UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Southern Maryland Electric Cooperative, Inc.	)	
	)	Docket No. EL16-107-000
Choptank Electric Cooperative, Inc.	)	

ANSWER OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF THE PETITION FOR DECLARATORY ORDER OF SOUTHERN MARYLAND ELECTRIC COOPERATIVE, INC. AND CHOPTANK ELECTRIC COOPERATIVE, INC.

The National Rural Electric Cooperative Association ("NRECA") submits this Answer[1] in support of the Petition for Declaratory Order ("Petition") filed in this docket by Southern Maryland Electric Cooperative, Inc. and Choptank Electric Cooperative, Inc. (collectively, "the Cooperatives").[2] The Petition requests that FERC review certain aspects of regulations promulgated by the Public Service Commission of Maryland ("MD PSC") regarding community solar energy generation systems ("CSEGS") and issue a declaratory order finding that said aspects of the MD PSC's CSEGS regulations[3] fail to comply with federal law, including the Public Utility Regulatory Policies Act ("PURPA") and the Federal Power Act ("FPA"). NRECA supports the Petition and provides herein additional grounds to rule favorably on the Cooperatives' request.

I. SUPPORTING ANSWER

The Petition correctly contends that certain aspects of the MD PSC's CSEGS regulations fail to comply with PURPA and the FPA: "(i) *to the extent* that CSEGS regulations require

[1] This Answer is being filed pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission") (18 C.F.R. § 385.213 (2016). NRECA filed a doc-less intervention in this proceeding on August 29, 2016.
[2] *Petition for Declaratory Order of Southern Maryland Electric Cooperative, Inc. and Choptank Electric Cooperative, Inc.*, Docket No. EL16-107-000 (filed Aug. 23, 2016).
[3] Community Solar Energy Generation Systems, MD. CODE REGS. §§ 20.62.01.00-20.62.05.20 (2016).

Maryland electric companies to purchase energy from CSEGSs at a particular price, Maryland regulations are preempted by federal law unless such CSEGSs are Qualifying Facilities ("QFs") under PURPA; and (ii) CSEGS regulations that require payment to CSEGSs at prices higher than avoided costs violate, and are preempted by, PURPA."[4] The Cooperatives appropriately ask FERC to apply settled law to the MD CSEGS regulations and determine that those regulations, in several respects, fail to comply with that settled law.

As discussed subsequently, FERC has determined on several occasions that state energy regulations must acknowledge and abide by limitations set forth by federal laws such as PURPA. A similar result is necessitated in this matter. While the issues raised in the Petition with respect to the MD CSEGS regulations are specific to the Maryland CSEGS program, it is notable that a decision regarding the application of federal law to the CSEGS regulations may apply to similar programs in other states. Thus, requiring consistency between the CSEGS regulations and federal law – a decision which certainly aligns with past Commission findings – provides desirable clarification regarding state and federal jurisdiction, QF status, and avoided cost calculations.

NRECA acknowledges that community solar programs can offer significant benefits to consumers, and NRECA's member-owned, not-for-profit electric cooperatives are leaders in developing such programs. Electric cooperatives are driven by their purpose to power communities and empower their members to improve their quality of life through programs such as community solar. As such programs gain increasing traction in a number of States, NRECA implores FERC to take action in this docket to clarify the legal guidelines governing state

[4] Petition, *supra* note 2, p. 5 (emphasis added).

initiatives, such as the Maryland CSEGS pilot program.[5] Clear implementation rules are needed in order to ensure that all program participants remain compliant with the law on matters of jurisdiction, QF status and PURPA requirements respecting avoided cost pricing.

A. The Commission Has Already Determined that State Energy Regulations Must Acknowledge the Limitations Set Forth by Federal Law; The MD CSEGS Regulations Should Be Amended Pursuant to the Cooperatives' Recommendations in Their Petition Consistent with Those Determinations.

The issues present in the Cooperatives' argument regarding the CSEGS regulations closely resemble issues presented in a prior FERC proceeding involving the California Public Utilities Commission's ("CPUC") implementation rules for the California Waste Heat and Carbon Emissions Reduction Act ("California AB 1613").[6] California AB 1613 amended the California Public Utilities Code to require California state regulated utilities to "offer to purchase, at a price to be set by the CPUC, electricity that is generated by certain CHP generators and delivered to the grid."[7]

The CPUC's petition for declaratory order requested that FERC "find that sections 205 and 206 of the [FPA], and section 210 of [PURPA] and Commission regulations do not preempt the CPUC's decision to require California utilities to offer a certain price to combined heat and

[5] *See* Chris Mooney, *Many Americans still lack access to solar energy. Here's how Obama plans to change that*, WASH. POST, (July 7, 2015), https://www.washingtonpost.com/news/energy-environment/wp/2015/07/07/many-americans-lack-access-to-solar-energy-heres-how-obama-plans-to-change-that/?utm_term=.26ec05d4a2b4.

