UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF ADVANCED ENERGY ECONOMY

Advanced Energy Economy ("AEE") respectfully submits these comments in response to the Notice of Proposed Rulemaking[1] issued September 19, 2019 in the above captioned dockets by the Federal Energy Regulatory Commission ("FERC" or "Commission"). The Commission has proposed to revise its regulations implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA"). AEE has concerns with many aspects of the NOPR, but has chosen to focus these comments on one issue: the creation of a rebuttable presumption that resources greater than 1 MW have non-discriminatory and meaningful access to organized wholesale markets. This proposal is without factual support in the NOPR and flatly contradicts the Commission's past statements and decisions. We suggest instead that, when considering reforms to its regulations implementing PURPA, the Commission should return to the first principle that runs through PURPA's text and structure and that has driven past PURPA reform efforts: the powerful and beneficial impact of facilitating market competition in the electric power sector. Regulatory changes that fail to recognize this illuminating purpose of PURPA and the clear intent of Congress (both when it enacted PURPA in 1978 and when it amended the law in 2005)

[1] *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 168 FERC ¶ 61,184 (Sept. 19, 2019) ("NOPR").

to encourage alternatives to monopoly utility-owned generation and greater competition in wholesale energy markets are unlikely to prove legally sufficient and will represent a significant departure from over four decades of national policy.

I. Congress Enacted PURPA to Foster Competition in the Electric Generation Sector

The Commission frames its NOPR with a discussion of the circumstances underlying the passage of PURPA and the manner in which those circumstances have changed in the three decades since. Notably, the Commission observes that PURPA was part of a legislative package enacted in 1978 to address the then-recent energy crises.[2] The Commission then concludes that "there no longer are shortages of natural gas supply,"[3] as an apparent justification for weakening or eliminating PURPA's regulatory implementation. But, even if it were the Commission's prerogative to nullify an act of Congress on the grounds that it has outlived its motivating purpose, which of course it is not, the Commission has misjudged that purpose. From its inception through EPAct 2005, PURPA's distinctive purpose has been to introduce and strengthen market competition in an industry long dominated by franchised monopolies.

The Commission is correct to locate PURPA historically within a series of legislative acts intended to reduce dependence on foreign fuels. But, as the Commission has observed elsewhere,[4] PURPA was also part of a series of enactments in the late 1970s intended to introduce market competition into heavily-concentrated and price-regulated industries, such as airlines and trucking, among others. Moreover, Congress enacted PURPA in response to rising

[2] *Id.* at P 15.

[3] *Id*. at P 19.

[4] *See* FERC, *Energy Primer: A Handbook of Energy Market Basics* (2015) at 39.

electricity prices caused, in part, by costly monopoly utility generation construction projects.[5] If Congress' only objective in enacting PURPA was to reduce reliance on certain fuels, it could have simply commanded vertically integrated utilities to build more "small power production facilities." It did not. Instead, Congress sought the more profound change of requiring market access for new competitive entrants into the electric generation sector.

PURPA was remarkably successful in this regard. It led to the birth of the independent power producer industry, accelerated the development of new power production technologies, provoked the need for open access on the transmission system, and thereby laid the groundwork for the Energy Policy Act of 1992 and subsequent reforms at the Commission and among the States that opened the door to market competition yet further.[6] In short, PURPA is the cornerstone of the national policy supporting competition in wholesale power markets, a policy that has been carried through several successive pieces of legislation (including EPAct 1992, the Energy Policy Act of 2005, and the Energy Independence and Security Act of 2007) and numerous landmark Commission rulemakings (including Order Nos. 888, 889, 890, and 1000, to name just a few).[7]

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[5] *See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,545 (May 10, 1996) ("In enacting PURPA, Congress recognized that the rising costs and decreasing efficiencies of utility-owned generating facilities were increasing rates and harming the economy as a whole." (citations omitted)).

[6] *Id.* at 21,545 (recounting the history of "The Public Utility Regulatory Policies Act and the Growth of Competition").

