

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Implementation Issues Under the Public
Utility Regulatory Policies Act of 1978

Docket No. AD16-16-000

**POST-TECHNICAL CONFERENCE COMMENTS OF THE
ELECTRICITY CONSUMERS RESOURCE COUNCIL (“ELCON”)**

The Electricity Consumers Resource Council (ELCON) appreciates the opportunity to provide post-technical conference comments on implementation issues under the Public Utility Regulatory Policies Act of 1978 (PURPA). ELCON is particularly pleased that the Commission has limited the scope of implementation issues to: (1) the One-Mile Rule, and (2) Minimum Standards for PURPA-Purchase Contracts.

ELCON membership includes large manufacturers that own and/or operated PURPA qualifying cogeneration facilities and some that do not.¹ Some members also have qualifying small power production facilities although this is the exception. As such, ELCON supports policies on PURPA that emphasize fair and nondiscriminatory treatment to both classes of manufacturers. PURPA, when implemented correctly, provides a safety net for utility capacity costs, which benefits all consumers.

As ELCON’s President and CEO, John P. Hughes, emphasized in this opening remarks at the June 29th conference, PURPA is working and changes to the Commission’s rules and regulations implementing the law as it applies to qualifying cogeneration facilities are not warranted. If anything, the existing rules and regulations need greater enforcement. Nonetheless, there exist certain tensions in some regions of the country associated with the encouragement of qualifying small power production

¹ Cogeneration is also referred to as combined heat and power (CHP). The terms are used interchangeably in these comments.

facilities and the utilities and state regulators in those regions are seeking FERC guidance on how to address those tensions. We also believe the implementation of section 210(m) needs some degree of reconsideration given that the organized markets are not capable of providing even a rough estimate of long-avoided costs or any other viable alternative to the mandatory purchase obligation.

ONE-MILE RULE

PURPA defines a small power production facility as “a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which (i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and (ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts.”

Section 292.204(a) of the Commission’s regulations states that small power production facilities are considered to be at the same site if they are located within one mile of each other, share the same energy resource, and are owned by the same person(s) or its affiliates. This is commonly referred to as “the one-mile rule.” Some developers were using the rule to reconfigure (or “disaggregate”) large projects into smaller projects to qualify for 20-MW/80-MW and below status.

1. Should the presumption inherent in the one-mile rule be made rebuttable? If so, who should benefit from the presumption and who should bear the burden of overcoming the presumption; i.e., should the interconnecting utility or the QF be required to rebut the presumption?

Response: Making the one-mile rule rebuttable or not does not solve the underlying problem. The creation of two separate but unequal classes of qualifying facilities (QFs) in which smaller is deemed “better,” lends itself to regulatory arbitrage – where a developer capitalizes on loopholes in regulations in order to circumvent unfavorable treatment. As a matter of public policy, the problems

associated with the one-mile rule says more about the generally unfair treatment of larger QFs than it does about the opportunistic behavior of small ones. For example, the implementation of section 210(m) is flawed and, at least in part, was responsible for the huge drop-off in new cogeneration development beginning in 2005 – the year section 210(m) was enacted. The solution is not further denying smaller QFs the benefits and protections intended by PURPA, but rather FERC policies that make QFs indifferent to classification as large or small. This is discussed in greater detail in our responses below to the questions on minimum standards for PURPA-purchase contracts.

2. Alternatively, should the Commission consider modifying the rule to either require projects seeking QF status to be spaced further apart or allowed to be closer together?

Response: See response to previous question.

3. Should the Commission consider a more fact-based analysis based on the criteria proposed by Edison Electric Institute (EEI) and Idaho Commissioner Kjellander, or some other criteria?

