UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Implementation Issues Under the Public Utility Regulatory Policies Act of 1978	Docket No. RM19-15-000

COMMENTS OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

In its Notice of Proposed Rulemaking ("NOPR"),[1] the Federal Energy Regulatory Commission (the "Commission") proposes to revise its regulations implementing Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 796(17)-(22), 824a-3. The Transmission Access Policy Study Group ("TAPS") welcomes the Commission's interest in modernizing its PURPA regulations to reflect the significant changes to the energy landscape since those regulations were first promulgated in 1980.[2]

In particular, TAPS supports the NOPR's proposal regarding Section 210(m) of PURPA, 16 U.S.C. § 824a-3(m), the proposals providing states and nonregulated utilities with greater flexibility in determining how to set avoided cost rates for purchases from Qualifying Facilities ("QFs"), and the proposal to modify the "one-mile rule" for

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[1] *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 168 FERC ¶ 61,184 (2019).

[2] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983); *Small Power Production and Cogeneration Facilities – Qualifying Status*, Order No. 70, FERC Stats. & Regs. ¶ 30,134, *orders on reh'g*, Order No. 70-A, FERC Stats. & Regs. ¶ 30,159 *and* FERC Stats. & Regs. ¶ 30,160, *order on reh'g*, Order No. 70-B, FERC Stats. & Regs. ¶ 30,176, *order on reh'g*, FERC Stats. & Regs. ¶ 30,192 (1980), *amending regulations*, Order No. 70-D, FERC Stats. & Regs. ¶ 30,234, *amending regulations*, Order No. 70-E, FERC Stats. & Regs. ¶ 30,274 (1981).

determining whether affiliated facilities should be considered part of a single facility. TAPS also seeks confirmation that when an all-requirements customer determines its avoided costs, it will be able to do so by calculating the avoided costs of its all-requirements supplier using any of the proposed avoided cost methods that are adopted in the final rule.[3] This confirmation will ensure consistency with longstanding Commission precedent, which does not depend on the particular method employed by an all-requirements customer to calculate its supplier's avoided costs. Although nothing in the NOPR suggests that an all-requirements customer could not determine its all-requirements supplier's avoided costs consistent with the proposed revisions, TAPS requests that the Commission confirm this point to avoid any potential for future disputes.

I. INTEREST OF TAPS

TAPS is a trade association of transmission-dependent utilities in thirty-five states, promoting open and non-discriminatory transmission access.[4] TAPS members include municipal utilities, municipal joint action agencies, electric cooperatives, and an investor-owned utility that entirely or predominantly rely on transmission systems owned and controlled by others to gain access to wholesale power markets in which they are

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[3] In these Comments, the term "all-requirements" has the same meaning as when the Commission has used this this term, and similar terms, in cases regarding avoided costs. The Commission has not required that a customer obtain literally "all" of its power from the supplier for it to be considered an "all-requirements" customer. *See Carolina Power & Light Co.*, 48 FERC ¶ 61,101, at 61,389 (1989) (concluding that the "claim that [the customer] is not a full requirements customer because it has generation [to be] without merit," adding that "it is not uncommon for a customer that owns generation to contract for full requirements service for certain delivery points"); *City of Longmont*, 39 FERC ¶ 61,301, at 61,974 (1987) (referring to a contract as an "all-requirements contract" even though it permitted the customer to meet a small portion of its energy needs through customer-owned hydroelectric projects). For TAPS members, an all-requirements customer typically is a retail service-providing distribution utility that purchases its wholesale power requirements from a joint action agency.

[4] David Geschwind, Southern Minnesota Municipal Power Agency, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

active participants. TAPS members (or the distribution utilities that are members of TAPS members) are subject to the PURPA obligations applicable to "electric utilities," PURPA § 3(4), 16 U.S.C. § 2602(4), and many are also responsible for implementing the Commission's PURPA regulations as "nonregulated electric utilit[ies]," PURPA § 210(f)(2), 16 U.S.C. § 824a-3(f)(2). TAPS members therefore have a strong and direct interest in any revisions to the Commission's PURPA regulations.

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II. COMMENTS

TAPS appreciates the Commission's efforts to ensure that its PURPA regulations reflect the modern energy landscape. As the NOPR indicates, there have been dramatic changes over the past four decades, including the Commission's open access reforms and the development of regional transmission organizations and independent system operators. TAPS supports the modernization of the Commission's PURPA regulations to better reflect these changes, which is consistent with Congress's directive that the Commission "revise" its PURPA regulations "from time to time." PURPA § 210(a), 16 U.S.C. § 824a-3(a).

