UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Qualifying Facility Rates and Requirements	**Docket Nos. RM19-15-000**
Implementation Issues Under the Public Utility Regulatory Policies Act of 1978	**AD16-16-000**

COMMENTS OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

The Commission proposes to revise its regulations implementing Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978, as amended (PURPA) in light of the changes in the energy industry since PURPA was enacted in 1978.[1] As the Commission has acknowledged, circumstances in electric markets have changed since the Commission first implemented PURPA in 1980. Markets have developed as a result of, among other things, open access transmission, greater transmission system interconnectivity, and the growth and development of organized wholesale electric markets, and technology has evolved to ensure relatively inexpensive supplies of certain energy resources like natural gas. The development of markets has led to a significant amount of growth of new, independently owned generation resources, and favorable state and federal policies have encouraged the development of alternative resources including renewable resources. And with the development of energy markets, fewer renewable resources are relying on PURPA to ensure their development and continued place in the markets. Given the evolution of the energy industry since PURPA's implementation, the National Rural Electric Cooperative Association (NRECA) supports the Commissions efforts to reform and modernize its PURPA regulations and appreciates the opportunity to submit these comments.

[1] *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, "Notice of Proposed Rulemaking," Docket Nos. RM19-15-000 & AD16-16-000, 168 FERC ¶ 61,184 (2019) (NOPR).

I. Interest of NRECA

NRECA represents nearly 900 local electric cooperatives operating in 48 states. America's electric cooperatives power over 20 million businesses, homes, schools, and farms across 56 percent of the nation's landmass and serve one in eight (42 million) consumers.[2]

NRECA's member cooperatives include 831 distribution cooperatives and 62 generation and transmission (G&T) cooperatives. Distribution cooperatives provide power to their end-of-the-line cooperative consumer-members. The G&T cooperatives generate, purchase, and transmit power to distribution cooperatives. Collectively, G&T cooperatives provide power to nearly 80 percent of the nation's distribution cooperatives. The remaining distribution cooperatives receive power from other generation sources within the electric sector. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

Cooperatives own and maintain 2.6 million miles, or 42 percent, of the nation's electric distribution lines. Cooperatives serve an average of eight consumers per mile of line and collect annual revenue of approximately $19,000 per mile. All other utilities, by contrast, average 32 customers per mile of line and collect $79,000 in annual revenue per mile.[3]

As NRECA has explained in prior PURPA-related proceedings, PURPA is of significant interest to NRECA's cooperative members because wind and solar electric generating resources tend to be predominantly located in remote, low-population-density areas – the very types of areas served by NRECA members. NRECA members are therefore regularly called upon to interconnect

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[2] *See* https://www.electric.coop/electric-co-op-facts-figures-2019/. With the addition of Block Island Utility District to NRECA membership in 2019, NRECA's members are in 48 states. *See* https://www.electric.coop/block-island-utility-district-nreca-rhode-island-electric-cooperative/.

[3] *See* https://www.cooperative.com/programs-services/bts/Documents/Data/Electric-Co-op-Factsheet-Update-February-2019.pdf.

with and purchase the output of qualifying small power production and cogeneration facilities under PURPA (collectively, QFs). Because of the interests of NRECA's membership, NRECA is interested in ensuring that the rules governing QFs and their arrangements with electric utilities appropriately protect the consumer-owners of electric cooperatives – who ultimately must fund the QF output sold to cooperatives, both directly and indirectly.

NRECA also agrees with the Commission in its assessment in the NOPR that the energy industry has undergone significant changes since PURPA was enacted in 1978. As NRECA has previously explained, "[t]here has been a meaningful evolution in the generation resource mix, including significant growth in renewable resources and use of new and improved technologies."[4] Therefore, NRECA supports the Commission's efforts to reform its PURPA regulations so these regulations better reflect the evolution of and present realities existing in the energy markets.

NRECA has actively participated in the various proceedings leading up to the Commission's issuance of the NOPR. For example, NRECA participated in the June 29, 2016 Technical Conference and submitted Post-Technical Conference Comments.[5] NRECA has advocated a number of positions intended to protect the consumers served by its member cooperatives. Not all of NRECA's preferred positions are reflected in the NOPR. Nonetheless, as discussed below, NRECA supports the NOPR as a reasonable, balanced approach to the problems identified by NRECA and others in the continued implementation of PURPA in regions with different wholesale market structures and different state and local regulatory practices.

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[4] *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, "Answer of the American Public Power Association and National Rural Electric Cooperative Association to Motion to Lodge of the Edison Electric Institute," Docket No. AD16-16-000, at 1 (filed Feb. 19, 2019).

[5] *See Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, "Post-Technical Conference Comments of the National Rural Electric Cooperative Association," Docket No. AD16-16 -000 (filed Nov. 7, 2016) (Post-Technical Conference Comments).