Response: “A more fact-based analysis” cannot and should not be used as the basis for *de facto* repeal of PURPA. The implication of either proposal is that the QF developer is the dishonest player in the dispute. A broader review of the problem – documented by other parties during the technical conference – reveals that utility claims are not always “fact-based” and that utility actions to prevent it from purchasing power from QFs do not always lead to a lower cost solution for its ratepayers.² As a first step, state commissions responsible for implementing federal PURPA regulations must better recognize the importance of resource competition for ensuring a reliable, least-cost utility resource mix. Claims by utilities that they do not need additional

² See Comments of Northwest and Intermountain Power Producers Coalition, Docket No. AD16-16-000 (“Implementation Issues Under the Public Utility Regulatory Policies Act of 1978”), June 7, 2016.

capacity ring hollow when it has been determined – after the fact – that they had committed to other resources (often their own) at a higher, long-term cost to ratepayers. ELCON does not take lightly the potential that utilities overbuild or overcommit to resources and PURPA does not require purchases at any cost. But before legitimate QF developers are singled out for blame, state commissions need to better scrutinize the motives and planning behavior of their jurisdictional utilities to ensure that outright hostility to PURPA did not foreclose a more reliable and least-cost resource mix.

MINIMUM STANDARDS FOR PURPA-PURCHASE CONTRACTS

In section 210 of PURPA, the Commission was tasked with prescribing and from time to time revising such rules as it determines necessary to encourage cogeneration and small power production. The Commission’s regulations require each electric utility to provide standard rates for QFs with a design capacity of 100 kW or less and permit such rates for QFs with a design capacity above 100kW. The Commission has not required any particular minimum contract length or other minimum contract provisions in PURPA-purchase contracts. The Commission invites comments in response to the follow questions:

1. What is an appropriate minimum length of a PURPA-purchase contract, and are there other minimum contract terms and conditions that a developer needs to secure financing?

Response: Recent ELCON member experiences are indicative. Generally, there has been next to no new investment for 7 to 12 year contract terms. While a 20-year term is probably optimal for new QF facilities to optimize financing – although it is half the guarantee typically afforded to traditional rate-based generation – it is imperative that QFs have the flexibility to be able to unilaterally decide to accept less than any FERC imposed “minimum length.” Such flexibility would align with the rules requiring electric utilities to purchase power from QFs at the electric utility’s avoided cost rate. That is, while under PURPA QFs are entitled to a rate equal to the purchasing

utility's "full avoided cost" (the statutory ceiling), QFs nonetheless have the flexibility to unilaterally decide to accept less than the "full avoided cost."

PURPA requires encouragement and, for it to work, encouragement must strive to defeat any barriers to development that exist for whatever reason. As the Commission is well aware, cogeneration development has all but disappeared since enactment of section 210(m) by the Energy Policy Act of 2005. While the failure of organized markets to provide a predictable, long-term revenue stream in support of new investment may not be the only cause, it is clearly a significant part of the problem that cannot be addressed by simply amending the Commission's PURPA regulations. There is a bigger problem here that begs careful review.

2. How would establishing a required minimum contract length or other required contract terms and conditions affect QF development?

Response: In enacting PURPA, and specifically Section 210 of PURPA, Congress intended to encourage the development of non-utility generation utilizing cogeneration and small power production, thereby conserving use of fossil fuels.³ "Congress believed that increased use of cogeneration and small power production would reduce the demand for traditional fossil fuels, and it recognized that electric utilities had traditionally been 'reluctant to purchase power from, and to sell power to, the nontraditional facilities.'"⁴ The best way to encourage investment in those technologies is to provide a predictable, long-term revenue stream. We also strongly believe that standardized contract terms and conditions are important. This avoids protracted negotiation on every issue in situations where the host utility is clearly attempting to kill the project. The down side of this is where the utility hands you the 200-page EEI

³ *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 405, 103 S.Ct. 1921, 76 L.Ed.2d 22 (1983). See also *Middle S. Servs., Inc.*, 15 FERC ¶ 61,302 at 61,662 (1981) ("Section 210 of PURPA was intended by Congress to encourage cogeneration"); *FERC v. Miss.*, 456 U.S. 742,750 (1982).

