



## **I. Background**

### **A. Statutory and Regulatory Background**

#### **1. Federal Law**

##### **a. PURPA**

2. Section 210(a) of PURPA requires the Commission to prescribe rules to encourage cogeneration and small power production—including rules that require electric utilities to purchase electric energy generated by QFs.<sup>3</sup> But the Commission also cannot require an electric utility to pay more than the incremental cost to the utility of alternative electric energy and capacity, i.e., the cost to the utility of electric energy, which, but for the purchases from the QF, such utility would generate itself or purchase from another source.<sup>4</sup>

##### **b. Federal Power Act**

3. Part II of the Federal Power Act (FPA) confers on the Commission jurisdiction over “the transmission of electric energy in interstate commerce” and the “sale of electric energy at wholesale in interstate commerce,” as well as “all facilities for such transmission or sale.”<sup>5</sup> The FPA further defines the phrase “sale of electric energy at wholesale” as “a sale of electric energy to any person for resale.”<sup>6</sup> States retain jurisdiction over “any other sale of electric energy” and “facilities used for the generation of electric energy or over facilities used in local distribution” of electricity.<sup>7</sup>

#### **2. State of Maryland Law – Community Solar Systems Pilot Program**

4. The Maryland General Assembly enacted a Community Solar Systems pilot program legislation “to provide residents and businesses, including those that lease

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<sup>3</sup> 16 U.S.C. § 824a-3(a) (2012).

<sup>4</sup> 16 U.S.C. § 824a-3(b), (d) (2012); 18 C.F.R. §§ 292.101(b)(6), 304(a)(2) (2016).

<sup>5</sup> 16 U.S.C. § 824(b)(1) (2012).

<sup>6</sup> 16 U.S.C. § 824(d) (2012).

<sup>7</sup> 16 U.S.C. § 824(b)(1) (2012).

property, increased access to local solar electricity while encouraging private investment in solar resources.”<sup>8</sup> Additionally, the legislation is intended to allow renters and low- and moderate-income retail electric customers to have interests in Community Solar Systems. To fulfill the goals of the legislation, the Community Solar Systems’ arrangements with their customers (which are called “subscribers” for purposes of this legislation) rely on the concept of “virtual net metering.” Virtual net metering allows the sharing of generation credits among multiple parties with multiple meters even when the generation itself may not be directly connected to all or any customers in the virtual net metering group. Moreover, the net excess generation<sup>9</sup> must be acquired by the local electric companies and credited (or paid out) to the Community Solar Systems pursuant to the pilot program’s dictates.<sup>10</sup>

5. The Maryland Commission promulgated regulations to implement the pilot program. Two provisions contained in these regulations are at the heart of the Petition.

## **II. Petition for Declaratory Order**

6. Cooperatives’ petition is not a protest of the Maryland legislation enacting the pilot program; rather, it challenges particular provisions included in the Maryland Commission’s regulations implementing the legislation. Specifically, Cooperatives assert that the following regulations are problematic:

Section 20.62.02.07(A) – An electric company shall pay a subscriber a dollar amount of excess generation as reasonably adjusted to exclude the distribution, transmission, and non-commodity portion of the customer’s bill unless the electric company records subscriber credits as kilowatt hours.

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<sup>8</sup> MD. CODE. ANN., Public Utilities Article, at § 7-306.2(b)(i).

<sup>9</sup> The Maryland Code defines net excess generation as “the amount of the electricity generated by an eligible customer-generator that is in excess of the electricity consumed by the eligible customer-generator and that results in a negative kilowatt-hour reading at the end of the eligible customer-generator's billing cycle.” MD. CODE. ANN., Public Utilities Article, § 7-306(a)(8).

<sup>10</sup> MD. CODE. ANN., Public Utilities Article, §§ 7-306.2(a)(3)(iv), 7-306.2 (a)(9), 7-306.2(d)(7).