II. Comments

NRECA generally supports the NOPR's proposals and provides comments on selected questions posed in the NOPR. Decisions as to how to determine avoided costs for the purposes of QF rates are best left with the states and nonregulated utilities in the first instance in order to provide them maximum flexibility to promote the development of QFs while at the same time protecting their retail customers.[6]

At the outset, NRECA appreciates the NOPR's clarification that when the NOPR refers to "states," it includes both "state regulatory authorities that oversee regulated electric utilities and nonregulated electric utilities."[7] NRECA uses this nomenclature as well in these comments, i.e., references to "states" in these comments includes both state regulatory authorities as well as nonregulated electric utilities such as rural electric cooperatives. NRECA urges the Commission to retain this clarification in the Final Rule.

NRECA also understands that, in some of its proposals, the NOPR is only clarifying or codifying past flexible implementation practices that states have undertaken in their implementation of PURPA. NRECA asks generally that the Commission clarify that any Final Rule adopted as part of this NOPR applies only prospectively and is not intended to adjudicate the lawfulness of any past implementation practices undertaken by states. Doing so will help ensure that the Commission's necessary reforming of PURPA is done in the least disruptive manner by not upsetting prior decisions and settled expectations.

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[6] Post-Technical Conference Comments at 11.

[7] NOPR at P 4.

A. NRECA Supports the Commission's Proposals to Allow States the Flexibility to Incorporate Market Forces in Setting QF Rates.

In the NOPR, the Commission makes a series of proposals related to how states can "incorporate competitive market forces in setting QF rates."[8] NRECA generally supports the Commission's proposals, which will give states additional flexibility in determining how avoided costs rates for QFs can be established. As noted above, decisions as to how to determine avoided costs for the purposes of QF rates are best left with the states in the first instance because this provides the maximum flexibility to both promote the development of QFs and protect retail customers, including the consumer-members of electric cooperatives. As the Commission explained in Order No. 69, electric utilities purchasing power from QFs should be financially indifferent to such purchases.[9] As a consequence, if avoided costs are determined appropriately, the retail customers served by utilities, including consumer-members of electric cooperatives, should be held harmless from purchases of QF power. Providing states with flexibility to determine avoided cost rates for QF purchases will help ensure that utilities and the customers they serve remain financially unharmed by QF purchases, while simultaneously providing a market for QF power where it is still needed.

To ensure that states continue to maintain their existing flexibility and to ensure that states are able to implement proposals that allow the additional flexibility, NRECA requests that the Commission clarify in any Final Rule that results from this NOPR that the Final Rule applies prospectively only and is not intended to adjudicate the lawfulness of any past implementation practices. For example, states that have already determined that the use of market prices, such as

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[8] NOPR at P 32.

[9] *See, e.g.*, *Small Power Production and Cogeneration Facilities; and Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,868, 30,871, *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980).

locational marginal price (LMP), or competitive solicitations is the most appropriate way to set avoided costs should continue to be permitted to use those mechanisms. By the same token, states that have determined that administrative regulations or formulas are the most suitable for the utilities within their jurisdictions should be permitted to use those mechanisms. Either way, so long as they comply with the requirements of PURPA and the Commission's implementing regulations, states should have the flexibility to make the avoided cost determinations most appropriate for the consumers within their respective jurisdictions. Ensuring this flexibility is consistent with the intent of the Commission's proposals in the NOPR and with existing state PURPA implementation practices.

Regarding the proposals in the NOPR, the Commission first proposes to allow states to use LMP as a permissible rate for certain as-available QF energy sales.[10] This proposal applies inside markets operated by regional transmission organizations (RTOs) and independent system operators (ISOs). Specifically, the Commission proposes to revise the PURPA regulations in 18 C.F.R. § 292.304 to add subsections (b)(6) and (e)(1) to permit a state the flexibility to set the as-available energy rate paid to a QF by an electric utility located in an RTO/ISO market at LMPs calculated at the time of delivery. NRECA supports this proposal because it furthers the Commission's efforts to incorporate market forces in setting QF rates. NRECA also supports this proposal because it codifies the existing practices of some cooperatives that operate in RTOs/ISOs and that already use LMP to set the rate for certain as-available QF energy sales. Many utilities, including electric cooperatives, that participate in the RTO/ISO markets are offering the entirety of their generation into the market and bidding in (buying) all of their load requirements from the market, in each case at LMP. In those circumstances, any purchase by the utilities from QFs would

[10] NOPR at PP 43-50.

result in the avoidance of market purchases. Pursuant to the Commission's PURPA regulations, the market price (LMP) establishes the avoided costs for the utility, since the power purchased from the market is the power that the utility would "generate itself ***or purchase from another source***."[11] Thus, in many ways, the NOPR's proposal is simply a codification of what states are already doing with respect to the use of market price in establishing avoided costs.

