

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Implementation Issues under the Public
Utilities Regulatory Policy Act of 1978

Docket No. AD16-16-000

**SUPPLEMENTAL COMMENTS OF THE
ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON),
AMERICAN CHEMISTRY COUNCIL (ACC),
AMERICAN FOREST & PAPER ASSOCIATION (AF&PA), AND
COUNCIL OF INDUSTRIAL BOILER OWNERS (CIBO)
(TOGETHER "U.S. MANUFACTURERS")**

The Electricity Consumers Resource Council (ELCON), the American Chemistry Council (ACC), the American Forest & Paper Association (AF&PA), and the Council of Industrial Boiler Owners (CIBO) (together U.S. Manufacturers) respectfully submit these supplemental comments regarding the Commission's prospective review of its regulations implementing the Public Utilities Regulatory Policy Act of 1978 (PURPA). ELCON and AF&PA have actively participated in this docket, including by way of a presentation at the 2016 technical conference. These comments are in response to the statement during the May 17, 2018 Open Meeting that the Commission would be reviewing its rules implementing the provisions of PURPA and the supplemental comments subsequently filed by the Edison Electric Institute (EEI), which proposes a "holistic" review process. In U.S. Manufacturers' view this review would effectuate unwarranted and substantial changes to the Commission's regulations which would be inconsistent with the Congressional intent underlying PURPA.

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and are consumers of electricity in the footprints of all

organized markets and other regions throughout the United States. Reliable electricity supply at just and reasonable rates is essential to our members' operations. ELCON members are among the largest owners and operators of cogeneration facilities that are used in oil refining, petrochemicals, organic and inorganic chemicals, food processing, and motor vehicles. As such, ELCON supports policies on PURPA that emphasize fair and nondiscriminatory treatment to manufacturers. PURPA, when implemented correctly, provides a safety net for utility energy and capacity costs, which benefits all consumers.

ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The business of chemistry is a key element of the nation's economy.

AF&PA is the trade association of the forest, pulp, paper, paperboard, and wood products industry in the United States. AF&PA's members are among the nation's largest consumers of electric power, purchasing over 82 billion kilowatt-hours of electricity annually nationwide. AF&PA's members include electricity consumers and producers.

CIBO is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates with over 100 members representing 20 major industrial sectors. Since its formation, CIBO has been active in the development of technically sound, reasonable, cost-effective energy and environmental regulations for industrial boilers. CIBO supports regulatory programs that provide industry with enough flexibility to modernize - effectively and without penalty - the nation's aging energy infrastructure, as modernization is the key to cost-effective environmental protection.

I. OVERVIEW OF U.S. MANUFACTURERS' INTEREST IN A ROBUST PURPA AND OBJECTION TO EEI'S PROPOSALS

As the Commission has recognized, the directive in Section 210(a) of PURPA directs that the Commission prescribe, and from time to time revise, such rules as it determines necessary to *encourage* cogeneration and small power production, remains in full force. Moreover, Section 210(n)(1)(A)(iii) of PURPA requires the Commission to issue rules to ensure “continuing progress in the development of efficient electric energy generating technology.” The Commission has endorsed EPA’s comments that “CHP . . . remains one of the most significant opportunities to improve the efficiency and reduce the environmental impact of United States energy production . . .” and that “CHP processes are inherently more efficient than producing electric energy and heat separately”.¹

Combined Heat and Power (CHP) or cogeneration technology, which is extremely efficient because it uses the same fuel to produce both thermal energy used in the manufacturing process and electricity, is an important part of our nation’s energy mix. The United States has an installed capacity of over 82 gigawatts of CHP at more than 4,100 industrial and commercial facilities, but there remains 149 gigawatts of potential CHP. Full implementation of PURPA is essential to the continuing development of CHP which enhances our energy security by reducing our national energy requirements, improves business international competitiveness by increasing energy efficiency and reducing costs, diversifies energy supplies by enabling further integration of domestically produced and renewable fuels, advances societal goals by reducing CO₂ and criteria pollutants, improves grid reliability, and creates jobs.

EEI’s supplemental comments are just the latest in a long line of utilities’ opposition to PURPA. Although Congress responded to many of utilities’ demands in the 2005 amendments, utilities have continued to fight qualifying facilities (QFs) with FERC filings, foot-dragging responses to requests for fair and nondiscriminatory

¹ Order 671 at PP 69-71.

buyback rates and standby, supplemental, back up or maintenance power services, and purchase offers limited to shorter-term deals wrapped in unnecessarily-complicated contracts, violating the intent of PURPA to promote CHP and other clean and efficient technologies. EEI's new supplemental comments missive seems to be precipitated by the over-saturation of renewable qualifying facilities ("qualifying small power production facilities") in certain states, a problem that is worthy of a targeted fix. However, as written, EEI's proposed changes to FERC's PURPA implementation regulations would impose substantial collateral damage on qualifying cogeneration facilities.