[7] *See id.*; *see also Open-Access Same-Time Information System (OASIS) and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), *order on reh'g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

As the cornerstone of national wholesale market competition policy, PURPA still has a vital role to play. Congress made this principle clear in EPAct 2005, when it added Section 210(m) of PURPA. By 2005, the energy crises of the 1970s were distant memories and use of petroleum products for electric power generation had plummeted with no signs of returning.[8] Nevertheless, when it re-examined PURPA in EPAct 2005, Congress did not repeal PURPA as having outlived its usefulness, as it did to the Public Utility Holding Company Act. Rather, Congress continued to use PURPA as a tool to drive market competition. In recognition of the development of organized wholesale markets, Congress provided for the termination of electric utilities' mandatory purchase obligations, *but only from small power production facilities with nondiscriminatory and meaningful access to organized wholesale markets meeting certain criteria*.[9] This reform incentivized transmission owners to join those organized markets, while also ensuring that PURPA would continue to fulfill its central purpose of providing market access to competitive entrants. In considering reforms to its PURPA regulations, the Commission should weigh whether each proposed change advances the cause of market competition – either in parts of the country without access to organized wholesale markets or, within ISO/RTO regions, for small resources that continue to face barriers to entry in those markets.

[8] By 2005, petroleum had fallen to 3.0% of the national generation mix. *See* Energy Information Administration, *Electric Power Annual 2005* at 1.

[9] PURPA § 210(m)(1); 16 U.S.C. § 824a-3(m)(1). Note that the NOPR would change the rebuttable presumption for all three market categories described in Subsection (m)(1). Thus, in considering the factual predicate for lowering the threshold from 20 MW to 1 MW, the Commission must weigh not only whether all markets provide "nondiscriminatory access" to facilities between 1 MW and 20 MW, but also whether markets described in Subsection (m)(1)(B) provide those small resources "a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected."

AEE has consistently raised the need for the Commission to eliminate barriers to wholesale market participation faced by advanced energy technologies, including small power production facilities. While the Commission has taken important steps to reduce those barriers, many remain, especially for smaller resources that can provide valuable services in the wholesale markets but are stymied by outdated market rules and structures, planning and operating practices that fail to account for their technical and operational characteristics, and a lack of alignment between wholesale and retail markets.

II. The NOPR Fails to Justify a Presumption that Facilities Greater than 1 MW Have Non-Discriminatory and Meaningful Market Access

In Order Nos. 688 and 688-A, the Commission determined that, for purposes of implementing Section 210(m) of PURPA, resources smaller than 20 MW would be rebuttably presumed to lack non-discriminatory market access.[10] The Commission articulated several reasons for this determination, beginning with the fact that many smaller Qualifying Facilities ("QFs") interconnect at the distribution level:

> [I]t is reasonable to conclude that some, perhaps most, small QFs at or below the 20 MW level can be distinguished from larger QFs by the type of delivery facilities to which they typically interconnect. Most QFs larger than 20 MW are interconnected to higher voltage lines, typically considered to be transmission lines, while smaller QFs tend to be interconnected to lower voltage radial lines, frequently considered to be distribution. Many lower voltage facilities are radial systems designed to carry power from the high-voltage grid downstream to loads, and there may be technical enhancements required to move power injected into such facilities upstream to the transmission grid to access the broader wholesale market. Smaller QFs are also more likely to have to overcome other

[10] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *aff'd sub nom. American Forest and Paper Ass'n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

> obstacles, such as jurisdictional differences, pancaked delivery rates, and perhaps additional administrative procedures, to obtain access to distant buyers.[11]

In further support for drawing the line at 20 MW, the Commission reasoned that it had used that same threshold in related contexts that required drawing a line between small and large resources:

> Although there is no unique and distinct megawatt size that uniquely determines if a generator is small, in other contexts the Commission has used 20 MW, based on similar considerations to those presented here, to determine the applicability of its rules and policies. Indicative of this is the Commission's reliance in the Final Rule on its findings in Order No. 671, where the Commission retained exemptions for QFs that are 20 MW or smaller from sections 205 and 206 of the FPA, and Order Nos. 2006 and 2006-A, where the Commission recognized that generators 20 MW or smaller should have different standards for interconnection than large generators.[12]

By proposing to move the 20 MW threshold to a 1 MW threshold, the Commission has preliminarily concluded that the factual basis for Order No. 688 is no longer valid and that resources between 1 MW and 20 MW now have "non-discriminatory" and "meaningful" access to organized wholesale markets. But, the Commission offers no evidence in support of its new conclusion. The Supreme Court has held that when an agency reverses course on a policy issue and "its new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[13] This is because "a reasoned explanation is needed for

[11] Order No. 688-A at P 96 (footnotes omitted).

