

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

**Technical Conference on Implementation Issues Under
the Public Utility Regulatory Policies Act of 1978**

Docket No. AD16-16-000

**STATEMENT OF ALLISON CLEMENTS
THE SUSTAINABLE FERC PROJECT**

On behalf of the Sustainable FERC Project (“Project”),¹ I am pleased to comment on issues related to implementation of the Public Utility Regulatory Policies Act of 1978 (“PURPA”).² The Project and its coalition partners have participated in nearly 20 years of Federal Energy Regulatory Commission (“Commission”) rulemakings. We also participate extensively in planning, reliability, and market initiatives in most grid regions of the country. We also have deep knowledge of state and federal environmental and energy standards and other factors influencing grid design and operation. In considering the questions posed for this conference, we emphasize the critical role that PURPA continues to play in furthering Congressional intent towards developing zero fuel cost, carbon free renewable energy and reducing reliance on fossil-fueled power generation.

COMMENTS ON PANEL 1 QUESTIONS

Panel 1 will address issues related to the Commission’s regulations implementing the mandatory purchase obligation under PURPA in light of changes in the electricity markets since the enactment of PURPA.

• The rebuttable presumption that the Commission has adopted in the context of PURPA section 210(m) that qualifying facilities (QFs) 20 megawatts and below do not have nondiscriminatory access to competitive organized wholesale markets and the barriers to access encountered by these facilities.

The Sustainable FERC Project emphasizes the critical importance in maintaining the rebuttable presumption first specified in Order No. 688 that QFs 20 megawatts (MWs) and below lack

¹ The Sustainable FERC Project is a coalition of environmental and other public interest organizations throughout the United States. The Project and its partner organizations engage in Commission proceedings involving transmission grid planning, operations and markets. The Project and its coalition members also are active stakeholders in RTOs, ISOs, and other FERC jurisdictional entities throughout the country. See www.sustainableFERC.org for more information.

² Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scatter sections of 16 42, 15, 43, 15,7 U.S.C.).

nondiscriminatory access to markets.³ Although markets have evolved significantly since 2006, the circumstances that small QFs specifically face in attempting to gain market access – based on interconnection realities, available business opportunities and wholesale market structures – have not changed sufficiently to justify departure from the rebuttable presumption. To remove or lessen it would therefore undermine the Congressional intent contained in 210(m) to provide market opportunities for small QFs whenever they do not have nondiscriminatory access to robust wholesale markets.

Even within RTO and ISO regions with robust wholesale markets, small qualifying facilities face barriers to wholesale market entry that the rebuttable presumption, set forth in 18 C.F.R. § 292.309(d), was designed to address. In promulgating the rebuttable presumption, the Commission observed that QFs 20 MW and below tend to be interconnected to lower voltage distribution lines, and are “more likely to have to overcome other obstacles, such as jurisdictional differences, pancaked delivery rates, and perhaps additional administrative procedures, to obtain access to distant buyers.”⁴ FERC recognized that there is “no perfect bright line” to divide “small” QFs from “large” ones with regard to the market access that such generators enjoy,⁵ but set 20 MW as a reasonable threshold based on its observations about the general interconnection practices and market barriers for such facilities. It rejected a much smaller size threshold “of one or two MW” due to the challenges that small entities as large as 20 MW still face.⁶ FERC acknowledged that some facilities under this threshold do have access to markets, and for this reason it made the presumption rebuttable.⁷

Many of circumstances that led to FERC’s promulgation of the rebuttable presumption and its choice of a 20 MW threshold continue today. Just last year, in *Northern States Power Company*, the Commission reiterated the rationale behind its rebuttable presumption, observing that small QFs continue to face interconnection, pancaked rate, operational limitations and administrative cost burdens that add up to

³ See Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006) (“Order No. 688”); Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007) (“Order No. 688-A”); 18 C.F.R. § 292.309(d).

⁴ Order No. 688-A at P 96.

⁵ *Id.* at P 95.

⁶ *Id.* at P 101.