During the FERC technical conference on PURPA in 2016 and the House Energy and Commerce Committee hearings on PURPA reform in September 2017 and January 2018, there was unanimous agreement that PURPA regulations for CHP were working and did not need "reforms." The intent underlying PURPA to encourage cogeneration and small power production, as recognized by the Supreme Court,² remains in full force.

The adoption of the EEI proposals set forth in its supplemental comments would eviscerate the immutable requirement in PURPA Title II to encourage the development of qualifying cogeneration facilities. The proposals include elimination of: QF energy payments by means of fixed price long-term contracts; the flexibility afforded to the legally enforceable obligation; the 20-MW threshold; and self-certification. U.S. Manufacturers address these points in the following comments.

² *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 405 (1983), see also *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."); *Middle S. Servs., Inc.*, 15 FERC ¶ 61,302 at 61,662 (1981) ("Section 210 of PURPA was intended by Congress to encourage cogeneration").

II. DETERMINATION OF AVOIDED COSTS

EEI assumes that going forward, due to the increase in resources with zero-cost fuel, it is likely that energy prices will decline over time and therefore that QF energy payments should be determined at time of delivery and not based on long-term projections. Doing so would have the effect of reinstating the obstacles to QFs that Congress intended to remove by enactment of PURPA.

The starting point for evaluating the ongoing complaints of utilities about avoided costs under PURPA is the Supreme Court's determinations on the subject. In upholding FERC's full avoided cost rule, the Supreme Court observed that "although FERC recognized that the rule would not directly provide any rate savings to consumers, it reasonably deemed it more important at this time that the rule would provide a significant incentive for the development of cogeneration and small power production, and that ratepayers and the Nation as a whole will benefit from the decreased reliance on scarce fossil fuels and the more efficient use of energy."³

Utilities already have a considerable advantage in influencing how avoided cost is determined. FERC's rules allow for considerable flexibility, as the factors that may be considered in determining avoided costs include: availability of capacity or energy from a QF during the system daily and seasonal peak periods; dispatchability and reliability; the relationship of the availability of energy or capacity from the QF to the ability of the utility to avoid costs; costs or savings from variations in line losses; and application of technology-specific avoided cost rates. The methodologies used by the individual states in applying FERC's guidelines vary considerably. The access to information that utilities have and the special knowledge of and experience with the state commissions give the utilities considerable advantages in navigating the process and obtaining favorable avoided cost determinations.

A recent study by researchers at the Lawrence Berkeley National Laboratory⁴

³ 461 U.S. at 403, 415-18. In the 2005 Amendments to PURPA, Congress expressly declined to change the terms of the Commission's avoided cost rule.

⁴ Carvalho, Larsen, Sanstad, and Goldman, Long Term Load Forecasting Accuracy in Electric Utility

indicates that almost all the major utilities in the Western United States systematically overestimated long-term load forecasts. While it may be easy to quibble over the complexities and uncertainties of long-term forecasts, any obvious systemic bias can only be explained by the incentives endemic to utility operation and planning – notably the desire to inflate the revenue requirement. Avoided cost determination is not that complicated and if there is a problem in estimating such costs, it is the utility’s responsibility to solve it. EEI’s assumption that energy prices should decline over time is an assumption that can be used in its load forecasts. However this assumption flies in the face of the behavior of EEI’s own members who are diligently working (and succeeding) to inflate future electricity rates with zero-emission credits (ZECs), government-sponsored bailouts of uneconomic coal and nuclear plants, proposals to re-regulate merchant generators that were once or twice afforded stranded cost recovery, and other behaviors that generally undermine the competitive nature of wholesale and retail electric markets. Furthermore, any aggressive attempt to mandate decarbonization of the industry by states or a future federal administration would greatly eliminate sustained downward pressure on rates. So attempting “to undertake a holistic review of [FERC’s] rules and regulations implementing PURPA to ensure that they are consistent with today’s electric markets” begs the question, ‘which electric markets today is EEI referring to?’

It is extremely important that power purchase agreements (PPAs) remain an option for encouraging CHP. FERC has historically interpreted PURPA to require some degree of “certainty with regard to return on investment” in QFs and thus that PPAs “should be long enough to allow QFs reasonable opportunities to attract capital from potential investors.” To optimize financing it is imperative that QFs have the flexibility to be able to unilaterally decide to accept a PPA term of any 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 QFs under PURPA are entitled to a

Integrated Resource Planning, Advanced Workshop in Regulation and Competition, 37th Annual Eastern Conference of the Center for Research in Regulated Industries, Rutgers Business School, June 2018.

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."