[12] *Id*. at P 97.

[13] *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

disregarding facts and circumstances that underlay or were engendered by the prior policy."[14] The NOPR falls far short of that standard.

In the NOPR, the Commission makes two observations in support of lowering the threshold to 1 MW. First, the Commission notes that, since Order No. 688, it has "required public utilities to provide a Fast-Track interconnection process for some interconnection customers whose capacity is up to and including 5 MW (up from the previous 2 MW threshold)."[15] The Fast Track interconnection process – which eliminates certain meetings and studies, and instead uses technical screens to identify reliability issues – was in existence when the Commission issued Order No. 688. Yet, in Order No. 688 the Commission did not raise the Fast Track process as a factor mitigating the access issues facing QFs that interconnect on distribution facilities. In 2013, the Commission expanded eligibility for the Fast Track process for inverter-based resources from a maximum of 2 MW to a maximum of 5 MW, with lower thresholds based on the voltage at the point of interconnection and other system characteristics.[16] While this change was certainly a positive development, the expansion of the Fast Track process in Order No. 792 is far from sufficient to support a rebuttable presumption that all QFs under 20 MW have nondiscriminatory access. The expansion of the Fast Track procedures applied only to a narrow slice of inverter-based resources under 20 MW. Further, by replacing studies and meetings with technical screens, the Fast Track procedures did not remove *all* the obstacles that small QFs face when interconnecting at the distribution level, obtaining transmission access, or realizing the opportunity to provide all wholesale market services they are technically capable of

[14] *Id*. at 516.

[15] NOPR at P 129 (footnote omitted).

[16] *Small Generator Interconnection Agreements and Procedures*, Order No. 792, 145 FERC ¶ 61,159, at P 103 (2013), *clarifying*, Order No. 792-A, 146 FERC ¶ 61,214 (2014).

providing. If it had, the Commission surely would have mentioned that fact in Order No. 688. Moreover, as discussed below, these obstacles largely remain intact today.

The NOPR also cites to Order No. 841 as support for lowering the rebuttable presumption to 1 MW. AEE strongly supports the Commission's actions in Order No. 841 and believes that Order No. 841 will indeed expand the scope of market competition. Nevertheless, Order No. 841 applies only to a small subset of QFs (energy storage resources that charge 75 percent or more with energy that meets the fuel use criterion)[17] and cannot possibly suffice as factual support for lowering the rebuttable presumption threshold for *all* types of QFs.

The NOPR is silent regarding the other reasons the Commission gave for the 20 MW threshold in Order No. 688. The NOPR notes that the Commission does not intend to change the use of the 20 MW threshold for the exemption from sections 205 and 206 of the FPA, or for the demarcation between small and large generator interconnection procedures. But the NOPR offers no explanation for why these other regulatory determinations presented "similar considerations" to the size-based rebuttable presumption at the time of Order No. 688 but no longer do today. Similarly, the Commission offers no explanation at all regarding other factors noted in Order No. 688, including "jurisdictional differences," "pancaked delivery rates," and "additional administrative procedures."[18]

The Commission's decision to depart from the 20 MW threshold set in Order No. 688 appears to take its justification, at least in part, from the observation that "when Order No. 688 was issued, the organized electric markets had been existence for only a few years and were not well understood by all market participants."[19] But, this statement contradicts the Commission's

[17] *See* 18 C.F.R. § 292.204(b)(1)(i); *see also Luz Development and Finance Corp*., 51 FERC ¶ 61,078 (1990).

[18] Order No, 688-A at P 96.

