

# FERC Proposal Would Shake Up Renewable Energy Pricing

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On Sept. 19, the Federal Energy Regulatory Commission issued a notice of proposed rulemaking in FERC Docket Nos. RM-19-15-000 and AD16-16-000,[1] recommending substantial modifications to its regulations concerning the Public Utility Regulatory Policies Act of 1978, or PURPA.[2]

The NOPR proposes extensive changes to critical components of the PURPA framework, including the qualifying facility, or QF, rate calculation, the one-mile rule and the QF purchase mandate. If adopted, those changes could significantly affect the ability of QFs to require electric utilities to purchase their output — and the price that utilities will have pay for that output.

In general, the proposals in the NOPR appear to be designed to provide QFs with market-clearing prices for their output, rather than avoided-cost rates, and to modify QF purchase requirements.

## Background

President Jimmy Carter signed PURPA into law on Nov. 9, 1978, to counter the United States' dependence on foreign oil and to "encourage conservation and more efficient use of scarce energy resources." [3] To that end, PURPA implemented a raft of policies to support the development of energy-efficient cogeneration and small power-production facilities, including renewable energy sources such as wind and solar generators.

These generation facilities are known as qualifying facilities. PURPA helped QFs establish their footing in wholesale markets by imposing a "purchase obligation" on electric utilities, a core feature of PURPA that required electric utilities to purchase energy and capacity from QFs.

Pursuant to Section 210 of PURPA, FERC promulgated rules requiring utilities to purchase and sell power generated by QFs at rates not to exceed "the incremental cost to the electric utility of alternative electric energy," otherwise referred to as the "avoided cost." [4] PURPA tasked state regulatory authorities with calculating just and reasonable avoided-cost rates for utilities subject to their jurisdiction.

Under this shared federal and state system, PURPA began to open wholesale electricity markets across the country, and spurred the development of significant amounts of new independently owned generation resources, including renewable resources.

PURPA's critics, however, have argued that a legal framework born in the late 1970s no longer addresses the challenges facing a 21st century energy industry, given the changes



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that have occurred in the last 40 years. Since PURPA was enacted, the country has experienced the shale gas and oil booms, developed organized wholesale electricity markets and seen the unprecedented integration of renewables.

Therefore, as PURPA permits FERC to revisit its implementing regulations “from time to time,” the commission has proposed an ambitious reform of those regulations.[5]

### **Key Reforms Proposed**

The key reforms proposed by FERC are described below, with the commission seeking industry input on each of these issues.

#### ***QF Rates No Longer Need to Be Fixed for Term of Contract***

The existing PURPA regulations provide that, if a QF sells power pursuant to a contract, the QF can choose a pricing option based on either: (1) the purchasing electric utility’s avoided cost, calculated and fixed at the time the legally enforceable obligation, or LEO, is incurred; or (2) the purchasing electric utility’s avoided cost calculated at the time of delivery.

Under the NOPR, state authorities would have discretion to require that energy rates under QF contracts be based on “as-available” energy rates calculated at the time of delivery, rather than being fixed for the term of the contract.[6] The NOPR, therefore, proposes to eliminate the requirement that a utility must provide a QF the option of entering into a QF contract or a LEO at an avoided-cost, fixed energy rate for the duration of the contract.

#### ***Fixed Energy Rates for QFs Can Be Based on Forward Price Curve***

The NOPR would also allow state authorities to authorize a fixed energy rate for QFs based on forecasted energy prices and the anticipated dates of delivery during the term of a QF’s contract.[7] States would be permitted to develop fixed energy rates using the forward price curve, essentially a projection of energy prices at delivery over the life of the QF contract.

If states adopt this proposal, the avoided-cost methodologies are likely to face substantial changes. It appears that FERC’s proposal would allow states to adopt methodologies to set QF rates at levels designed to approach market-clearing rates.

#### ***State Authorities Can Develop As-Available QF Energy Rates Based on Market Factors***

The existing PURPA regulations require state authorities to consider nonmarket factors when setting the avoided-cost rate, including reliability and the availability of the QF. However, the NOPR proposes to retool the QF rate calculation to focus on market factors.[8]

The NOPR proposes to authorize state authorities to set as-available QF energy rates for power sales to electric utilities located outside of regional transmission organizations, or RTOs, and independent system operator, or ISO, markets, based on “competitive prices” established at the time of delivery.

Competitive prices could be based on energy rates established at liquid market hubs, or energy rates determined pursuant to formulas based on natural gas price indices and a proxy heat rate for an efficient natural gas combined-cycle generating facility. This aspect of the NOPR further indicates FERC’s desire to permit QF rates to be set at market-clearing levels.

## ***Utilities in States With Retail Choice Programs Are Relieved From QF Purchase Obligation***

An important feature of PURPA is the requirement that electric utilities must purchase energy and capacity from QFs. However, the NOPR excuses electric utilities from the purchase obligation under PURPA to the extent the purchasing electric utility's supply obligation has been reduced by a state retail choice program.[9]

FERC is proposing to further reduce utilities' purchase obligations under PURPA beyond that permitted by the Energy Policy Act of 2005.