⁷ See *id.*

discriminatory market barriers despite the existence of fully-formed energy and capacity markets.⁸ In denying Northern States Power Company a waiver from its mandatory purchase obligation, the Commission not only stated that Northern States failed to rebut the presumption, it affirmatively found that “in fact” the nearly 18 MW facility in question “lack[ed] such access.”⁹ Cases such as *Northern States* demonstrate that at least some subset of QFs as large as 20 MW face continuing barriers to market access and have a continuing need for the rebuttable presumption to be applied to them.^{10,11} For example, the reality that many small QFs, including the one at issue in *Northern States*, continue to connect to the distribution system, mean that a “pancaked” distribution access charge continues to act as a barrier to wholesale market access.

Wholesale energy and capacity markets are continuing to evolve and the Commission’s inquiry into the impact of that evolution on PURPA implementation is an important one. However, there is still significant need for progress in order to guarantee small QFs have non-discriminatory access to wholesale energy and capacity markets. The small QFs’ rebuttable presumption may be overcome on a fact specific basis. It is not a generic, blanket excuse for small generators and does not lock utilities into mandatory purchase obligations if QFs actually have nondiscriminatory market access. It ensures that the Commission can recognize and address changes in specific market-related circumstances as they may occur.¹² Departure from the rebuttable presumption is a significant policy change and should require clear, concrete evidence that market barriers are no longer discriminatory towards smaller QFs across the country.

It is important that the burden to rebut remain with the purchasing utility and not with the small QF, because practically speaking it can prove difficult for the QF without market access to demonstrate its lack of fair treatment. Doing so necessarily requires proving a negative. By contrast, demonstrating that a QF *does* have market access is easier for utilities, which, as the potential off-takers from all QFs in their service

⁸ 151 FERC ¶ 61,110 at PP 28-37 (2015).

⁹ *Id.* at P 36.

¹⁰ See also *PPL Electric Utilities Corp.*, 145 FERC ¶ 61,053 (2013), *reh’g denied*, 148 FERC ¶ 61,207 at PP 19, 24 (2014) (denying PPL’s request to waive its mandatory purchase obligation for a roughly 18 MW cogeneration facility in PJM and re-emphasizing the various reasons behind creation of the small QF exemption in Order No. 688).

¹¹ *Northern States Power Co.*, 151 FERC ¶ 61,110 at PP 28-29 (2015).

¹² See *Pub. Serv. Co. of New Hampshire*, 131 FERC ¶ 61,027 at P 22 (2010), *reh’g denied*, 134 FERC ¶ 61,041 (2013) (the burden is on the utility to “rebut the presumption on a QF-by-QF basis,” as required by Order No. 688).

territories, have the resources and institutional knowledge to demonstrate when a QF can access the market. The Commission has explained that evidence of market participation by a QF or a QF's affiliate entity may be relevant to rebutting the presumption.¹³ Where such access exists, utilities have been successful in rebutting the § 292.309(d) presumption.¹⁴ Where applicable, utilities are also better positioned to demonstrate that transmission tariffs do not constitute market barriers for QFs, because an inquiry regarding transmission-related barriers will generally involve assessing the utility's own transmission tariffs.¹⁵

• ***The impact of utility contracting practices on QF transactions.***

One potentially distressing trend in states' treatment of PURPA has been attempts to narrow power purchase contracting parameters for QFs in a manner that may undermine PURPA's intent. In Utah and Oregon last year, for example, state commissions considered but rejected utility proposals to lower standard contract lengths from 20 years to as few as 2 years.¹⁶ But in Idaho, the Public Utilities Commission did in fact reduce the standard contract term from 20 to 2 years.¹⁷ A similar proposal is under consideration in Wyoming.¹⁸ North Carolina's legislature has introduced a bill that would decrease the size for standard offer contracts from 5 MW to 100 kW QFs.¹⁹

Modifications to standard offer contract terms like reducing the term length by 18 years makes financing most QF projects nearly impossible. Obtaining financing is one of several barriers that QFs face as compared to other generating sources. These term reductions effectively re-establish the barriers that

¹³ See *Fitchburg Gas and Elec. Light Co.*, 146 FERC ¶ 61,186 at P 32 (2013).

¹⁴ See, e.g., *Fitchburg*, 146 FERC ¶ 61,186 (granting an application to terminate a utility's purchase obligation from a QF under 20 MW); *City of Burlington*, 145 FERC ¶ 61,121 (2013) (same).

¹⁵ See *Fitchburg*, 146 FERC ¶ 61,186 (Fitchburg successfully demonstrated that its transmission tariff under which the QF could send its power into the organized market did not constitute a pancaked rate acting as a barrier to market access).

