

# CLIENT ALERT

## Does FERC Encourage QFs Anymore?

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The Federal Energy Regulatory Commission (“FERC”) issued [Order No. 872](#), its much-anticipated decision adopting major revisions to its regulations implementing the Public Utility Regulatory Policies Act of 1978 (“PURPA”). PURPA generally requires utilities to purchase power from certain renewable energy sources and cogeneration projects (“Qualifying Facilities” or “QFs”) at the utilities’ “avoided cost” in order to incent generation development using those fuel sources.

Although the statute has not changed, Order No. 872 adopts more stringent requirements and may negatively affect QF development. FERC gives states added flexibility to vary the utility’s as-available energy avoided cost over the duration of the QFs power sale; heightens requirements for a QF to obtain a legally enforceable obligation (“LEO”), which is the trigger for imposing a purchase obligation on a purchasing utility; and allows third party challenges to QF status for new small power production facilities with affiliated small power production QFs that are more than one and less than ten miles apart. These changes could result in QFs facing uncertain revenue streams, making it more difficult and expensive to develop and obtain financing for new projects. QFs could also face additional regulatory litigation in state PURPA implementation overhaul proceedings and in defending against protests to QF certifications.

### Changing the Way States Can Establish Avoided Cost Rates Might Lead to Uncertain Revenue Streams

FERC granted states the flexibility to require that energy rates in QF power sale arrangements vary with the purchasing utility’s as-available avoided costs. This additional flexibility could result in less certain revenue streams, making QFs more difficult to finance and thereby develop.

- For utilities located in organized electricity markets, FERC established a rebuttable presumption that the locational marginal price in a wholesale market reflects utilities’ avoided energy cost.
- For utilities located outside of organized electricity markets, states are permitted to set as-available energy avoided cost rates at competitive prices from liquid market hubs or formula rates based on gas price indices if the state first determines that such prices represent utilities’ avoided costs.
- FERC also will allow states the option of setting energy and capacity rates through a competitive solicitation process, consistent with certain parameters FERC laid out the order.
- QFs remain entitled to a fixed capacity rate over the duration of the power sale arrangement, but FERC recognized that a state could find that a utility’s avoided cost capacity rate is zero because the purchasing utility does not require additional capacity.

## Obtaining a LEO May Be More Rigorous

FERC's existing regulations give QFs the right to put utilities under a contract or LEOs. To be eligible for a LEO, the new rule requires a QF to demonstrate that the proposed facility is commercially viable and that it has a financial commitment to construct the project, based on objective and reasonable criteria determined by each state.

- In establishing the objective LEO-eligibility criteria, states *cannot* require that a QF show that it has obtained site control, local permitting and zoning, an executed interconnection agreement, a power purchase agreement, or financing. However, FERC also provided guidance on the types of criteria a state could consider:
  - As a factor in demonstrating commercial viability, a state can require that a QF demonstrate that it has applied for all necessary permits and zoning variances, including payment of fees.
  - As a factor in demonstrating financial commitment, a state can require that a QF has taken meaningful steps to seek site control or to meet other developmental milestones to demonstrate the QF developers' financial commitment to the development.

## Expanding Meaning of "Same Site" Makes It Harder To Get and Maintain QF Status

Under FERC's existing PURPA regulations, to qualify for QF status, a small power production facility seeking QF status may not exceed a net power production capability of 80 MW. In certain circumstances, the facility must combine its capability with the capability of affiliated small power production facilities using the same fuel resource if they are located at the same site. Under Order No. 872, FERC determined that:

- Affiliated facilities whose electrical generating equipment is located within one mile of each other are irrebuttably presumed to be the same site.
- Affiliated facilities whose electrical generating equipment is located more than 10 miles from each other are irrebuttably presumed to not be at the same site.
- Affiliated facilities whose electrical generating equipment is located more than one mile and less than ten miles apart are rebuttably presumed to be located at the same site.
  - FERC will now allow third parties to protest a facility's initial certification or any recertification of QF status which makes substantive changes to existing certification within 30 days of filing without being required to file a petition for declaratory order and paying the associated filing fee.
  - The protestor must make a *prima facie* showing that the facility does not satisfy the requirements for QF status and be adequately supported.
  - Once FERC has affirmatively certified QF status in response to a protest, any later protest to a recertification must demonstrate changed circumstances that call into question the continued validity of FERC's earlier certification. Thus, although FERC found that Order No. 872 should not disturb existing QF certifications, there is the potential that a new facility to be located within 10 miles of an existing affiliated QF could jeopardize the QF status of the existing QF.
  - FERC also permits the applicant to preemptively demonstrate that its facility is not located at the same site as its affiliated small power production facilities.
  - Indicia of being "at the same site" include, among other things: evidence of shared control systems, common permitting, common land leasing and easements, common interconnection agreements, shared step-up

transformer, common ownership, common debt or equity financing, and shared engineering or procurement contracts.

These changes may leave QFs vulnerable to utility protests, even if only as a means to slow down the development of QF projects, and added litigation expenses.

### **FERC Makes It Easier For Utilities To Shed Put Obligation**

PURPA provides that a utility's obligation to purchase from a QF is terminated when a QF has nondiscriminatory access to certain markets. Under its longstanding rules, FERC presumed that QFs located in an Independent System Operator ("ISO) or Regional Transmission Organization ("RTO") with a capacity of 20 MW or less lacked nondiscriminatory market access, but under its new formulation, FERC implements a rebuttable presumption that small power production QFs with a net capacity at or below 5 MW do not have nondiscriminatory access to such markets, narrowing the class of QFs that can impose a put obligation on a utility. The 20 MW rebuttable presumption is retained for cogeneration QFs located in an ISO/RTO.

### **Impact on Existing QFs**

FERC stated that the changes in Order No. 872 were only to be applied "prospectively for new contracts or LEOs and for new facility certifications and recertifications filed on or after the effective date of this final rule." FERC emphasized that nothing in the order permits existing contracts or LEOs to be changed. As noted above, existing QFs could face protests and lose eligibility for QF status upon recertification of QF status.

FERC's proposed changes go into effect 120 days from the date of their publication in the Federal Register, which has not yet occurred.

Crowell & Moring's energy team has been advising on PURPA's requirements for over 30 years. If you have any questions about Order No. 872, or its application to your projects, please reach out to the points of contact listed below.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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