### ***A Flexible One-Mile Rule***

FERC's current one-mile rule is a component of the test to determine if multiple small power-production facilities actually constitute a single generation facility located "at the same site" under PURPA, or are multiple generation facilities. As generation facilities cannot exceed 80 MW to obtain QF status as a small power-production facility, the question of how many generating units are located "at the same site" can be critical to determining if a facility or facilities is a QF.

Under the one-mile rule, a generating facility with multiple generating units (the "electrical generating equipment") is deemed a single facility if all pieces of electrical generating equipment: (1) are located within one mile of each other; (2) use the same energy resource; and (3) are owned by the same persons or their affiliates.

The commission's regulations explain that the one-mile span between generating facilities must be measured from the electrical generating equipment of each facility. Thus, for example, wind or solar facilities located more than a mile apart may each qualify as QFs under the current regulations.

The current one-mile rule has generated discussion regarding its application. The NOPR proposes a framework that addresses the application of the one-mile rule.[10] Under the NOPR, there would be an irrebuttable presumption that facilities that are located one mile apart or less constitute a single facility.

If power production facilities are one to ten miles apart, the facilities must demonstrate that they constitute a single facility, thereby qualifying as a QF. There would be an irrebuttable presumption that facilities ten miles apart or more are separate facilities.

In addition, the NOPR proposes to define "electrical generating equipment" to refer to all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar panels and/or inverters, fuel cell equipment and/or other primary power generation equipment used in the facility, excluding equipment for gathering energy to be used in the facility.[11]

In other words, the NOPR seeks to clarify a number of issues surrounding the one-mile rule.

### ***Reduce Small Facilities' Rebuttable Presumption for Participation in Wholesale Markets***

The Energy Policy Act of 2005 added Section 210(m) to PURPA, which permitted FERC to eliminate an electric utility's obligation to purchase power from QFs that have access to

organized wholesale markets.

FERC's regulations implementing Section 210(m) established a rebuttable presumption that QFs under 20 MW lacked access to organized wholesale markets and therefore, unless the presumption could be rebutted, the purchase obligation for QFs under 20 MW remained intact.

The NOPR proposes to reduce the rebuttable presumption for small power-production facilities from 20 MW to 1 MW.[20] However, the NOPR explicitly maintains the 20 MW threshold for cogeneration facilities. Under the proposal in the NOPR, utilities in RTOs and ISOs would be able to seek exemptions from the obligation to purchase energy or capacity from small power-production facilities larger than 1 MW if they provided nondiscriminatory access to the RTO and ISO organized markets.

FERC appears to believe that, as many small power production facilities continue to be developed, those in regions with organized markets have access to buyers for their output. On the other hand, the development of cogeneration facilities has lagged, and the NOPR would maintain the purchase obligation for any such facilities under 20 MW even in organized markets.

### ***QFs Must Demonstrate Commercial Viability and Be Supported by Suitable Financial Commitments***

The NOPR also proposes to require QFs to demonstrate that a proposed project is commercially viable, and that the QF has a financial commitment to construct the proposed project pursuant to objective, reasonable and state-determined criteria in order to be eligible for a LEO.[13]

The commission believes that this reform will confirm that QF projects have sufficient support before obligating electric utilities to include nascent QF facilities in their resource planning.

### ***Reformed QF Certification Process***

Finally, the NOPR proposes to permit a party to challenge a QF's filing to self-certify or self-recertify that its facility meets the requirements for QF status without being required to file a separate petition for a declaratory order and pay the associated filing fee.[14]

However, the intervening party would have to make a prima facie demonstration in its protest that the QF's self-certification did not comply with the PURPA regulations.

### **Conclusion**

As noted, the changes proposed in the NOPR, if adopted by FERC, are likely to provide for QFs to be paid market-clearing rates, rather than avoided-cost rates, among other significant changes.

Parties interested in commenting on the PURPA NOPR must file their comments with the Commission in FERC Docket Nos. RM19-15-000 and AD16-16-000 within 60 days after the NOPR is published in the Federal Register.

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[1] Qualifying Facility Rates and Requirements, Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, 168 FERC paragraph 61,184 (2019) (NOPR).

[2] Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended at 16 U.S.C. Section 824a-3 (2012)).

[3] **FERC v. Mississippi**, 456 U.S. 742, 757 (1982).

[4] 16 U.S.C. Section 824a-3(c); 18 C.F.R. Section 292.304(d) (2019) (“avoided cost” is defined as “the incremental cost[ ] to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.” 18 C.F.R. Section 292.101(6)).

[5] Congress previously revised statutory components of PURPA when it adopted the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

[6] NOPR, 168 FERC paragraph 61,184 at P 61.

[7] NOPR, 168 FERC paragraph 61,184 at P 63.

[8] NOPR, 168 FERC paragraph 61,184 at P 55.

[9] NOPR, 168 FERC paragraph 61,184 at P 89.

[10] NOPR, 168 FERC paragraph 61,184 at P 93.

[11] NOPR, 168 FERC paragraph 61,184 at P 108.

[12] NOPR, 168 FERC paragraph 61,184 at P 118.

[13] NOPR, 168 FERC paragraph 61,184 at P 140.

[14] NOPR, 168 FERC paragraph 61,184 at P 148.