In this regard, U.S. Manufacturers recognize that the states can improve their avoided cost calculations, which are not always consistent or transparent. PURPA and the FERC regulations already prohibit states from using avoided costs as a policy tool to discourage economically viable resources (with rates that are below avoided costs) or to encourage or subsidize uneconomic resources (with rates that exceed avoided costs). What is needed is enforcement of, rather than change to, PURPA and FERC regulations. U.S. Manufacturers reiterate their recommendation that the Commission should direct its staff to prepare a guidance document on the applicability of the various avoided cost methodologies. The audience for this document would be state commissions and utilities. We do not believe that there is one best method, and it is important that states be given maximum flexibility to fulfill their statutory responsibilities. Staff guidance would include its assessment of the pros and cons of each methodology, best practices, and options for addressing the pricing anomalies that exist in wholesale markets created by federal subsidies.

III. ESTABLISHMENT OF A LEGALLY ENFORCEABLE OBLIGATION

EEI proposes that the states should have latitude to determine when the legally enforceable obligation is incurred for purposes of fixing the avoided costs. Commission regulations allow QFs to choose whether avoided costs are determined at the time of delivery or when the legally enforceable obligation is incurred. The flexibility is valuable to CHP developers. EEI suggests that the current FERC regulations protecting against utilities that "may refuse to negotiate a contract, or otherwise inhibit interconnection . . . are misplaced and fail to recognize the opportunities for the QF to seek relief from the Commission, the state authority, or through the courts." But the whole objective of PURPA was to remove these types of obstacles for QFs and thus to

establish greater commercial certainty. Cogenerators and other QFs should not suffer the burden of taking affirmative steps to seek redress from utilities' malfeasance.

IV. THE 20 MW THRESHOLD

The Commission has reasonably concluded that certain QFs may have difficulty accessing the market due to their small size and that a reasonable and administratively workable definition of "small" is 20 MW net capacity or smaller. EEI proposes that the 20MW threshold should be eliminated or significantly reduced on the basis that the question of whether a QF has "nondiscriminatory access" to a market should focus on just that – whether the QF meets the applicable minimum participation rules in the applicable region. EEI presents no support for its multiple claims that there is "gaming" of the 20 MW threshold,⁵ and its examples of FERC extending primary frequency response and ride-through of low voltage events to small generators in view of their low cost has no relevance to PURPA, where the Commission distinguishes between small and large facilities to reflect the ability of particular QFs to access markets. Nor does the over-saturation of renewable QFs in certain states – the result of lucrative federal and state subsidies – justify the sweeping changes that would destroy the viability of CHP, which receive no direct subsidies. CHP is not over-saturated anywhere. CHP facilities typically remain net purchasers of electricity from the local utility or organized market, and where they are in abundance, are the bedrock of the local economy.

Although the 20-MW threshold represents a somewhat arbitrary balancing, in practice it has functioned well, and there is no compelling need to change it. The 20-MW threshold reasonably recognizes the burdens faced by smaller QFs with limited resources and the utilities' disproportionate access to information relevant to whether discrimination exists, such as modeling data and study assumptions. Given the long-standing history of the existing threshold level, it should remain because the industry

⁵ The Alliant Energy example referenced by EEI would be addressed by fixes to the one-mile rule.

has learned to live with it and plan accordingly. Certainty is essential to promotion of capital investment. Utilities retain the opportunity to rebut the presumption based on a case-by-case review to assess whether the small QF in fact has non-discriminatory access to markets.

V. SELF-CERTIFICATION

EEI proposes to require any QF to certify that it meets the requirements of the regulations, requiring any interested party to protest the certification, and shift the burden of proof to the QF. The Commission has rejected previous efforts to do away with self-certification on the grounds that the “processes and safeguards” that are in place are sufficient and that the Commission has the authority to review a self-certification.⁶ There is no need for a change in the established practice.

The Commission has noted that the reasons for self-certification “were that the complexity, delays, and uncertainties created by a case-by-case qualification procedure would act as an economic disincentive to owners of smaller facilities.”⁷ This is exactly what would happen if, as EEI proposes, a utility could simply file an objection to a QF certification filing to shift the burden to and impose those costs on a QF. There is no evidence that FERC’s existing regulations for the self-certification of qualifying cogeneration facilities is in any way a burden on utilities or utility customers. EEI’s proposal would be burdensome on the QF and discourage future development of this technology

VI. CONCLUSION

The Commission should deny suggestions that a holistic review of its FERC regulations is necessary or appropriate. Wholesale changes would be inconsistent with the Congressional intent underlying PURPA with the outcomes of recent Congressional

⁶ Order 671-A at P 22. In Order 671 at P 79, responding to comments questioning self-certification, FERC revised its rules make explicit its authority to revoke, on its on motion, the QF status of self-certified QFs.

⁷ Order 671 at P 83.

hearings on PURPA implementation and potential reforms, and with the testimony and statements provided at FERC's 2016 technical conference in this docket. The Commission should limit its PURPA inquiry to narrow, targeted fixes that may warrant review, such as reassessment of the one mile rule and correction of the over-saturation of renewable qualifying facilities in certain states

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be 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.: July 13, 2018

/s/ W. RICHARD BIDSTRUP

W. Richard Bidstrup