¹⁶ Oregon rejected the proposal and maintained the existing 20-year contract length, and Utah rejected a proposal for 3 years and reduced the existing 20-year contract length to 15 years. See Public Service Commission of Oregon, *Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap.*, Order No. 16130 (Mar. 29, 2016) retrieved from <https://drive.google.com/file/d/0BwIXiaj8LO3GOkIVOUiwQmtMR1k/view>; Public Service Commission of Utah, *In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities*, Docket No. 15-035-53 (Jan. 7, 2016) retrieved from <http://psc.utah.gov/utilities/electric/ordersindx/documents/2712701503553o.pdf>.

¹⁷ See Idaho Public Utilities Commission, Case Nos. IPC-E-15-01, AVU-E-15-01, PAC-E-15-03; available at www.puc.idaho.gov.

¹⁸ See *Notice of Application*, Before the Public Service Commission of Wyoming, Docket No. 20000-481-EA-15 (Aug. 28, 2015).

¹⁹ Energy Policy Amendments, HB 332; 2015 Gen. Assemb. Reg. Sess. (NC 2015).

<http://www.ncleg.net/Applications/BillLookup/LoadBillDocument.aspx?SessionCode=2015&DocNum=4824&SeqNum=0>

PURPA intends to diminish. Although state commissions and non-regulated utilities are largely responsible for determining that standard offer rates and rates for sale are just and reasonable and non-discriminatory against any QF,²⁰ the Commission is responsible for addressing discriminatory or unjust terms and should consider how to ensure nondiscriminatory treatment as it relates to potentially discriminatory standard offer terms.

In addition to narrowing or limiting standard offer terms, some generation and transmission utilities attempt to discourage their distribution customers from negotiating avoided cost contract rates with QFs. For example, in an ongoing Commission proceeding, a generation and transmission utility is attempting to do this by charging its customers a fee to recover purported lost revenue from sales that would have been made by the generation and transmission utility but are effectively being replaced by sales from a QF.²¹ PURPA, and FERC regulations and orders, permit electric utilities to negotiate with QFs for a rate for sale.²² Nonregulated electric distribution utilities may choose to petition FERC for a waiver of their purchase obligation under certain circumstances. However, FERC should ensure that electric utilities that desire to negotiate a rate for sale with QFs, even nonregulated distribution customers, will in fact be permitted to negotiate a rate for sale without undue discrimination. Doing so will support the continued development of cogeneration and small power production facilities, as intended by PURPA.

• *The impact the emerging energy imbalance market in the West may have on the mandatory purchase obligation.*

The emerging Energy Imbalance Market (“EIM”) is an exciting development helping to deliver customer cost savings and cost-effective renewable energy integration in the Western United States.²³ It does not however, constitute a market in connection with which Congress intended to relieve utilities’ obligation to purchase electricity from QFs.

²⁰ See Robert E Burns and Kenneth Rose PURPA Title II Compliance Manual, 79 (2014).

²¹ See *Comments and Request of the Southern Environmental Law Center, et. al. to deny proposed rate penalty by Tri-State Generation & Transmission on Delta-Montrose Electric Association*, Docket No. EL16-39-000 (Mar. 24, 2016).

²² 18 C.F.R. § 292.301(b); *Delta-Montrose Elec. Ass’n*, 151 FERC ¶ 61,238 (2015); *affirmed on reh’g*, 153 FERC ¶ 61,028 (2015).

²³ See “Quarterly Benefits Reports,” available at <http://www.caiso.com/informed/pages/eimoverview/default.aspx>.

In EPCRA 2005, Congress recognized that the development of competitive wholesale markets has changed the landscape of market access for some renewable and cogeneration facilities. It added Section 210(m) to PURPA, which provides that if the Commission finds a qualifying facility has access to certain types of markets, utilities can be relieved of a mandatory purchase obligation with regards to that qualifying facility. Section 210(m)(1) of PURPA (repeated verbatim in 18 C.F.R. 292.309 in the context of FERC's adoption of the rebuttable presumption for small QFs) defines these markets as:

(A) (i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

(B) (i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide 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. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).²⁴

The EIM does not satisfy any of these options that would allow participation in it to exempt participating utilities from their mandatory purchase obligations. The EIM is a residual market that allows distinct participant balancing authorities to share available generation to address their own supply and demand imbalances on a fifteen-minute scheduling and five-minute dispatch basis. The market does not provide ancillary services, reserves or capacity.²⁵

