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FERC Proposes to Revise Qualifying Facility Rates and Requirements

By J. Daniel Skees, Mark C. Williams, Stephen M. Spina, and Joseph W. Lowell*

This article explains the Federal Energy Regulatory Commission's notice of proposed rulemaking announcing its intent to revise key rules governing the status and rights of Qualifying Facilities.

The Federal Energy Regulatory Commission ("FERC") issued a notice of proposed rulemaking ("NOPR") announcing its intent to revise key rules governing the status and rights of Qualifying Facilities ("QFs"). These revisions include proposed changes to the rules for measuring QF size that could make it more difficult for certain projects to maintain QF status. The NOPR also proposes to provide greater flexibility to states in regulating the rates that QFs can receive from their interconnected utilities, as well as a number of other fundamental changes in the regulation of QFs.

FERC's proposed rulemaking would affect two classes of power generators: small power production facilities and cogeneration facilities. Small power production facilities are generally those producing 80 MW or fewer using predominately renewable, biomass, waste, or geothermal resources. Cogeneration facilities are those that make use of the thermal energy that normally results from the production of electricity using fossil fuels. These two classes receive special rates and regulatory treatment intended to encourage their development. Because the regulatory rights and exemptions held by small power production QFs turn on their total generation capacity, the proposed changes to the means by which FERC determines their capacity can have significant effects on the commercial advantages of those projects.

BACKGROUND

FERC's proposed revisions represent its first comprehensive review of the regulations promulgated pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA"), apart from certain less significant changes, largely affecting only cogeneration QFs, that were adopted following the Energy Policy Act of 2005. According to FERC, a combination of greater oil and gas reserves discovered in the last two decades, deregulation and decoupling of electric

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generation and delivery and the resultant markets, and other federal and state programs to incentivize electric generation through renewable resources has prompted these proposed revisions.

SUMMARY OF PROPOSED REVISIONS

One proposed revision would alter how FERC determines whether separate production sites operated by the same or affiliated entities constitute one facility for purposes of measuring the total capacity of a Small Power QF, to which FERC capacity size limitations apply. Currently, FERC regulations consider a generation site to be part of a facility seeking qualification if the site is within one mile of the facility (measured from generation facility to generation facility), or if a hydroelectric generator, it uses water from the same impounded water source. Under FERC's proposal, the one-mile rule would remain. However, expressing concern that developers were circumventing the regulations by siting facilities strategically to qualify as small power production facilities, FERC has proposed allowing both the Commission itself and other interested parties to show that affiliated small power production facilities more than one mile apart but within 10 miles of each other constitute a single facility.

Under its existing policies, FERC presumes that affiliated facilities located more than one mile apart are separate facilities for purposes of QF qualification, but the NOPR would make that presumption rebuttable. Nonexhaustive factors FERC would consider include whether the sites share the same infrastructure or property, sell to the same utility, were built or placed into operation within 12 months of each other, or use common financing. Facilities within 10 miles affirmatively certified by FERC to be separate would be free from future challenge absent a showing of changed circumstances. Facilities further than 10 miles apart would possess an irrebuttable presumption that they are separate facilities. In summary, affiliated facilities located more than one mile apart but less than 10 miles from each other would only possess a rebuttable presumption that they are separate. FERC does not propose to "grandfather" any small power QF, but indicates that only self-certifications and self-recertifications filed after the rulemaking's effective date would be subject to the new 10-mile regulatory structure.

A second proposal would permit states to rely more directly on markets to set the energy component of the rate a utility pays for electricity produced by a QF. For utilities located within a Regional Transmission Organization ("RTO") or an Independent System Operator ("ISO"), states could require the energy rates paid to QFs be based on the market's locational marginal price or similar market price. For utilities outside of an RTO/ISO, states could require a competitive price for the energy rate, determined by liquid market hub energy prices or formula rates based on observed natural gas prices and a specified heat

rate. Further, states would have the flexibility to set energy and capacity rates pursuant to a competitive solicitation process conducted pursuant to transparent and nondiscriminatory procedures. States could also require that energy rates under contracts and other legally enforceable obligations be determined at the time of delivery rather than at predetermined fixed rates, or for RTO/ISO markets, states could require that fixed energy rates be determined based on estimates of the present value of the future locational marginal price or similar market price. FERC also proposes to clarify that states may require that both energy and capacity rates be determined though a competitive process.

Another proposed change would permit protests of a facility's self-certification of its qualification. Self-certification, the more common method of certification, is effective upon certification, and typically is neither published in the *Federal Register* nor evaluated by FERC. Accordingly, a party opting to protest a self-certification must petition FERC for a declaratory order and pay the associated significant filing fee, which is currently $28,990. Concerned that this places the burden to challenge a self-certification on a protestor rather than the entity seeking QF regulatory status, FERC has proposed allowing interested parties to intervene and protest in the QF's self-certification within 30 days of its filing with FERC, and thus avoid the fee attendant to filing a petition for declaratory order. While a protest is pending, the self-certificated facility would continue to hold QF status, and FERC expects that it would ordinarily act within 90 days of the protest filing.

Further changes include relieving a utility of the obligation to purchase energy or capacity from a QF if its supply obligations are reduced by a state's retail choice program, and reducing the threshold at which a qualifying power small production facility has a rebuttable presumption of nondiscriminatory market access from 20 MW to 1 MW. In organized markets where FERC has found a rebuttable presumption of market access for QFs, this latter change, if adopted, would only obligate utilities to purchase from a QF sized between 20 MW and 1 MW if the QF can rebut the presumption and demonstrate that it does not have nondiscriminatory access to the market.

Finally, the proposed rulemaking would require states to establish objective and reasonable criteria by which the state would determine the commercial viability of a QF before the QF becomes entitled under PURPA to a power sales contract or other legally enforceable obligation with a utility. This requirement would enable states to establish financial viability requirements, such as:

(1) Obtaining site control adequate to commence construction of the project at the proposed location;
(2) Filing an interconnection application with the appropriate entity;
(3) Securing local permitting and zoning; or

(4) Meeting other criteria that demonstrate a QF's commercial viability and financial commitment to construct the facilities.