Second, the Commission proposes to allow the use of other competitive prices as a permissible rate for certain as-available QF energy sales.[12] This proposal is intended to apply to electric utilities located outside RTOs/ISOs. Specifically, the Commission proposes to revise 18 C.F.R. § 292.304 to add a subsection (b)(7) which, in combination with new subsection (e)(1), would permit a state to set the as-available energy rate paid to a QF by electric utilities located outside of RTO/ISO markets at a "Competitive Price" calculated at the time of delivery.[13] The NOPR proposes to define "Competitive Prices" as: (1) "Market Hub Prices" – energy rates established at liquid market hubs;[14] or (2) "Combined Cycle Prices" – 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.[15] The Commission explains in the NOPR that these proposals are not intended to supersede other methods states may use.[16] For the same reasons NRECA supports the use of LMP as a permissible rate for certain as-available QF energy sales,

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[11] 18 C.F.R. § 292.101(b)(6) (2019) (definition of "avoided cost") (emphasis added). Concerns about how the market price (LMP) is established are beyond the scope of the NOPR and are being addressed in other dockets. *See, e.g.*, *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (Commission rejected PJM's minimum offer price rule and is considering impact of out-of-market payments on market prices).

[12] NOPR at PP 51-61.

[13] *Id.* at P 55.

[14] *Id*. at P 56.

[15] *Id*. at P 59.

[16] *Id*. at P 60.

NRECA also supports this proposal to use other competitive prices to set rates for certain as-available QF energy sales in areas where no LMPs exist. NRECA supports the Commission's proposed definitions of "Competitive Prices," and also appreciates the Commission's confirmation that this proposal is not intended to supersede other methods states may use to determine competitive prices.[17]

Third, the Commission proposes to permit the energy rate component of a contract to be fixed at the time that the QF creates a legally enforceable obligation (LEO) using forecasted values of the estimated stream of market revenues.[18] To implement this proposal, the Commission proposes to add a new option in 18 C.F.R. § 292.304(d)(1)(iii) permitting fixed energy rates to be based on forecasted estimates of the stream of revenue flows during the term of the contract, explaining that "states could rely on market estimates of forecasted energy prices at the times of delivery over the anticipated life of the contract – such estimates are commonly referred to as a forward price curve – to develop a fixed energy rate component for that contract when such estimates reflect the purchasing electric utility's avoided costs."[19] NRECA supports this proposal because, as noted, this approach would incorporate market forces in setting QF rates. As with other proposals in the NOPR, NRECA urges the Commission to recognize that states must have sufficient flexibility to determine how those forecasted market prices are determined, including (if warranted) appropriate discounting[20] to ensure that utilities and consumers are not locked into long-term contracts with fixed prices that are higher than prevailing market prices.[21]

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[17] *Id*. at P 60.

[18] *Id*. at PP 61-62.

[19] *Id*. at P 61.

[20] By discounting, we refer not only to the need to discount future (forward) prices to present value, but also applying a discount to reflect the uncertainty – even speculation – inherent in forecasting prices too far into the future.

[21] *See, e.g.*, Statement of the Honorable Paul Kjellander, Commissioner, Idaho Public Utilities Commission, at 7, Docket No. AD16-16-000 (June 29, 2016) (describing year contracts under PURPA must-purchase obligation with

While NRECA supports this proposal, NRECA also requests that the Commission clarify in its final rule that an electric utility is not obligated to offer a stream of market revenue as payment, even if there is a market hub price that could be relevant. The Commission's proposed revisions to § 292.304(d)(1)(i), (ii) and (iii) could be interpreted to imply that a QF could require a utility to offer a stream of market revenue as payment. To the extent this is what the Commission intended with its proposal, NRECA objects to this requirement as it removes some of the flexibility that the states would retain under the NOPR. To the extent that this is not what the Commission intended, NRECA respectfully requests that the Commission clarify that in its Final Rule.

Fourth, the Commission proposes to revise 18 C.F.R. § 292.304(d) to permit a state to limit a QF's option to elect to fix at the outset of a LEO the energy rate for the entire length of its contract, and instead allow the state to require QF energy rates to vary during the term of the contract.[22] Under this proposal, a QF would continue to be entitled to a contract with avoided capacity costs calculated and fixed at the time the LEO is incurred (assuming capacity costs are avoided as a result of the QF contract), but the state could require the contracted energy rate to vary.[23] NRECA supports this proposal because it provides states with flexibility in implementing PURPA to reflect the energy costs that are avoided as a result of the purchase from the QF. The Commission's proposed approach strikes an appropriate balance between the asserted needs of developers to enter into long-term contracts with the concern of utilities (and the consumers they

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fixed, long-term avoided costs well above actual avoided costs in later years of contract); Statement of Al Brogan, Corporate Counsel – NorthWestern Energy, Participating on behalf of the Edison Electric Institute, at 5, Docket No. AD16-16-000 (June 29, 2016) (discussing concern over disconnect between QF pricing and actual avoided cost of energy in light of long-term contracts locking in prices, and citing study showing decline in wind and solar costs between 2009 and 2015).