Section 20.62.02.07(B) – An electric company that serves electric retail choice customers shall pay the subscriber for kilowatt hours of excess generation at the lesser of the subscriber’s retail supply rate or the Standard Offer Service rate in effect at the time of payment.

7. Cooperatives maintain that the “Commission [should] determine: (i) to the extent that [the pilot program’s] regulations require Maryland electric companies to purchase energy from [the Community Solar Systems] at a particular price, Maryland regulations are preempted by federal law unless such [Community Solar Systems] are [QFs] under PURPA; and (ii) [the] regulations that require payment to [Community Solar Systems] at prices higher than avoided costs violate, and are preempted by, PURPA.”<sup>11</sup>

8. Cooperatives contend that, in a case where the Community Solar Systems produce energy above their subscribers’ electricity requirements (i.e., net excess energy) and the electric company must compensate the Community Solar Systems or its subscribers, this transaction constitutes a sale of electric energy to others, i.e., a resale, and thus amounts to a wholesale sale subject to either PURPA or the FPA.<sup>12</sup> Additionally, Cooperatives maintain that, in order to bring the Maryland Commission’s regulations into compliance, the rate for net excess generation produced by Community Solar Systems that are QFs must be consistent with PURPA’s avoided cost standards.<sup>13</sup>

### **III. Notices and Responsive Pleadings**

9. Notice of Cooperatives’ petition was published in the *Federal Register*, 81 Fed. Reg. 59,210 (2016), with comments, protests or motions to intervene due on or before September 22, 2016, which was later extended to October 7, 2016.<sup>14</sup> On October 7, 2016, the Maryland Commission submitted a response to the Petition.

10. Timely motions to intervene were filed by: Allco Renewable Energy Limited (Allco), American Municipal Power, Inc., American Petroleum Institute, American Public Power Association, Coalition for Community Solar Access, Edison Electric

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<sup>11</sup> Petition at 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> On August 30, 2016, the Commission issued a Notice of Extension of Time granting the Maryland Commission’s request for a 15-day extension of time to respond to the Petition.

Institute (EEI), Electric Power Supply Association (EPSA), Independent Market Monitor for PJM, Interstate Renewable Energy Council (IRC), Maryland Office of People's Counsel, Joint Solar Parties,<sup>15</sup> National Association of Regulatory Utility Commissioners (NARUC), National Rural Electric Cooperative Association (NRECA), North Carolina Electric Membership Corporation, NRG Energy, Inc., Old Dominion Electric Cooperative, Public Interest Organizations,<sup>16</sup> PSEG Companies,<sup>17</sup> SolarCity Corporation (SolarCity), Solar Energy Industries Association, Southern California Edison Company, Sunrun, and Sustainable FERC Project. Notices of intervention were also filed by the Delaware Public Service Commission, the New Jersey Board of Public Utilities, and the New York State Public Service Commission (New York Commission). An out-of-time motion to intervene was filed by Calpine Corporation.

11. Comments were filed by the Maryland Commission, NARUC, EEI, Joint Parties, NRECA, EPSA, and API, with protests being filed by Allco, Joint Solar Parties, SolarCity, Public Interest Organizations, New York Commission, and IRC.

#### **IV. Responses to the Petition for Declaratory Order**

12. The Maryland Commission requests that the Petition be dismissed, noting that the Cooperatives have not, as of the time of the Maryland Commission's response filed in this matter, filed tariffs indicating any intention to participate in the pilot program, and moreover have failed to demonstrate that the provisions of the pilot program violate the FPA or PURPA.<sup>18</sup>

13. According to the Maryland Commission, the Commission should dismiss the Petition "because it seeks an advisory opinion from the Commission based on inchoate claims of potential harm" and the Cooperatives have not exhausted their administrative

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<sup>15</sup> Joint Solar Parties comprises the Coalition for Community Solar Access; Maryland DC Virginia Solar Energy Industries Association; and Solar Energy Industries Association.