⁴ *American Paper*, 461 U.S. at 405 (citing *FERC v. Miss.*, 456 U.S. 742, 750 (1982)); *Sithe Energies, Inc.*, 105 FERC ¶ 61,240 at P 2 (2003) ("In passing PURPA, Congress identified two major obstacles that had served in the past to stifle non-utility powerplant development: (1) the reluctance of traditional electric utilities to purchase power from and sell power to non-traditional utilities; and (2) the substantial burdens of pervasive federal and state regulation. Congress in PURPA sought to remove these obstacles.").

standard contract. What is really needed is something that an industrial developer of a CHP project can read and understand and explain to their upper management. This is necessary because the bread-and-butter core business of manufacturers is very different from the power business. What must be avoided is a scenario in which the creation of a complicated compliance situation requires the developer to hire more people. PURPA was intended to encourage, not discourage, the development of QFs by removing such obstacles.

In Mr. Hughes' opening statement at the technical conference, he recommended the Commission require each ISO and RTO to develop a standardized QF tariff that a QF may use to more easily access the bewildering array of energy and capacity services available in the organized markets. In open-access states, this might include the procurement of supplemental, backup and maintenance power, and providing a "self-supply" capability in which the surplus power from one site can be used to offset purchases off the grid at another site of the same company. Given the short-term nature of the organized markets, the tariff cannot offer published fixed rates for these services. The tariff could be structured to accommodate both "as available" power and transactions that can be scheduled in advance. The intent is to provide the QF with a more user friendly interface with these markets. Forcing QFs to be experts on the exceedingly complex market design of organized markets violates the spirit if not the outright intent of PURPA sections 201 and 210 to promote these clean and efficient technologies.

3. Should the size threshold for requiring standard rates be changed, and, if so, to what?

Response: Ideally there should be no thresholds. But given the history of the existing threshold levels, they should probably remain because the industry has learned to live with them and plan accordingly – to the distress of some utilities and some states. Some form of regulatory arbitrage will always exist whenever two separate classes of projects are created and one class is given what is deemed to be preferential

treatment. The 20-MW size threshold for projects that must seek a competitive market alternative to the mandatory purchase obligation is somewhat arbitrary. The problem is not what the right number should be, it is the fact that, whatever it is, there exists no viable purchase option for QFs that exceed the threshold. There is nothing magical about larger QFs that enable them to achieve results from a market that does not exist and would otherwise not be achieved by a smaller QF. The congressional intent of section 201(m) was based on wishful thinking at the time, and it is FERC's duty now to reconsider the test for a true competitive market alternative for projects greater than 20 MW to fulfill the more overarching mandate of PURPA to encourage cogeneration and small power production.

4. Section 292.302 of the Commission's regulations requires electric utilities to provide five and ten years of cost data to state regulatory agencies, and certain small electric utilities are required to provide data to enable QFs to estimate the avoided costs. Section 292.304(e) identifies this data, and state review of such data, as one factor to be used in determining avoided cost rates for QF purchases. To what extent is the data currently being provided? To what extent is this data taken into account and/or is helpful in calculating avoided cost rates?

Response: Generally, ELCON member experience is that this data is not provided to QFs. This underscores Mr. Hughes' statement at the technical conference that what is needed is greater enforcement of, not changes to, existing PURPA rules and regulations.

Certainly whatever a utility contracts for with itself should be the avoided cost. There can be no clearer definition of avoided costs. But we are aware of situations where the terms of the utility's self-contracting is redacted and appeals to the appropriate state regulator fail to produce documentation on what the utilities pay themselves. In this regard, FERC may have given state PUCs too much discretion that has the effect of administrative repeal of PURPA.

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Respectfully submitted,

/s/ JOHN P. HUGHES

John P. Hughes
President and CEO
ELECTRICITY CONSUMERS RESOURCE COUNCIL
1101 K Street, NW, Suite 700
Washington, DC 20005
Email: jhughes@elcon.org
Phone: (202) 682-1390

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: November 7, 2016

/s/ W. RICHARD BIDSTRUP

W. Richard Bidstrup
Counsel for ELCON