[22] NOPR at P 66.

[23] *Id.* The NOPR also states that if a QF is not entitled to capacity payments because the purchasing utility is not avoiding capacity by entering into the QF contract, the state could limit the QF's contract to variable energy payments, but the only costs being avoided would be the incremental costs of purchasing or producing energy at the time the energy is delivered. *Id.* at P 67. NRECA supports this approach.

serve) of being locked into power purchase prices that end up being above market and/or above cost. Allowing states the flexibility to provide for varying energy rates in the purchase contract is an appropriate way to balance these two concerns. The approach is not mandatory – if states believe that a fixed energy rate for the duration of the QF contract is the most appropriate way of promoting the development of QFs while also protecting ratepayers, then the states have that flexibility.

Finally, the Commission proposes to explicitly allow for the consideration of competitive solicitations to determine avoided costs. For this purpose, the Commission proposes to revise 18 C.F.R. § 292.304 to add subsection (b)(8), which, in combination with new subsection (e)(1), would permit a state the flexibility to set avoided energy and/or capacity rates using competitive solicitations (i.e., requests for proposals, or RFPs), conducted pursuant to appropriate procedures to be set by the states.[24] The Commission does not propose detailed RFP criteria – and NRECA agrees it should not endeavor to do so. Instead, the Commission proposes "certain minimum criteria governing the process by which RFPs are to be conducted in order for an RFP to be used to set QF rates," including: (a) an open and transparent process; (b) that solicitations are open to all sources to satisfy a purchasing electric utility's capacity needs, taking into account the required operating characteristics of the needed capacity; (c) that solicitations are conducted at regular intervals; (d) there is oversight by an independent administrator; and (e) there is a certification by the state regulatory authority or nonregulated electric utility that the competitive solicitation process satisfies these minimum criteria. With minor modifications and clarification as discussed below, NRECA supports these criteria.

[24] *Id*. at P 82.

At the outset, NRECA strongly supports the Commission's proposal to explicitly permit the use of competitive solicitations to determine avoided cost rates. Numerous NRECA members have already had success using competitive solicitations to establish both energy and capacity rates in states where this is permitted, and NRECA supports the Commission adopting a Final Rule that would allow these members and others to continue to use these processes.

NRECA also supports the Commission's proposal to allow states to define the specifics of the competitive solicitation process. NRECA agrees with the Commission that states are in the best position to determine the factors that should go into the RFP process for resources in their territories.[25] NRECA generally supports the minimum criteria suggested by the Commission, with one important exception. NRECA believes the states are in the best position to determine the need for "oversight by an independent administrator" and recommends that this criterion be deleted. Under PURPA, states (i.e., state regulatory authorities and nonregulated electric utilities like electric cooperatives) are assigned the responsibility to implement PURPA's requirements. NRECA sees no reason why adoption of criteria to govern competitive solicitations and the implementation of those solicitations should be an exception to that responsibility. There also are adequate avenues for relief should any state fail to appropriately implement PURPA's requirements, including in the use of competitive solicitations. But in the first instance, the Commission should allow states to adopt and implement governing criteria for RFP oversight.

In particular, states should be allowed to determine what degree of independent oversight is needed for RFPs conducted by not-for-profit, consumer-owned cooperatives. A not-for-profit, consumer-owned cooperative has an economic incentive to conduct the solicitation to identify the lowest-cost resource that meets its needs, and therefore to treat all resources participating in the

[25] *Id*. at P 86.

cooperative's RFPs – QF and non-QF – fairly and in a non-discriminatory manner. The Commission has long recognized that an electric cooperative does not have an incentive to favor self-build or similar affiliate transactions, because the customers are the owners of the cooperative and there are no shareholders with conflicting interests.[26] Thus, there is no need to impose a blanket requirement for "independent administrator" oversight of electric cooperative RFPs in particular or of electric utility solicitations more broadly.