[19] NOPR at P 126.

own explanation in Order No. 688-A, in which it stated that the rebuttable presumptions it had created were "based on the Commission's experience in implementing non-discriminatory open access transmission over the past 11 years, its experience with QF issues (including interconnection issues) over the past 29 years, and its experience with RTO/ISO markets over almost 10 years."[20]

Moreover, the Commission has reaffirmed the validity of the 20 MW threshold much more recently than Order No. 688, a fact that is neither acknowledged nor explained in the NOPR. In a series of orders issued this decade, the Commission considered petitions by utilities to allow termination of their mandatory purchase obligations from certain QFs below 20 MW. In three of those orders the Commission denied the utility's petition to rebut the 20 MW presumption,[21] and in two others (where the subject QFs had in fact already been making sales into wholesale markets), the Commission determined that the utility had rebutted the presumption.[22] Nothing in those orders, however, betrayed any doubt regarding the continued validity of the assessments made in Order No. 688. To the contrary, the Commission reaffirmed those conclusions. In *PPL Elec. Util. Corp*. the Commission referred to the "greater practical difficulty faced by small QFs in participating in power markets."[23] In *City of Burlington*, the Commission noted that it was "generally concerned that small QFs are vulnerable to administrative burdens preventing their access to organized electric markets."[24] And, in

[20] Order No. 688-A at P 63.

[21] *See N. States Power Co*., 151 FERC ¶ 61,110 (2015); *PPL Elec. Util. Corp.,* 145 FERC ¶ 61,053 (2013); *Pub. Serv. Co. of New Hampshire*, 131 FERC ¶ 61,027 (2010).

[22] *Fitchburg Gas and Elec. Light Co*., 146 FERC ¶ 61,186 (2014); *City of Burlington*, 145 FERC ¶ 61,121 (2013).

[23] 145 FERC ¶ 61,053 at P 24.

[24] 145 FERC ¶ 61,121 at P 34.

Northern States Power Co., the Commission concluded that the subject QF's lack of access to the MISO capacity market presented "the very circumstances explained in Order No. 688 that give rise to the rebuttable presumption that smaller QFs lack nondiscriminatory access to markets."[25] The Commission has an obligation to explain not only what has changed since Order No. 688-A was issued in 2007, but also what has changed in just the few years since these orders reaffirmed Order No. 688-A's reasoning.

It is not surprising that the Commission does not provide such an explanation in the NOPR, given that little has changed since Order No. 688-A and the subsequent orders noted above. Smaller energy resources, especially distributed energy resources, still face significant and in many cases insurmountable barriers to their ability to access wholesale markets. With respect to interconnection – a barrier that the Commission specifically pointed to in Order No. 688 to support the existing 20 MW presumption – the Commission recently sought information from the six FERC-jurisdictional RTOs/ISOs on the interconnection procedures and practices applied to smaller distributed energy resources.[26] As AEE explained to the Commission in its comments in that docket, the RTO/ISO responses demonstrate that distributed energy resources, including smaller QFs, generally lack non-discriminatory access to the markets.[27] For example, those responses showed that some RTO/ISO interconnection processes and procedures require all DERs, including existing DERs who already have a distribution interconnection agreement and the physical ability to access the wholesale market, to enter the interconnection queue and

[25] 151 FERC ¶ 61,110 at P 34.

[26] *See* Docket No. RM18-9-000 (data requests issued September 5, 2019).

[27] Comments of Advanced Energy Economy in Docket No. RM18-9 (Nov. 12, 2019).

proceed through a lengthy process before they can participate in some or all of their wholesale markets.[28]

The "jurisdictional differences" and "administrative difficulties" the Commission identified in Order No. 688-A also remain stubbornly intact. Jurisdictional disputes remain a key stumbling block to removing barriers to the ability of smaller distributed energy resources to participate in the RTO/ISO markets.[29] In addition, the complexity and cost of actively participating in RTO/ISO markets have not waned, and in fact have in some instances have worsened. As one example, PJM reported that it held 498 stakeholder meetings in a single year, representing a serious administrative barrier to participation for smaller entrants into the market.[30]

Taken together, these factors have resulted in a relative lack of participation by smaller resources, including smaller QFs, in RTO/ISO markets. In response to Commission Staff's request that the RTOs/ISOs provide "data on or estimates of the number of individual DERs in your region that are participating today in your RTO/ISO markets as compared to DERs in your region that are not participating in wholesale markets," the RTOs/ISOs either did not have sufficient data to report to the Commission how many distributed energy resources participate in their markets, or reported that none currently participate.[31] These responses, and the relative lack

[28] *Id*. at 2–5; *see also, e.g.*, PJM Response at 4, 7 (Oct. 7 2019) (describing interconnection process DERs must go through to participate in capacity market).