[6] This proceeding was a case of first impression.

[7] *See* Order Denying Rehearing, *Ca. Pub. Util. Comm'n.*, 134 FERC 61,044, ¶ 4 (Jan. 20, 2011). As further explained in FERC's Order Denying Rehearing, under California AB 1613:

> . . . CHP generators eligible for the price set by the CPUC must have a generating capacity of not more than 20 MW and must meet certain efficiency and emissions standards. The legislation requires CPUC-jurisdictional utilities to file standard ten-year purchase contracts (AB 1613 feed-in tariffs) with the CPUC that require them to offer to purchase at the CPUC-set price electricity generated by eligible CHP generators. As amended, the California Public Utilities Code states that this tariff shall "provide for payment for every kilowatt hour delivered to the electrical grid by the combined heat and power system at a price determined by the commission." AB 1613 requires that the CPUC set the rates at which the utilities must offer to purchase from CHP generators at a level that "ensure[s] that ratepayers not utilizing [CHP] systems are held indifferent to the existence of [the AB 1613 feed-in] tariff."

power generating (CHP) facilities of 20 MW or less that meet energy efficiency and environmental compliance requirements."[8] All three California investor-owned utilities subsequently filed a separate petition for declaratory order, arguing that "the CPUC's decision is preempted by the FPA insofar as it sets rates for electric energy that is sold at wholesale."[9] FERC's order addressing both petitions found that the CPUC's decision was not preempted by the FPA, PURPA or Commission regulations, as long as the program meets certain requirements.[10] Specifically, according to that decision, a state commission may, pursuant to PURPA, determine avoided cost rates for QFs. FERC clarified that: "Although the CPUC [did] not argue that its AB 1613 program is an implementation of PURPA . . . to the extent the CHP generators that can take part in the AB 1613 program obtain QF status, the CPUC's AB 1613 feed-in tariff is not be preempted by the FPA, PURPA, or Commission's regulations, subject to": (1) the CHP generators from which the CPUC is requiring the [IOUs] to purchase energy and capacity are QFs pursuant to PURPA; and (2) the rate established by the CPUC does not exceed the avoided cost of the purchasing utility.[11]

Indeed, the questions presented by the Cooperatives' Petition closely track the issues resolved by the Commission's order with respect to the CPUC's AB 1613 implementation rules. FERC's Order on Petitions in the California AB 1613 proceeding affirms that: (1) state regulation of wholesale rates is limited to the rates for output from QFs, and (2) any such regulation must not exceed the avoided cost of the purchasing utility..

[8] *Id.* at ¶ 3.
[9] *Id.*
[10] *California Public Utilities Commission; Southern California Edison Company; Pacific Gas and Electric Company; San Diego Gas & Electric Company*, Order on Petitions for Declaratory Order, 132 F.E.R.C. ¶ 61,047 (2010) ("Order on Petitions").
[11] *Id.*

Notably, in its Clarification/Rehearing Order, FERC concluded that states – in meeting their obligations to establish the levels of avoided costs – may take into account costs that are avoided by certain types or tiers of similar generation that serve similar functions pursuant to state programs.[12] In Maryland, the avoided cost standard would be sufficiently implemented with respect to purchases from CSEGSs if the CSEGS regulatory language regarding electric company purchases of unsubscribed energy were to be applied equally to electric company purchases of "excess generation." Contrary to the standards enunciated in FERC's Clarification/Rehearing Order, the MD PSC's CSEGS regulations adopt different pricing language for substantially identical types of purchases of unsubscribed energy and excess generation. There is nothing in the Maryland statutes or the CSEGS regulations that identify any cost-based factors that distinguish between the two.

The CSEGS program requires that any excess unsubscribed energy must be purchased by the utility from the CSEGS and, thus, the transactions become subject to federal regulation.[13] To the extent that a CSEGS constitutes a QF under PURPA, the pricing of such transactions may be subject to state regulation but the pricing must remain consistent with the FERC's regulations and precedent applicable to QFs.[14] If a CSEGS is not a QF, then these transactions would violate the FPA because only FERC may regulate wholesale sales of energy by CSEGSs to electric utilities for resale to retail customers.[15] Under this latter scenario, the CSEGSs would be subject to FERC regulation as public utilities. FERC should act here to align the CSEGS program with the jurisdictional boundaries and requirements established by the FPA and PURPA.

