

FERC Proposes Major Changes to PURPA Regulations

by Zev Simpser, Steven A. Weiler, and Colin Wicker

On September 19, 2019, a divided Federal Energy Regulatory Commission (FERC) issued a Notice of Proposed Rulemaking (NOPR) in which it proposed significant changes to its regulations implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). Responding to significant industry and regulatory changes since PURPA was enacted 40 years ago, the NOPR represents FERC's first major attempt to overhaul the PURPA regulations. FERC's proposal would vest the states with more flexibility to tailor their PURPA implementing regulations in light of current market conditions. The proposed changes could limit the impact of PURPA, which might be welcomed by utilities but opposed by developers of smaller generation projects. Once the NOPR is published in the Federal Register, a 60-day comment period will begin. FERC currently has only three commissioners. As a result, in addition to public comments, new commissioners will likely shape any future rule.

Summary of Proposed Revisions

FERC proposes to grant states flexibility to set qualifying facility (QF) energy rates that (1) change at regular intervals based on changes in the purchasing utility's avoided costs, *i.e.*, a state could decide that a QFs' energy rates could not be fixed for the term of the contract; (2) are fixed based on projected energy prices during the term of a QF's contract based on the anticipated dates of delivery; and/or (3) are set by competitive prices, *e.g.*, at a locational marginal price (LMP) for sales to a utility in an organized market or at a formula rate for other utilities where there is a liquid market. States would also be given the option of setting QF energy rates using a competitive solicitation process.¹

FERC also proposes to change key rules for determining a QF's status and the extent to which a utility has a purchase obligation. Specifically, the NOPR would:

- Require a QF to demonstrate commercial viability and financial commitment to construct its facility before the QF is entitled to a contract.
- Allow a party to protest a self-certification or self-recertification of a facility without

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being required to file a separate petition for declaratory order and to pay the associated filing fee.

- Change the rebuttable presumption that QFs (but not cogenerators) with a net capacity at or below 20 MW do not have nondiscriminatory access to certain markets (the ISOs and RTOs) to a rebuttable presumption that QFs with a net capacity at or below 1 MW do not have nondiscriminatory access to those markets, which would likely allow utilities within ISOs or RTOs to terminate the purchase obligation under PURPA for many or most QFs with net capacities above 1 MW.
- Revise the current “one-mile rule,” such that generation facilities within one mile would still be irrefutably deemed a single facility and those that are more than 10 miles apart still be treated as separate, but facilities between 1 to 10 miles apart subject to a rebuttable presumption of being separate.
- Permit reduction of a utility’s obligation to purchase from QFs to the extent the utility’s supply obligation was reduced by a state retail choice program.

Reasons for the Proposed Revisions and Bases for Future Litigation

The NOPR explains that the proposed changes to regulations PURPA are the result of various changes to the marketplace since the law was enacted in 1978, including open access transmission, wholesale electrical markets in much of the country, significant amounts of independently-owned generation (including from renewables), and a reduced dependency on PURPA by new renewable generation projects. FERC also notes that PURPA was originally passed was to reduce the United States’ dependency on natural gas and petroleum. However, scarcity of natural gas is no longer a concern.

Commissioner Richard Glick dissented, arguing that whether PURPA is no longer needed is a matter for Congress. Ultimately, federal judges may have to consider the matter.

¹ Certain states already do so, but the legality of California’s mechanism was recently cast into doubt by *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861 (9th Cir. 2019).