TAPS supports the proposed revisions to the Commission's regulations implementing Section 210(m) of PURPA, which were first promulgated in 2006.[5] Section 210(m) authorizes the Commission to terminate the PURPA must-purchase obligation with respect to QFs that have "nondiscriminatory access" to competitive markets that satisfy the statutory conditions. PURPA § 210(m)(1), 16 U.S.C. § 824a-3(m)(1). While existing Commission regulations include a rebuttable presumption that QFs with a capacity at or below 20 MW lack such nondiscriminatory access, 18 C.F.R. 292.309(d)(1), the statute contains no size threshold for terminating must-purchase obligations. It is appropriate for the Commission to reduce to 1 MW the threshold for the rebuttable presumptions in its regulations to better reflect QFs' current ability to access competitive markets that satisfy the statutory conditions.

TAPS also supports the proposed revisions to the Commission's PURPA regulations that would provide greater flexibly in determining avoided cost rates (i.e., the proposed revisions to 18 C.F.R. § 292.304 and corresponding proposed definitions in 18 C.F.R. § 292.101). Many TAPS members, or the distribution utilities that are members of TAPS members, are not subject to the ratemaking authority of a state regulatory authority. As a result, they are responsible for implementing the Commission's PURPA regulations, and it is their obligation in the first instance to determine their avoided costs. PURPA § 210(f)(2), 16 U.S.C. § 824a-3(f)(2); *N. Little Rock Cogeneration, L.P. v. Entergy Servs., Inc.*, 72 FERC ¶ 61,263, at 62,173 n.7 (1995). The proposed revisions

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[5] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, 117 FERC ¶ 61,078, PP 9-12 (2006), *clarified*, Order No. 688-A, 119 FERC ¶ 61,305 (2007), *aff'd sub nom. Am. Forest & Paper Ass'n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

should significantly facilitate their ability to do so, consistent with the objective of PURPA.

In addition, TAPS supports the proposed revisions to the Commission's regulations that would modify the "one-mile rule" for determining whether affiliated facilities should be considered to be part of a single facility for purposes of applying PURPA's 80 MW limit for small power production QFs. For affiliated facilities using the same energy resource that are located more than one mile but less than ten miles apart, the NOPR proposes to make rebuttable its existing irrebuttable presumption that they are separate facilities. The proposal would allow stakeholders challenging QF certification to show that such facilities are actually part of a single facility and should not be treated as separate facilities, and it would enable the Commission to act *sua sponte*. This revision is needed to prevent QF developers from circumventing the "one-mile rule" by strategically siting facilities over slightly more than a mile to qualify as separate, thereby securing QF treatment for facilities larger than Congress had intended when it set out to promote small power production facilities in enacting PURPA.

Finally, TAPS seeks confirmation on one limited issue: that an all-requirements customer will be able to use the avoided cost methods the NOPR proposes to expressly permit (if adopted in the final rule) when calculating the avoided costs of its all-requirements supplier to determine its avoided cost rates. While we assume the Commission so intends given its clear precedent on the subject and the absence of any discussion in the NOPR, express Commission confirmation would be helpful in avoiding the potential for future disputes.

Specifically, the Commission has repeatedly held that the avoided costs of an all-requirements customer are those of its all-requirements supplier. It "first made this determination in Order No. 69, which implemented section 210 of PURPA," and "has consistently followed this determination in subsequent case law." *Basin Elec. Power Coop.*, 160 FERC ¶ 61,078, P 16 n.18 (2017) (citing Order No. 69 at ¶ 30,871; 115 FERC ¶ 61,323, P 27 (2006); *Carolina Power & Light Co.*, 48 FERC ¶ 61,101, at 61,390 (1989); *Hoosier Energy Rural Elec. Coop., Inc*., 154 FERC ¶ 62,205 (2016)). This precedent aligns with the basic concept of avoided costs, "since it is the supplier that avoids generation when the full requirements customer purchases from a QF." *Carolina Power & Light Co.*, 48 FERC ¶ 61,101, at 61,390 (1989) (citing *City of Longmont*, 39 FERC ¶ 61,301 (1987)).

Nothing in the NOPR is contrary to this precedent. The Commission's policy regarding the avoided costs of an all-requirements customer has never depended on how the customer determines the avoided costs of its supplier, so long as it does so in a manner consistent with PURPA and the Commission's regulations. Nor would it make any sense for the rules governing the calculation of avoided cost to differ depending on whether it is an all-requirements customer calculating its supplier's avoided cost, or a supplier making the calculation in connection with its own QF purchase.

Accordingly, consistent with this longstanding policy, if the Commission's final rule adopts some or all of the revisions proposed in the NOPR, an all-requirements customer determining the avoided cost of its supplier should be able to use any of the methodologies that the final rule's revisions would expressly permit, just as it would if the customer used any other valid method for calculating its supplier's avoided costs.

CONCLUSION

The Commission should adopt its proposed revisions, particularly those regarding Section 210(m) of PURPA, its proposals to provide states and nonregulated utilities with greater flexibility in determining how to set avoided cost rates, and its proposal to modify the "one-mile rule." The Commission should also confirm that when determining its own avoided costs by calculating the avoided costs of its supplier, an all-requirements customer may use any method consistent with the Commission regulations, including any revisions proposed in the NOPR that are adopted.

Respectfully submitted,

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December 3, 2019