If the Commission retains the requirement that RFP processes include some type of oversight, NRECA would propose that, instead of requiring oversight of every single RFP by an "independent administrator," the Commission allow states the flexibility to allow electric utilities to retain a third-party consultant for this purpose. Under this approach, an independent entity could be used to develop the criteria that would govern the utility's RFPs, but a third-party consultant could be used to conduct and review the RFP process and confirm that the results are adequate. It may place a significant financial and resource burden on cooperatives – particularly smaller entities – to retain an "independent administrator" for every capacity solicitation, regardless of how small. Many cooperatives have long-standing relationships with third-party consultants that assist the cooperatives in evaluating power supply options. Requiring those cooperatives to now use some other entity (i.e., the "independent administrator") would be disruptive and costly, to the detriment of their consumer-members. It therefore would be reasonable for the Commission to allow the use of third-party consultants to implement the RFPs under predetermined criteria,

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[26] *See, e.g.*, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity & Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, at P 526 (2007) (treating jurisdictional electric cooperatives as "not subject to the Commission's affiliate-abuse restrictions, based on a finding that transactions of an electric cooperative with its members do not present dangers of affiliate abuse through self-dealing" because "the cooperative's members are both the ratepayers and shareholders"); *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 122 FERC ¶ 61,155, at P 49 (2008) (same).

should the Commission's minimum criteria require some type of oversight of competitive solicitations (i.e., other than what a state may require).[27]

B. NRECA Supports the Proposed Changes to Relief from Purchase Obligation in Competitive Retail Markets.

The Commission's PURPA regulations at 18 C.F.R. § 292.303(a) currently require electric utilities to purchase "any energy and capacity which is made available from a qualifying facility."[28] The Commission proposes to modify this regulation to provide electric utilities relief from this purchase obligation to the extent their supply obligations are reduced by a state's retail choice program. The Commission explains that "[i]t is reasonable for electric utilities' PUPRA capacity purchase obligations to be reduced to the extent retail choice reduces their supply obligations."[29] NRECA supports the Commission's proposal. While not many of NRECA's members are subject to retail choice, several states in which NRECA members are located are engaged in new efforts to consider retail choice. Therefore, there is value in the Commission adopting its proposal to allow relief from this purchase obligation to the extent their supply obligations are reduced by a state's retail choice program. This will benefit NRECA's members to the extent that they do participate in state retail choice programs either now or in the future because an electric utility should not be required to buy more energy or capacity from a QF than it needs to serve its load.[30] Retail restructuring often results in a decrease to a utility's native load obligations as a result of retail consumers switching power suppliers. Consistent with longstanding Commission precedent, an

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[27] To the extent that the Commission did not intend its term "independent administrator" to be construed narrowly, NRECA requests that the Commission clarify that point in its Final Rule.

[28] 18 C.F.R. § 292.303(a) (2019).

[29] NOPR at P 91.

[30] *Id*. at P 90.

electric utility should not be required to buy more QF power than its load requirements.[31] In that regard, the NOPR simply codifies existing Commission policy. NRECA supports that approach.[32]

C. NRECA Supports the Commission's Efforts to Reform the One-Mile Rule.

1. The Commission Should Adopt a Rebuttable Presumption that Applies to Affiliated Facilities Located between One and Ten Miles Apart.

The Commission proposes to allow entities challenging a QF certification to rebut the presumption that affiliated facilities located more than one mile apart are considered to be separate QFs.[33] The Commission confirms that, under this proposal, affiliated facilities one mile or less apart will be irrebuttably presumed to be a single facility at a single site, and affiliated facilities ten miles or more apart will be irrebuttably presumed to be separate facilities at separate sites.[34] The Commission also proposes that affiliated facilities more than one mile apart but less than ten miles apart will be rebuttably presumed to be separate facilities at separate sites.[35] NRECA supported the Commission's initiation of a rulemaking to amend the one-mile rule,[36] and NRECA supports the Commission's proposal here.

Specifically, NRECA supports the Commission's proposal to establish a rebuttal presumption for facilities located more than one mile but less than ten miles apart, which will state

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[31] Order No. 69 at 30,870 (while a QF may seek to have a utility purchase more than the utility's total load requirements, the rate for that purchase must include only the payment for energy and capacity which the utility can use to meet its total system load).

[32] In the retail choice context, the load-serving utility typically retains some provider of last resort (POLR) service obligations for customers that switch to third-party suppliers but later return to the utility (for example, if the third-party supplier defaults and no longer can meet its power supply obligations). The load associated with these POLR obligations is too speculative for the utility to be locked into a QF purchase to supply the POLR load in advance. If the utility were required to buy QF power for this potential (but uncertain) POLR load, it would be paying for power it does not need, in contravention of PURPA's principles.

[33] NOPR at P 100.

[34] *Id*. at P 101.

[35] *Id*. at P 102.

[36] Post-Technical Conference Comments at 1, 4-6.

that these facilities are rebuttably presumed to be separate facilities at separate sites. NRECA has previously stated, and continues to believe, that the one-mile rule works well as a logical, bright-line test for deeming facilities that are geographically close together to be on the same site.[37] The one-mile rule is a good proxy for determining that such facilities are in fact a single project.

