

Alert | Energy & Natural Resources



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FERC Launches Comprehensive PURPA Overhaul

On Sept. 19, 2019, the Federal Energy Regulatory Commission (FERC) **issued a Notice of Proposed Rulemaking** (NOPR) to modernize the Public Utility Regulatory Policies Act of 1978 (PURPA), to address market changes in the energy landscape over recent decades. Comments are due 60 days from publication in the Federal Register.

PURPA was enacted in 1978 as part of a legislative package of proposals intended to reduce U.S. dependence on fossil fuels. PURPA encourages the development of alternative generation resources or qualifying facilities (QFs). QFs are small power-production facilities (SPP), which are typically renewable generation facilities, or cogeneration facilities that make more efficient use of the heat produced from electricity generation using fossil fuels.

The NOPR bases reform on changed circumstances since PURPA's enactment, including technology advances, the discovery of new and low-cost natural gas, the expansion of open-access transmission to wholesale electricity markets, and federal and state programs incentivizing the development of renewable resources. The NOPR is intended, as FERC explains, to encourage QF development while addressing concerns regarding how the current regulations work in today's competitive wholesale power markets.

The last update to PURPA was in 2005, when Congress under the Energy Policy Act amended the law, as reflected in FERC's rules, to allow exemptions from the mandatory utility purchase obligation from QFs if FERC finds that there is a sufficiently competitive market for the QF to sell its power.

NOPR Changes to PURPA

QF Rates

- States may require that energy rates (but not capacity rates) in QF power sales contracts and other legally enforceable obligations (LEO) vary in accordance with changes in the purchasing utility's "avoided costs" at the time the energy is delivered.
 - PURPA's mandatory purchase obligation currently requires certain electric utilities to purchase the power produced by QFs at the cost the utility would have incurred to produce the power itself or contract from another source.
- States may allow QFs to retain their rights to fixed energy rates, but must base them on projections of what energy prices will be at the time of delivery during the term of a QF's contract.
- States may set "as-available" QF energy rates based on the existing PURPA regulations or, at the state's discretion, market factors in accordance with the following:
 - QFs selling to electric utilities located in organized wholesale power markets, at the locational marginal price in those markets, or
 - QFs selling to electric utilities outside of the organized wholesale power markets, at competitive prices from liquid market hubs or calculated from a formula based on natural gas price indices and heat rates.
- States may set energy and capacity rates based on competitive solicitations (such as requests for proposals) conducted in a transparent and non-discriminatory manner.

New Criteria for Formation of LEOs

- States must establish objective and reasonable criteria to determine a QF's commercial viability and financial commitment to construction before a QF is entitled to a contract or LEO. This proposed requirement, FERC explains, is to ensure that no LEO is triggered for those QF projects that are not sufficiently advanced in their development.

Modification of the One-Mile Rule

- Modify the "one-mile rule" for determining whether affiliated QFs that use the same energy resource should be considered part of a single facility, or separate facilities, for purposes of determining whether a facility is entitled to QF status, or has exceeded the 80 MW threshold.
 - There would continue to be an irrebuttable presumption that facilities one mile apart or less constitute a single facility.
 - Parties could show that facilities located more than one mile apart, but less than 10 miles apart, constitute a single facility.
 - There would be an irrebuttable presumption that facilities 10 miles apart or more are separate facilities.

Reducing Threshold for Terminating the Mandatory Purchase Obligation

- Revise the regulations that provide for termination of a utility's obligation to purchase from a QF with non-discriminatory access to certain markets. FERC proposes to change the rebuttable presumption that QFs do not have non-discriminatory access to markets from ≤ 20 MW to ≤ 1 MW net capacity for

small power production facilities. The 20 MW threshold would remain in place for cogeneration facilities.

Self-Certification

- Allow an entity to protest a QF self-certification or self-recertification without having to file a declaratory order. Such a protest would be due within 30 days of the relevant QF filing. The protesting entity would have the burden of specifying facts that make a prima facie showing that the facility described in the QF filing does not satisfy the requirements for QF status.

FERC Commissioner Richard Glick, the one Democrat commissioner, issued a partial dissent. He argued that PURPA is a federal law and, therefore, changes to it should be made by Congress, and not by an administrative agency. Commissioner Glick said that FERC's actions would effectively gut PURPA because the NOPR "removes an important debate from the halls of Congress and isolates it within the Commission." Rather than focusing on PURPA's goal of ensuring competition, the NOPR would have the effect of dampening competition and allowing utilities to strengthen their monopoly status to the detriment of customers, he said. Commissioner Glick raised a number of objections to specific parts of the NOPR, including the proposal on how avoided cost would be calculated and applied to QFs. Among other things, Glick argued that allowing utilities to eliminate the fixed-price contract option will make it more difficult – or even impossible – for QFs to obtain financing.

Conclusion

The NOPR will likely have significant impacts on the development of renewable energy projects in the United States, including, among other things, reducing the number of projects eligible for SPP QF status, increasing regulatory uncertainty and costs for project developers, and increasing chances of litigating the QF status of energy projects and related storage facilities. These impacts may differ by region, depending on the extent to which PURPA has materially impacted renewable development in recent years.

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