September 25, 2019

FERC QF Developments: PURPA Implementation Changes Proposed; NH Crossed the Line

Modernizing or Gutting PURPA?

In an action that could have significant impacts on the development and financing of renewable resources, the Federal Energy Regulatory Commission (FERC) issued on September 19 proposed rules to reform its long-standing regulations implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA).[1] Those regulations address the obligation of electric utilities to purchase power produced by "qualifying facilities" or "QFs" at rates that must be "just and reasonable to the electric consumers of the electric utility and in the public interest, and not discriminate against" those QFs.[2]

The September 19, 2019 Notice of Proposed Rulemaking (NOPR) seeks public comment on draft rule changes "to rebalance the benefits and obligations of the [FERC's] PURPA Regulations in light of the changes in circumstances since the PURPA Regulations were promulgated."[3] The NOPR proposes the following changes that would revise how and when prices for QF power may be established and would reduce the circumstances under which a utility's mandatory purchase obligation would be triggered:

- Provide states the flexibility to establish QF energy rates at the purchasing utility's avoided costs at the time of energy *delivery*, rather than allowing the QFs to elect to *fix* the energy rate for an extended term at the time the utility becomes compelled to purchase the QF's energy.
- Specify that an avoided cost rate for QF energy can be based on *market factors* (including locational market prices, indices, trading hubs, or competitive solicitation processes) or, at the state's discretion, can continue to be set as they are under current PURPA Regulations.
- Reduce in states with a retail choice program an electric utility's obligation to purchase from QFs to the extent that the utility's provider of last resort (POLR) supply obligation has been reduced by the state's program. If POLR supplies are obtained through solicitations having a specific contract term, the term of any PURPA purchase contract should match the term of the POLR supply contract.
- Decrease from 20 MW to 1 MW the maximum size of QFs that would be entitled to require utilities located in areas with demonstrably competitive markets (RTO/ISOs) to purchase their power. If QF facilities qualify as cogeneration, the 20 MW cap would not change.
- Replace the "one-mile rule" for determining whether generation facilities under common ownership should be considered to be part of a single facility (to be eligible for favorable QF treatment, a small power production facility must be 80 MW or less). Some have argued that the current one-mile rule has been gamed to permit QF certification of projects that if combined would otherwise exceed the 80 MW cap. The impact of this change, if made, would primarily affect projects in non-RTO/ISO markets (e.g., the bilateral markets of the southern and western United States).
- Clarify that a utility's mandatory purchase obligation under PURPA does not arise until the QF can demonstrate commercial viability and financial commitment pursuant to objective and reasonable state-defined criteria.
- Allow for interested stakeholders to protest the self-certification of a QF.

It is noteworthy that the NOPR was issued in a 2-1 decision. Chairman Chatterjee and Commissioner McNamee, both Republicans, supported the NOPR. There are two vacant seats on the Commission and Commissioner Glick, the lone Democrat on the Commission, issued a strongly worded partial dissent, asserting at the outset that the proposed reforms would "effectively gut" PURPA. While he agreed that certain proposed changes to the PURPA Regulations were justified, he concluded that other changes were inconsistent with PURPA, were not justified, and would reduce competition.

Comments on the proposed rule changes are due 60 days after their publication in the *Federal Register*. There is no specific time by which the Commission must act after receipt of comments. Given the two vacancies on the FERC, it is very possible that the composition of the Commission that issues any final rule will change, which could also impact that final rule.

New Hampshire Crossed the Line

In another PURPA-related development, the FERC concluded that a recently-enacted New Hampshire bill (NH SB 365)[4] was both inconsistent with PURPA and pre-empted by the Federal Power Act (FPA).[5] NH SB 365 required New Hampshire utilities to purchase power from eligible biomass and waste facilities at rates that were established by the legislation. FERC ruled that the legislatively established rate was inconsistent with PURPA requirements because it would likely exceed, and was not otherwise limited to a rate equal to or less than, the purchasing utilities' avoided cost. Further, FERC concluded that NH SB 365 contravened the FPA's "division of authority between state and federal regulators and was pre-empted by the FPA because SB 365 establishes a rate for, and thereby infringes on the FERC's exclusive jurisdiction over, the rates for wholesale sales of electric energy in interstate commerce."

The FERC Order is potentially subject to challenge through a request for rehearing and potential appeal to the Courts thereafter. Any requests for hearing must be filed on or before October 21, 2019.

If you have questions concerning these specific QF developments or the regulatory processes they trigger, please contact any of the attorneys listed in this alert.

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[1] 16 U.S.C. § 2601 et seq. (2018). PURPA was enacted to help lessen the dependence on fossil fuels and promote the development of power generation from non-utility power producers.

[2] 16 U.S.C. § 824a–3; PURPA, Sec. 210(a)-(b).

[3] *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Notice of Proposed Rulemaking, 168 FERC ¶ 61,184 (2019) (NOPR).

[4] N.H. Rev. Stat. Chapter § 362-H (2019).

[5] *New England Ratepayers Association*, 168 FERC ¶ 61,169 (2019).

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