With respect to facilities located more than one mile apart, NRECA supports the Commission's proposal to allow interested parties an opportunity to rebut the presumption that facilities located more than one mile (but less than ten miles) apart are separate facilities.[38] Consistent with its obligation to ensure that only facilities that truly qualify under the statutory 80-MW limit will be certified as small power production QFs, the Commission can prevent certain practices by QF developers to "game" the one-mile rule by providing interested parties an opportunity to present evidence challenging the presumption that facilities that are more than a mile apart are separate. Ample evidence has been presented to the Commission regarding credible allegations of such "gaming,"[39] and the proposal here would help address such "gaming."

NRECA agrees that these challenges should be considered on a case-by-case basis. NRECA requests clarification that if a challenger meets its burden of production by presenting evidence that the presumption should be overcome in a particular case, then the applicant for QF status should then have the burden of persuasion to demonstrate that its facility should be treated as separate from other facilities. Without intending to limit the types of evidence that may be relevant to such an inquiry, NRECA notes that the types of evidence could include evidence of

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[37] *Id*. at 4.

[38] *Id*. at 5.

[39] *See, e.g.*, Transcript of Technical Conf. on Implementation Issues Under PURPA, at 34-36, 42-45, Docket No, AD16-16-000 (June 29, 2016) (Tech. Conf. Transcript) (discussing the issue of large projects being broken into smaller projects for the "sole purpose of gaming PURPA"); *see also* Post-Technical Conference Comments at 5 & n.8.

contemporaneous construction, shared interconnection, common communication and control, use of the same step-up transformer, and common permitting and land leasing, among other things.[40] NRECA also requests clarification that these are the types of evidentiary considerations that would be relevant to an inquiry as to whether the presumption would be overcome in a particular case, and that the foregoing examples of evidentiary considerations neither constitute an exhaustive list nor establish a minimum required showing.

In the NOPR, the Commission also solicits comment on whether other possible approaches to reform the one-mile rule would be "more appropriate."[41] The Commission states that some parties have suggested the use of the geographic center of the plant footprint or a weighted average of the locations of the individual pieces of "electric generating equipment" to determine whether facilities are separate facilities.[42] NRECA opposes the adoption and use of these alternative tests.[43] NRECA agrees with the Commission and believes that these alternative tests do not establish bright-line rules. Therefore, QF developers could have the opportunity to easily "game" these tests.[44] In its Post-Technical Conference Comments, NRECA explained (and cited evidence from the Technical Conference[45]) that some QF developers have been credibly accused of "gaming" the

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[40] *See* Post-Technical Conference Comments at 5-6 & n.10.

[41] NOPR at P 110.

[42] *Id*. at P 110.

[43] In its Post-Technical Conference Comments (at 7), NRECA supported the bright-line rule advocated by the Edison Electric Institute with respect to facilities using the same step-up transformer. NRECA continues to believe that such a rule would be appropriate, but in light of the approach proposed in the NOPR (i.e., establishment of a rebuttable presumption, with third parties allowed to challenge a QF applicant's assertion that its facilities constitute separate facilities) and NRECA's requested clarification regarding the types of evidence to be considered, NRECA is not pursuing this as a bright-line rule further at this time.

[44] In its Post-Technical Conference Comments, NRECA cited evidence that QF developers have been "gaming" the one-mile rule by locating facilities more than a mile apart for the sole purpose of evading the 80 MW limit on facility size or 20 MW threshold for the market-access presumptions. Post-Technical Conference Comments at 5.

[45] *See, e.g.*, Tech. Conf. Transcript at 34-36 (Paul Kjellander, Commissioner, Idaho Public Utilities Commission, discussing issue of large projects being broken into smaller projects for "sole purpose of gaming PURPA"), and 42-43 (Joel Schmidt, Vice President of Regulatory Affairs at Alliant Energy, explaining Alliant's experience with developer that broke one 58-MW project into two purported projects to qualify its project under PURPA).

one-mile rule by purporting to locate facilities more than a mile apart for the sole purpose of evading the 80-MW limit on facility size or 20-MW threshold for the market-access presumptions.[46] The Commission should not give QF developers additional opportunities to "game" the one-mile rule by adopting alternative proposals that establish something less than bright-line rules for determining when facilities should be considered separate facilities for purposes of PURPA implementation.

2. Definition of "electric generating equipment."

NRECA also supports the Commission's proposed definition of "electric generating equipment." For purposes of applying these mileage tests, "electric generating equipment" would "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."[47] The Commission also explains that each wind turbine and each solar panel would thus be considered "electrical generating equipment" because each wind turbine and each solar panel is independently capable of producing electric energy.[48] The Commission proposes that for two facilities (such as wind or solar farms) to be considered irrebuttably separate, all such "electrical generating equipment" of one QF must be at least ten miles away from all such equipment of another QF.[49] NRECA supports this proposal because, like the proposed mileage rules, it would reduce the opportunities for "gaming" the system.

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[46] Post-Technical Conference Comments at 5.

[47] NOPR at P 108.

[48] *Id*. at P 109.

