

Alert | Energy & Natural Resources



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FERC Approves the Overhaul of PURPA Regulations

On July 16, 2020, the Federal Energy Regulatory Commission (FERC or the Commission) approved a **Final Rule** revising the Commission's regulations implementing the Public Utility Regulatory Policies Act of 1978 (PURPA) (See a **prior GT Alert** for more details on PURPA and FERC's overhaul). The Final Rule will take effect 120 days after its publication in the Federal Register.

While Congress enacted PURPA to reduce U.S. dependence on oil and natural gas, and encourage the development of alternative energy generation, including cogeneration and small-scale renewable generation, FERC has long discussed updating its regulations under PURPA because it believes that the energy industry has undergone many significant changes since FERC first implemented PURPA in 1980.

When FERC released the Notice of Proposed Rulemaking (NOPR) in September 2019, it said that the proposed changes were intended to continue encouraging development of Qualifying Facilities (QFs), described further below, while addressing concerns regarding how the current regulations work in today's competitive wholesale power markets. The NOPR proposed to revise the Commission's regulations implementing sections 201 and 210 of PURPA and incorporated the record of a FERC 2016 technical conference addressing issues involving PURPA's implementation.

PURPA, among other things, requires electric utilities – private and public – to purchase power from certain cogeneration facilities and small power producers that are QFs under the statute. The rates for the power purchased are not supposed to exceed the cost that the utility would have incurred for the power if

obtained from another source. Such charges are referred to by FERC as “avoided costs” and the resultant rate for power purchased from QFs as a given utility’s “avoided cost rate.” State commissions generally have authority to determine these avoided costs, although public power utilities and electric cooperatives that do not have state-regulated rates can usually set their own avoided cost rates for QF purchases.

The Final Rule contains the following **key aspects of the revised regulations**:

- Regarding rates, the Final Rule grants states the flexibility to require that energy rates (but not capacity rates) in QF power sales contracts and other legally enforceable obligations vary in accordance with changes in the purchasing utility’s avoided costs at the time the energy is delivered. It also grants states additional flexibility to allow QFs to retain their rights to fixed energy rates, and to allow such rates to be based on projected energy prices during the term of a QF’s contract. The Final Rule also gives states the flexibility to set “as available” QF energy rates for:
 - QFs selling to electric utilities located in organized wholesale power markets at the locational marginal price (LMP) in those markets, subject to a rebuttable presumption that the LMP represents the as-available avoided costs of utilities located 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 will also be allowed to set energy and capacity rates based on competitive solicitations conducted pursuant to transparent and non-discriminatory procedures consistent with the Commission’s Allegheny standard, described in the Final Rule.
- The Final Rule also modifies the one-mile rule used to determine whether generation facilities are considered to be at the same site for purposes of determining whether a facility meets the 80 MW limit on qualifying small power production facilities. Under the Final Rule:
 - There will continue to be an irrebuttable presumption that facilities one mile apart or less constitute a single facility;
 - Parties can show that facilities that are located more than one mile apart, but less than 10 miles apart, constitute a single facility; and
 - There will be an irrebuttable presumption that facilities 10 miles apart or more are separate facilities.
- Regarding the obligation to purchase, FERC revised the regulations that provide for termination of a utility’s obligation to purchase from a QF with nondiscriminatory access to certain markets. The rebuttable presumption that QFs with a net capacity at or below 20 megawatts do not have nondiscriminatory access to those markets is reduced to 5 MW for small power production facilities, but remains unchanged for cogeneration facilities. This was a change from the NOPR, which had proposed 1 MW as the size at which QFs would be presumed to lack non-discriminatory access to markets.
- Regarding self-certification, under the Final Rule, entities will be allowed to protest a QF self-certification or self-recertification without having to file and pay for a declaratory order. In addition, protests may be made to new certifications – both self-certifications and applications for Commission certification – but for self-recertifications and applications for Commission recertifications, protests may be made only to those that make substantive changes to the existing certification.

- States will also be required to 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 legally enforceable obligation.

The Final Rule does not change other elements to the Commission's existing PURPA regulations that encourage QF development, including those requiring electric utilities to provide backup electric energy to QFs on a non-discriminatory basis and at just and reasonable rates; requiring electric utilities to interconnect with QFs; and providing exemptions to QFs from many provisions of the Federal Power Act and state laws governing utility rates and financial organization.

Utility trade groups Edison Electric Institute, the American Public Power Association, and the National Association of Rural Electric Cooperatives praised FERC's new rule in a joint statement. "FERC has helped to ensure that renewable energy can continue to grow without forcing electricity customers to pay a premium to the developers that learned how to game the system," EEI President Tom Kuhn said.

On the other hand, Commissioner Richard Glick offered a partial dissent to the Final Rule, stating that one of PURPA's key requirements is that utilities cannot treat QFs differently from their own resources, but the Final Rule ignores this. QFs no longer will be guaranteed an option for a fixed-term contract that makes it easier to finance certain projects. Commissioner Glick expects that the Final rule will discourage QF development.

Accordingly, Commissioner Glick echoed criticisms from clean-energy and environmental advocacy groups indicating that the Final Rule fails to reform key problems in how PURPA has been implemented on a state-by-state basis over the past decade and that the new changes could undermine PURPA's goal of creating a level playing field for independent energy developers in regions where vertically integrated utilities hold monopoly power.

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