<sup>16</sup> Public Interest Organizations comprises the Maryland Solar United Neighborhoods; Physicians for Social Responsibility, Chesapeake; Chesapeake Climate Action Network; Sierra Club; the Natural Resources Defense Council; and Sustainable FERC.

<sup>17</sup> PSEG Companies comprises Public Service Electric and Gas Company, PSEG Power, LLC, and PSEG Energy Resources & Trade, LLC.

<sup>18</sup> Maryland Commission Response at 1-2.

remedies because the Cooperatives have not filed tariffs with the Maryland Commission for consideration of specific provisions with regard to their service territories.<sup>19</sup>

14. Noting that the Cooperatives' claim that the Maryland regulations will *potentially* violate PURPA or the FPA, without providing any specific tariff filings implementing the pilot program, the Maryland Commission contends that the Petition is speculative.<sup>20</sup>

15. Additionally, the Maryland Commission opines that Maryland's "regulations do not implicate the wholesale sale provisions of the FPA as the Cooperatives assert. Rather, the [pilot program] is part of the State's existing net metering program; not governed by the Cooperatives' strict reading of PURPA avoided cost standards."<sup>21</sup>

16. The Maryland Commission highlights various Commission decisions where the Commission has routinely dismissed petitions and complaints where no clear demonstration of harm was raised and/or where the claims filed were not ripe for consideration or were otherwise considered premature.<sup>22</sup> Likewise, in this proceeding, the Maryland Commission contends that the Cooperatives' Petition is based on speculation, not on any specific effect of the Maryland Commission's regulations, and is made without developed facts that support their claims. In light of the Cooperatives' failure to submit compliance filings with the Maryland Commission within 45 days of making an election to participate in the pilot program, the Maryland Commission contends that this obviates any claim of harm articulated in their Petition. Given these facts, the Maryland Commission asserts that the Cooperatives have failed to exhaust their administrative remedies and their Petition is, at best, premature.<sup>23</sup>

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<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.* at 5.

<sup>21</sup> *Id.* at 6. In support of its motion, the Maryland Commission incorporates the Affidavit of Phillip E. VanderHeyden (Appendix 1), which the Maryland Commission characterizes as describing the pilot program and demonstrating that many of the Cooperatives' factual assertions regarding the pilot program are incorrect.

<sup>22</sup> *Id.* at 6-7.

<sup>23</sup> *Id.* at 7-8.

17. Next, the Maryland Commission notes that, while the FPA authorizes the Commission to regulate the sale of electric energy at wholesale in interstate commerce, it leaves to the States the regulation of “any other sale.”<sup>24</sup> The Maryland Commission explains that the Cooperatives have misconstrued the term “use” in the Maryland statute to mean a “sale of that energy to others” – i.e., a resale, which they claim constitutes a wholesale sale under the FPA; however, the regulations, according to the Maryland Commission, do not implicate PURPA.<sup>25</sup>

18. As support for the above contention, the Maryland Commission filed the Affidavit of Mr. VanderHeyden, who explains that electric distribution companies providing standard offer service (i.e., provider of last resort service for purposes of retail choice) are allowed to recover supply-related credits (paid to subscribers) from standard offer service revenues. Thus, the Maryland Commission states that, under the regulations, “energy used and generated by net-metered customers is accounted for as residual *use* in the [electric distribution company’s] hourly energy settlement process. Because the legislation permitted a dollar crediting mechanism...a means of [electric distribution company] cost recovery was established that would allow precise accounting (and tracking for purpose of the required program study) of the program revenue.”<sup>26</sup> Thus, according to the Maryland Commission, there is nothing in the Maryland statute or the regulations that connotes a transfer of title requirement, as suggested by the Cooperatives, that would turn an electric distribution company’s use of generation into a resale of energy, thereby creating a wholesale sale.<sup>27</sup>

19. Further, the Maryland Commission notes that, in Order No. 2003-A,<sup>28</sup> the Commission observed that net metering allows a retail customer to produce and sell power in the Transmission System without being subject to the Commission’s jurisdiction and that, even where a customer “may produce more electricity than it can use itself,” sending this electricity back into the distribution grid to be consumed by other end-users does not bring the sale within the Commission’s wholesale sales jurisdiction.<sup>29</sup>

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<sup>24</sup> *Id.* at 8.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 9.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160).