[49] *Id*.

D. The Commission Should Adopt Its Proposal to Decrease the Size Threshold for the Rebuttable Presumption of Nondiscriminatory Access to Markets.

NRECA supported the Commission initiating an inquiry into whether the 20-MW threshold for the presumption of access to markets is still the appropriate level,[50] and NRECA supports the Commission's proposal in the NOPR. In the NOPR, the Commission proposes to revise 18 C.F.R. § 292.309(d) to reduce the net power production capacity level at which the presumption of nondiscriminatory access to a market attaches for small power production facilities, but not cogeneration facilities, from 20 MW to 1 MW. Since the Commission adopted the 20-MW threshold, existing markets have become more robust, and the more robust state of the markets warrants a decrease in the MW threshold required to establish the rebuttable presumption under Section 210(m). Because resources even smaller than 1 MW can participate in RTO and ISO markets, a 1-MW threshold is a reasonable compromise. While NRECA supports the proposal, NRECA requests that the Commission clarify that the presumption will apply only to facilities having sufficient transmission access to the RTO/ISO markets. The Commission has separately proposed to require RTOs and ISOs to remove barriers to wholesale market participation by distributed energy resource (DER) aggregations.[51] NRECA is concerned that this reform to the Commission's PURPA regulations not indirectly result in a change to aggregation rules for DERs in RTOs/ISOs that would go beyond the scope of the Commission's intentions in the instant NOPR.[52]

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[50] Post-Technical Conference Comments at 14.

[51] *See Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators; and Electric Storage Participation in Regions with Organized Wholesale Electric Markets*, 157 FERC ¶ 61,121 (2016) (NOPR in Docket Nos. RM16-23-000 & AD16-20-000); *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators; and Distributed Energy Resources-Technical Considerations for the Bulk Power System*, "Notice of Technical Conference" (Feb. 15, 2018) (re-docketing DER aggregation reforms in Docket No. RM18-9-000).

[52] To the extent that lowering the size threshold for the Section 210(m) rebuttable presumption would encourage RTOs/ISOs to mandate distributed energy resource (DER) aggregation, NRECA notes that while it supports lowering

The Commission addresses a proposal offered by National Association of Regulatory Utility Commissioners (NARUC) that would allow utilities to rely on RFPs (in combination with liquid market hubs) to establish eligibility to terminate a utility's purchase obligation pursuant to PURPA Section 210(m)(1)(c).[53] NRECA does not object to the Commission's proposal that it will consider proposals, on a case-by-case basis, to establish eligibility to terminate a utility's purchase obligation pursuant to PURPA, including the proposal put forward by NARUC. Consistent with its general approach to the implementation of PURPA, NRECA believes that states should have maximum flexibility to address how to promote QFs and protect the retail consumers served by utilities purchasing power from QFs.

E. The Commission Should Adopt Its Proposal to Require that a QF Show That It Is Commercially Viable to Establish a LEO.

The Commission's current PURPA regulations at 18 C.F.R. § 292.304(d) provide that a QF can choose to have its rates based on the avoided cost calculated at the time of delivery or at the time a LEO is incurred. The Commission's regulations do not specify when or how a LEO is established, and the Commission has not identified specific criteria that states must follow in determining when a LEO is established. The Commission has traditionally left the determination

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the threshold to establish the rebuttable presumption, it continues to oppose to DER aggregation in RTO/ISO markets unless that aggregation has been approved by the relevant state or local utility regulatory authority, including the applicable cooperative board. *See Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators; and Electric Storage Participation in Regions with Organized Wholesale Electric Markets*, "Comments of the American Public Power Association and the National Rural Electric Cooperative Association on Notice of Proposed Rulemaking," at 21, Docket Nos. RM16-23-000 & AD16-20-000 (filed Feb 13, 2017) (requesting that the Commission adopt an opt-in/opt-out process as it did in Order No. 719 for aggregation of DER). *See also Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, "Post-Technical Conference Comments of the National Rural Electric Cooperative Association," at 27, Docket No. RM18-9-000 (filed June 26, 2018); *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, "Supplemental Comments of The American Public Power Association and The National Rural Electric Cooperative Association," at 8, Docket No. RM18-9-000 (filed Apr. 17, 2019) ("The Commission should instead adopt the RERRA opt-out/opt-in framework from Order Nos. 719 and 719-A and apply it to DER aggregation in RTO/ISO markets.").

[53] NOPR at PP 131-33.

of when a LEO is established to states in their implementation of the Commission's PURPA requirements.[54] In this NOPR, the Commission proposes to add text in 18 C.F.R. § 292.304(d)(3) to require QFs to demonstrate, in order to be eligible for a LEO, that a proposed project is "commercially viable and that the QF has a financial commitment to construct the proposed project pursuant to objective, reasonable, state-determined criteria."[55] The Commission further proposes to provide that states have flexibility as to what constitutes an acceptable showing of commercial viability and financial commitment.[56] NRECA supports the Commission's proposal.