[12] Order Granting Clarification and Dismissing Rehearing, *Ca. Pub. Util. Comm'n.*, 133 FERC 61,059, ¶ 7 (2011) ("Clarification/Rehearing Order").
[13] *Id.* at pp. 2-3.
[14] *Id.*
[15] *Id.*

1. The CSEGS Regulations Should Indicate that CSEGSs Must Constitute QFs Under PURPA; Otherwise, Any State-Prescribed Payments by Electric Companies to CSEGSs Will Violate Federal Law.

FERC has exclusive jurisdiction to regulate the rates, terms, and conditions of wholesale sales of electricity by generators to electric utilities for resale to the retail market.[16] When the Commission establishes a rate, a state must "'give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.'" *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 373 (1988) (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965, 966 (1986)). To the extent that CSEGS regulations require electric companies to purchase electricity from CSEGSs at a set price, those regulations are preempted by federal law unless the CSEGSs are QFs.

If the CSEGSs are not QFs, then the MD CSEGS regulations run afoul of federal law by attempting to regulate transactions by entities that are public utilities under the FPA.. As expounded upon above, the Commission in the California AB 1613 proceeding held that the CHP generators that sold power to the state regulated utilities must be QFs if the CPUC regulations are to avoid being preempted. The same requirement applies here to the MD CSEGSs.

2. Pursuant to PURPA, Rates Paid by Electric Utilities to CSEGSs for Excess Generation Must Not Exceed Avoided Costs.

It is appropriate for FERC to affirm that payments to CSEGSs that are QFs must be consistent with avoided cost calculations. Assuming that all CSEGSs are QFs, "the next step is to ensure that the sales by the QFs to electric companies are priced correctly by the MD PSC under the avoided cost standards of PURPA."[17] CSEGS regulations that require payment to CSEGSs at prices higher than avoided costs – as noted in the Petition – violate, and are

[16] 16 U.S.C. §§ 824(a)-(b).
[17] *Id.*

preempted by, PURPA.[18] The Cooperatives' proposed revisions to the CSEGS regulations would ensure that payments to CSEGS reflect the electric utility's actual avoided costs.[19]

The law is clear that sales of net excess generation to utilities constitute wholesale sales. In *MidAmerican Energy Company*[20] and *Sun Edison LLC*[21], the Commission addressed rates for net excess generation. In both instances, the Commission concluded that if the generators were QFs, sales of net excess generation to utilities constituted a wholesale sale, for which compensation was to be set at the avoided cost consistent with PURPA and FERC's regulations implementing PURPA.[22]

B. The Commission's Disposition of the CSEGS Regulations May Have Precedential Implications for Programs with Similar Arrangements in Other States.

The Commission's disposition of the Petition in this docket could have precedential effect for states that have programs, such as net metering programs, requiring utilities to compensate net excess generation at retail rates.[23] Like the CSEGS regulations, a state's net

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[18] *Id.*
[19] *Id.* at p. 12.
[20] 94 FERC ¶ 61,340 (2001).
[21] 129 FERC ¶ 61,146 (2009).
[22] *See, e.g., MidAmerican Energy Company*, 94 FERC 94 FERC at P62,263 ("When there is a net sale to a utility, and the individual's generation is not a QF, the individual would need to comply with the requirements of the Federal Power Act . . . When there is a net sale to a utility, and the individual's generation is a QF, that net sale must be at an avoided cost rate consistent with PURPA and our regulations implementing PURPA.")
[23] *See, e.g.*, http://www.dsireusa.org/ , citing Conn. Gen. Stat. §§ 16-243h and § 16-244u; M.G.L. ch. 164, § 138-140 (subsequently amended); 220 Mass. Code Regs. §§ 18.00-18.10; 8.00-8.08; Mont. Code Ann. §§ 69-8-601 - 69-8-605; 73 Pa Stat. Ann. §§ 1648.2-1648.8; 52 Pa. Code Chapter 75, Subchapter B, §§ 75.11-75.15; D.C. Code §§ 34-1501 – 34-1522; D.C. Mun. Regs tit. 15, chapter 9, §§ 15-900 to 15-999; 65-407-313 Me. Code R. §§ 1-4; Me. Rev. Stat Ann., tit. 35-A, §3209-A; R.I. Gen. Laws § 39-26.4; Miss. Pub. Serv. Comm'n. Order Adopting Net Metering Rule, Docket No. 2011-AD-2 (issued Dec. 3, 2015); NM Code R. § 17.9.570-17.9.570.15; Utah Code §§ 54-15-101 - 54-15-108; Utah Admin. Code r. R746-312-15; Cal. Pub. Util. Code §§ 2826.5, 2827.1, 2830; N.D. Admin. Code 69-09-07-09; N.H. Rev. Stat. Ann. §§ 362-A:1-a, 362-A:9; N.H. Code Admin. R. Chapter PUC 900, §§ 901-909.13; Ark. Code Ann. §§ 23-18-601 - 23-18-604; S.C. Order No. 2015-194; La. Rev. Stat. Ann. §§ 51:3061 – 51:3063; Nev. Rev. Stat. Ann. §§ 704.766-704.775; Nev. Admin. Code §§ 704.881 – 704.8825; Ohio Rev. Code Ann. §§ 4928.67-4928.72; Ohio Admin. Code §§ 4901:1-10-28, 4901:1-21-13; Del. Code Ann., tit. 26, § 1014(d); 26-3000-3001 Del. Admin. Code §§ 1-10; Ariz. Admin. Code §§ R14-2-2301 - R14-2-2308; Alaska Admin. Code tit. 3, §§ 50.90-50.949; Okla. Admin. Code §§ 165:40-9-1 – 165:40-9-3; 220 Ill. Comp. Stat. Ann. 5/16-107.5; 83 Ill. Adm. Code, Part 465; Wyo. Stat. Ann. §§ 37-16-101- 37-16-104; Va. Code Ann. § 56-594; 20 Va. Admin. Code §§ 5-315-10 – 5-315-90; Rev. Code Wash. §§ 80.60.005-80.60.040; Or. Rev. Stat. § 757.300; Or. Admin. R. 860-022-0075,