(A)(i) and (ii) Standard

In Order No. 688, the Commission determined that satisfaction of (A) requires both day-ahead and real-time energy and capacity market access. The Commission determined that "Midwest ISO, PJM, ISO-NE, and NYISO" met the (A) standard at the time Order No. 688 was issued.²⁶ Lacking both a robust real-

²⁴ 16 U.S.C. § 824a-3. Because FERC's regulations codify these standards at 18 C.F.R. § 292(a)(1), (a)(2) and (a)(3), they may sometimes be referred to as "(a)(1)," "(a)(2)" and "(a)(3)" rather than as "(A)," "(B)" and "(C)."

²⁵ See <http://www.caiso.com/informed/pages/eimoverview/default.aspx>.

time and any day-ahead energy markets and any form of capacity market, the EIM clearly fails to meet the criteria set forth in both (A)(i) and (A)(ii).

(B)(i) and (ii) Standard

For QFs to have access to markets satisfying the (B) standard, two requirements must be met. (B)(i) requires that there be transmission and interconnection services provided by a regional transmission entity pursuant to a Commission-approved open access tariff that ensures nondiscriminatory service. Section (B)(ii) requires the existence of “competitive wholesale markets that provide 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.” In Order No. 688, the Commission did not determine that any existing RTO regions satisfied both prongs of the (B) standard, although it did determine that the California Independent System Operator (“CAISO”) and the Southwest Power Pool satisfied (B)(i) “because they are Commission-approved regional transmission entities that provide transmission and interconnection services pursuant to open access transmission tariffs that provide nondiscriminatory treatment to all customers.”²⁷

Participants in the EIM do not satisfy the (B) standard to warrant relief of a mandatory purchase obligation. Some participants in the EIM likely fail to satisfy (B)(i), and all non-CAISO (and perhaps all) participants fail prong (B)(ii). The term “regional transmission entity” in (B)(i) is not defined in the statute or regulations and has not been tested.²⁸ As a result, although most EIM entities probably do not satisfy (B)(i)’s requirement, demonstrating the EIM’s failure to provide market opportunities to satisfy (B)(ii) is perhaps more straightforward.

²⁶ Order No. 688 at P 102.

²⁷ Order No. 688 at P 11 (these regions did not satisfy both prongs of the (A) standard at the time Order No. 688 was issued).

²⁸ In an order denying a request by Public Service Company of New Mexico to terminate a mandatory purchase obligation, the Commission came close to considering the issue but noted that Public Service Company of New Mexico had not made the case that the Four Corners Hub, an area at the intersection of several balancing areas and high voltage transmission lines, constitutes a regional transmission entity. PNM described the Hub as having created a “liquid” and “competitive” market but not as a regional entity. *Pub. Serv. Co. of New Mexico*, 140 FERC ¶ 61,191 at PP 8-10, 34 (2012). In addition, FERC did state in Order No. 688 that it has discretion to determine what constitutes a “regional transmission entity” and some factors for consideration include “sufficient regional scope or configuration of the multiple discrete transmission systems the regional transmission entity controls.” See also Order No. 688 at PP 130, 132, 158.

The (B)(ii) standard requires “competitive wholesale markets that provide 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.”²⁹ The EIM market is a real-time residual energy market that represents a small percentage of the total sales of energy transactions for participating utilities. The market is not even a full real-time market, let alone a fully competitive market that provides a meaningful opportunity for long- and short-term sales of energy and capacity. Participation in the EIM does not merit waiver of the mandatory purchase obligation.

(C) Standard

Qualification for a waiver of the mandatory purchase obligation pursuant to (C) requires “wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).” Since the EIM does not involve wholesale markets for capacity, it does not achieve exemption qualification under (C).

The Sustainable FERC Project is hopeful that there will be further development of regional markets in the West, which may allow QFs in the region to access more robust markets and eventually relieve utilities of mandatory purchase obligations for applicable QFs. At this time, however, the language of PURPA does not allow exemptions from the mandatory purchase obligation for utilities participating in the EIM.

The Sustainable FERC Project appreciates the opportunity to comment on these important issues.

²⁹ 18 C.F.R. § 292.309(a)(2)(ii).