NRECA members are regularly called upon to interconnect with and purchase the output of QFs. The process of interconnecting with QFs, as with any other interconnecting resources, can impose substantial expenses and administrative requirements on cooperatives. For example, the engineering studies required for interconnecting QFs and other resources can be costly in terms of time (internal staff time performing and reviewing studies), money (for outside consultants to perform studies, when required), and resources (personnel addressing interconnection studies are pulled from other duties required for reliable service to the cooperative's customers). Maintaining system safety and reliability requires engineering studies to determine the impact of interconnecting the QF; the need for any system upgrades, starting at the individual circuit level; and the need for any firming resources. Performing these and other tasks associated with integrating QFs into the utility's system can be burdensome, especially for smaller cooperatives. Therefore, it is reasonable to require QFs to show that a proposed project is commercially viable

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[54] *See, e.g.*, *Nebraska Public Power District*, 156 FERC ¶ 61,043, at P 20 (2016) ("it is the state regulatory authorities (or non-regulated entities) that determine whether and when a [LEO] is created, and the procedures for obtaining approval of such an obligation" (citing *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688-A, 119 FERC ¶ 61,305, at P 139 (2007), *aff'd sub nom. American Forest and Paper Assoc. v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008)).

[55] NOPR at P 140.

[56] *Id*. at P 141.

and that the QF has a financial commitment to construct the proposed project pursuant to objective, reasonable, state-determined criteria in order to be eligible for a LEO. This requirement will help alleviate the administrative requirements of beginning an interconnection process for projects that will not come to fruition. The rules governing QFs and their arrangements with electric utilities should appropriately protect the consumer-owners of electric cooperatives, including ensuring that the administrative process and expenses of entering into a contract with QFs remains reasonable. By requiring this additional showing to establish an LEO, the Commission will lessen the administrative burdens and potential expense of interconnecting with QFs of entities like cooperatives, thereby increasing the protection of the consumer-owners of electric cooperatives.

F. NRECA Supports the Commissions Efforts to Allow for Less Burdensome Participation in the Self-Certification Process.

NRECA supports the Commission's proposal[57] to change 18 C.F.R. § 292.207(a) to allow a party to intervene and to file a protest of a self-certification or self-recertification of a facility rather than file a petition for declaratory order and pay the hefty filing fee. Because the QF must serve a copy of its submission on interested electric utilities, the Commission proposal to allow interested persons 30 days from the date of filing to intervene and/or to file a protest or other comments is reasonable. The Commission's proposal will allow entities the ability to challenge representations made in a self-certification or self-recertification when necessary, without having to incur the cost of filing a petition for declaratory order. These are very real costs. In one notable example, an electric cooperative had to prepare and file a petition – including submitting the $[28,000] filing fee – in order to have the Commission revoke the QF status of a project that had

[57] *Id*. at P 148.

self-certified as a small power production and cogeneration QF without having met the most basic requirements for that status.[58]

There is value in allowing entities an opportunity to participate in the self-certification and self-recertification process. Such participation is a regular feature of rate filings under Sections 205 and 206 of the Federal Power Act, and the public interest is typically served by allowing robust participation by interested parties. Indeed, the Commission allows such participation in the case of a QF seeking Commission certification or recertification of its project.[59] There is no reason to deny that participation in the context of QFs seeking self-certification or self-recertification.

NRECA acknowledges that the self-certification and self-recertification process is intended to be a quick and inexpensive way for QFs to achieve the required regulatory status under PURPA. However, allowing interested parties to protest self-certification or self-recertification filings will not upset that quick and inexpensive process. Rather, protests (and other comments) will be reserved for only those cases in which the project's self-certification or self-recertification filing raises a question as to whether the project complies with the PURPA requirements for establishing QF status. The proposed rule thus strikes an appropriate balance between the need of the generation project for a quick and inexpensive process to achieve its QF status and the need of interested parties to ensure that projects that may not in fact be eligible for QF status do not obtain such status.

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[58] *Golden Valley Electric Assoc., Inc.*, 167 FERC ¶ 61,208 (2019).

[59] 18 C.F.R. § 292.207(c) (2019) (Commission will publish notice in Federal Register of an application for Commission certification or for self-certification of certain co-generator facilities; no similar publication requirements for self-certification or re-certification for other QFs); *see also* Order No. 671, 114 FERC ¶ 61,102, at P 80, *order on reh'g*, Order No. 671-A, 115 FERC ¶ 61,225, at P 23 (2006) (same).

CONCLUSION

NRECA respectfully requests that the Commission consider NRECA's comments and adopt a Final Rule consistent with the comments herein.

Respectfully submitted,

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Dated: December 3, 2019