[29] *See, e.g.*, Petition of Genbright, LLC, ER20-366 (Nov. 12, 2019) (alleging that certain DERs were unjustly disqualified from participating in the ISO-NE FCA-14 "due to uncertainty over the proper jurisdictional treatment of the distribution-level feeder lines to which each of the Projects is interconnected").

[30] Reported at May 2019 PJM Annual Meeting of Members. RTOs/ISOs have emphasized how central active attendance at these meetings is to the ability of potential market participants to do business in their markets. *See* https://www.youtube.com/watch?v=3HJTTG52_f4&feature=youtu.be&a=.

[31] *See, e.g.*, Southwest Power Pool Response to Data Request, Docket No. RM18-9-000 (Oct. 4, 2019) at 7 ("There is no DER directly participating in the SPP Integrated Marketplace . . . . SPP is not aware of the

of data or even estimates of the number of smaller resources participating in wholesale markets, show that these resources still lack the non-discriminatory access to the markets that Congress identified in Section 210(m) of PURPA as a necessary prerequisite to relief from the mandatory purchase obligation. The Commission cannot provide a reasoned explanation for its change of course from Order No. 688-A without more detailed information showing how these resources can access the markets on a non-discriminatory basis.

III. Reforms to PURPA's Implementing Regulations Should Aim at Expanding Market Competition

The Commission should focus efforts to reform its implementation of PURPA on promoting fair and open competition (including non-discriminatory access to transmission and interconnection services) as an alternative to the mandatory purchase obligation. This focus better comports with the intent of Congress when it enacted and amended PURPA, and with Congress's consistent affirmation of wholesale power market competition as a national policy objective.

The Solar Energy Industries Association (SEIA) and the National Association of Regulatory Commissioners (NARUC) have each made proposals to harness competitive forces to improve the efficacy and efficiency of the Commission's implementation of PURPA's objectives, such as through the use of open and transparent utility Requests for Proposals (RFPs).[32] While they differ materially, AEE believes that these two proposals could form the

amount of DER in the SPP region that may be a part of the regulated retail environment."); PJM Data Response at 9.

[32] Solar Energy Industries Association Supplemental Comments, Docket No. AD16-16-000 (Aug. 28, 2019); National Association of Regulatory Utility Commissioners Supplemental Comments, Docket No. AD16-16-000 (Oct. 17, 2018).

starting point for a stakeholder process that could achieve a broad and lasting consensus that moves the core competitive goals of PURPA forward, rather than rolling them back. Unfortunately, the NOPR does not acknowledge the SEIA proposal, devotes just a few short paragraphs to the NARUC proposal, and rather than making any proposal, sets forth an open-ended question about the "specific factors that would be useful in determining how a utility or utilities may satisfy PURPA 210(m)(1)(C)."[33]

Properly designed RFP processes could potentially be designed to be truly open and competitive, with no utility preference, in order to meet the statutory requirements of PURPA 210(m)(1)(C). However, the Commission's presentation of the issue in the NOPR does not allow for a full examination of the issues. AEE suggests that the Commission conduct focused additional processes on this topic, including one or more workshops or technical conferences, to explore in detail the "specific factors" that would make a utility RFP process a truly competitive process of a "comparative quality" to competitive wholesale energy and capacity markets. This process could ultimately develop proposed regulations guiding the states and utilities in implementing such open and competitive solicitation processes to obtain relief from the mandatory purchase obligation under 210(m)(1)(C).

Respectfully submitted,

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[33] NOPR at P 133.