metering guidelines may facilitate wholesale sales in violation of the FPA. It is therefore important that FERC takes appropriate action in this proceeding.[24]

II. CONCLUSION

WHEREFORE, NRECA supports the Cooperatives' Petition for Declaratory Order and requests that the Commission issue an order confirming that the CSEGS regulations, as enacted by the MD PSC, conflict with certain provisions of the FPA and PURPA, and find that the changes recommended by the Cooperatives would adequately resolve the conflict.

Respectfully submitted,

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860-039-0005 - 860-039-0080; Ky. Rev. Stat. Ann. §§ 278.465- 278.468; 170 Ind. Admin. Code. 4-4.2; Mich. Comp. Laws §§ 460.1171-460.1181; Minn. Stat. Ann. § 216B.164; Minn. R. 7835.3300 – 7835.4023, 7835.9910; Wis. Pub. Serv. Comm'n. Order, Docket Nos. 05-EP-6 and 4220-UR-117; Fla. Admin. Code Ann. r. 25-6.065; Fla. Stat. § 366.91; NY Pub. Serv. Law §§ 66-j and 66-l; Haw. Rev. Stat. Ann. §§ 269-101- 269-111; Order Adopting Net Metering, Docket No. E-100, Sub 83, N.C. Utils. Comm'n. (Oct. 20, 2005); Order Approving Tariffs, Riders, and Regulations Implementing Net Metering and Consolidating Reporting Requirements; Docket Nos. E-100, Sub 83 and E-100, Sub 101, N.C. Utils. Comm'n. (Dec. 27, 2005); Order on Reconsideration Modifying Net Metering Tariffs and Riders; Docket No. E-100, Sub 83, N.C. Utils. Comm'n. (July 6, 2006); Order Amending Net Metering Policy; Docket No. E-100, Sub 83, N.C. Utils. Comm'n. (March 31, 2009); Ga. Code Ann. §§ 46-3-50 – 46-3-56; Colo. Rev. Stat. §§ 40-9.5-118, 40-2-124, 40-2-127; 4 Colo. Code. Regs. 723-3 §§ 3664 and 3665; Kan. Stat. Ann. §§ 66-1263- 66-1271; Kan. Admin. Regs. §§ 82-17-1 – 82-17-5; Vt. Stat. Ann. tit. 30, §§ 219a- 219b; Vt. Pub. Serv. Bd. R. 5.100; N.J. Stat. Ann. § 48:3-87; N.J. Admin. Code §§ 14:8-4.1 – 14:8-4.11; Neb. Rev. Stat. Ann. §§ 70-2001 - 70-2005; Iowa Admin. Code r. § 199-15.11(5); Mo. Ann. Stat. § 386.890; Mo. Code Regs. Ann. tit. 4, § 240-20.065; W. Va. Code §§ 24-2F-1 - 24-2F-12.

[24] Rev. Code Wash. §§ 80.60.005-80.60.040.

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served the foregoing document on the parties listed on the Commission's official service list.

Dated at Arlington, Virginia this 7th day of October, 2016.

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