<sup>29</sup> *Id.* at 10.

20. Additionally, the Maryland Commission cites to several Commission orders providing, *inter alia*, that a state commission has the authority to implement the state's net metering requirements; and that the Commission has found that no sale occurs as long as the end-use customer that purchases solar energy does not make a net sale to the utility over a given billing period.<sup>30</sup> The Maryland Commission also notes that the Energy Policy Act of 2005 encourages states to implement net metering as an alternative to PURPA's avoided cost requirements.<sup>31</sup>

21. Finally, the Maryland Commission maintains that the Cooperatives' argument that its regulations would require them to pay Community Solar Systems prices higher than avoided cost is flawed, in that their argument is premised on the assumption that community solar electric generation systems are all QFs, which may or may not be true; and that, if they are QFs, the prices paid to them are not comparable with the rates otherwise provided for under the Maryland Commission's regulations. The Maryland Commission points out that as long as a state commission can justify the costs it requires the Cooperatives to pay as avoided cost-based prices, no matter whether another calculation could result in lower avoided costs, the Commission should defer to the state commission's decision.<sup>32</sup> Notwithstanding, the Maryland Commission maintains that its regulations do not exceed the Commission's avoided cost prescriptions.<sup>33</sup>

22. NARUC supports the Maryland Commission's motion to dismiss the Cooperatives' Petition. EEI, EPSA and NRECA, on the other hand, support the Cooperatives' Petition. The other intervenors variously support either the Maryland Commission or the Cooperatives.

23. On October 24, 2016, the Cooperatives filed an answer in response.

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<sup>30</sup> *Id.* at 10-12.

<sup>31</sup> *Id.* at 13.

<sup>32</sup> *Id.* at 14.

<sup>33</sup> *Id.* at 14-15.

**V. Discussion****A. Procedural Matters**

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), the notices of intervention and timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant Calpine's untimely motion to intervene given its interest in this proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2016), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the Cooperative's answer and will, therefore, reject it.

**B. Substantive Matters**

26. We conclude that the Cooperatives' Petition is premature. The Maryland statute implementing the pilot program provides for a voluntary election by cooperatives and municipalities to participate in the community solar energy generation systems pilot program.<sup>34</sup> The Cooperatives' Petition does not indicate that they are participating or even intend to participate in the pilot program, and, according to the Maryland Commission, they have not filed the compliance tariffs that they need to file with the Maryland Commission in order to participate. The voluntary nature of the pilot program makes the Cooperatives' concerns speculative at this time.

27. The fact that the Cooperatives have not yet made a compliance tariff filing with the Maryland Commission indicates that the issues raised in their Petition need not be addressed, or either are already being addressed or may in the future be addressed by the Maryland Commission and any subsequent court review. The Commission's issuance now of an order on the merits of the Petition could, in this latter circumstance where there are available state fora, inappropriately interfere with the Maryland Commission's and any state court's efforts to address the Cooperatives' concerns at the state level.

28. Additionally, as noted by the Maryland Commission, four electric companies have pending before it compliance tariff filings to implement the Community Solar Systems pilot program. Thus, the Cooperatives' concerns could well be addressed and resolved in the course of this separate review process of these separate tariffs. This likewise supports our treating the Cooperatives' Petition in this proceeding as premature.

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<sup>34</sup> MD. CODE. ANN., Public Utilities Article, §§ 7-306.2(d)(12).

29. Accordingly, the Commission dismisses the petition.

The Commission orders:

The petition for declaratory order of SMECO and Choptank is hereby dismissed as described above.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.