the various markets and their unique market participation rules, the size threshold for the rebuttable presumption of nondiscriminatory access to the market may need to be established for each RTO/ISO, instead of uniformly established for all RTO/ISO markets. FERC should consider the market participation rules for each RTO/ISO and make transparent in the record the support for the specific size threshold it establishes for nondiscriminatory access.

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14 18 CFR § 292.309(d)(1).

15 NOPR at P 126.

16 Letter from NARUC President to FERC Commissioners re: Implementation Issues under the Public Utility Regulatory Policies Act of 1978, FERC Docket No. AD16-16-000, (July 20, 2018).

D. Establishment of LEOs

The Commission created the concept of a LEO in Order No. 69 to address the circumstance of a utility refusing to enter into a contract with a QF.[17] While not every negotiation between a QF and a purchasing utility involves a dispute over whether a LEO exists, the dispute occurs in those cases where negotiations regarding the avoided cost to be paid and other service parameters are at a stalemate. State commissions typically are responsible for resolving the dispute between the parties, including evaluating the specific facts to determine whether a LEO exists and the timing of the LEO for establishing the utility's avoided cost.

In some cases, a lack of clarity regarding when a LEO attaches has caused great uncertainty for the utility, the QF, and the state involved. The determination of what constitutes a LEO and when it occurs has been the subject of repeated litigation between QFs and utilities, and even states. The NOPR includes a proposal to establish commercial viability of the proposed project and financial commitment to construct the proposed project as prerequisites for QFs to obtain a LEO.[18] It also proposes that state regulatory authorities have the flexibility to establish criteria or factors to determine the existence of a LEO.[19]

States already have the full authority and discretion to determine when a LEO attaches and should retain this authority.[20] However, NARUC supports this proposal and concurs with the NOPR's findings that it is appropriate to (1) establish as prerequisites for a LEO the commercial viability of a QF project and the QF's financial commitment to construct the project, and (2) provide guidance to states as to the types of criteria a state may adopt for QFs to make a

17 NOPR at P 137.
18 NOPR at P 140.
19 NOPR at P 140.
20 NARUC 2016 Resolution.

showing of a LEO.[21] It is helpful for FERC to provide some guidance to states on this issue. While PURPA guarantees that QFs receive nondiscriminatory treatment in the process, PURPA also requires that consumers be held harmless in terms of the effective rate for power. Ensuring that QFs demonstrate commercial viability and financial commitment when pursuing a PURPA project will reduce planning uncertainty for utilities and in turn benefit utility customers.

The Commission should assure states retain with the flexibility to establish "objective, reasonable … criteria" or indicia for what constitutes a showing of commercial viability and financial commitment, and thus specific actions or facts that may validate the establishment of a LEO.[22] NARUC appreciates the guidance that factors such as obtaining site control, filing an interconnection application, and securing local permitting are examples of valid options for states to consider in establishing objective and reasonable indicators. The Commission could also consider providing specific benchmarks of what constitutes a LEO, but NARUC recognizes that establishing several examples of specific actions is a very helpful step. Further, allowing states to determine the factors that would be indicia of the prerequisites for a LEO would greatly assist the states, as the determination of a LEO is a fact and circumstance specific exercise. Allowing individual states to establish indicators that are appropriate for the conditions in each state, with the understanding that those indicators cannot discriminate against QFs, is a positive step in reducing the potential disputes between QFs and utilities. States should also retain the authority to establish neutral timelines and other procedural guidelines to ensure a nondiscriminatory process.

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21 NOPR at P 139.

22 NOPR at P 140-141.

The proposal to establish commercial viability and financial commitment as prerequisites of a LEO will greatly reduce uncertainty and, in the end, benefit utility consumers. This approach, paired with flexibility for states to create their own set of factors or indicia of commercial viability and financial commitment, strikes the right balance between not discriminating against QFs and not harming consumers.

III. CONCLUSION

NARUC thanks the Commission for considering its comments. We look forward to working with you to ensure that PURPA is meeting the needs of both QFs and ratepayers by maintaining flexibility and discretion for states as they fulfill their PURPA duties.

Respectfully submitted,

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Dated: December 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: December 3, 2019

Respectfully submitted:

/s/ Jennifer M. Murphy