UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Qualifying Facility Rates and Requirements	)))	Docket No. RM19-15-000
Implementation Issues Under the Public Utility Regulatory Policies Act of 1978	)))	Docket No. AD16-16-000

COMMENTS OF THE
NORTH CAROLINA ATTORNEY GENERAL'S OFFICE
IN RESPONSE TO THE
FEDERAL ENERGY REGULATORY COMMISSION'S
NOTICE OF PROPOSED RULEMAKING

The North Carolina Attorney General's Office ("NCAGO") respectfully submits these comments in response to the Federal Energy Regulatory Commission's Notice of Proposed Rulemaking ("NOPR"), issued September 19, 2019 in the above-captioned proceeding.[1] In the NOPR, 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").[2] If adopted, the proposed revisions could hinder the expansion of renewable energy production in North Carolina.

I. INTRODUCTION

Role of the North Carolina Attorney General's Office

The Attorney General's Office, when it deems advisable in the public interest, shall intervene in federal agency proceedings for the using and consuming public of North Carolina. N.C. Gen. Stat. § 114-2(8)(a) (2019). NCAGO also has the authority to appear before federal

[1] *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 84 Fed. Reg. 53246 (October 4, 2019).
[2] 16 U.S.C. §§ 796(17)-(18), 824a-3.

agencies on behalf of the state and its citizens in all matters affecting the public interest. *Id.* Furthermore, under Chapter 62 of the North Carolina General Statutes, NCAGO may, when it deems advisable, appear before federal courts and agencies "in matters affecting public utility services." *Id.* § 62-20.

NCAGO has also joined a multi-state comment being submitted today by the attorney generals of multiple states. We write separately to emphasize two aspects of the proposed rule that are particularly important in North Carolina, based on our state's experience successfully implementing PURPA as the driving force behind new renewable energy projects.

PURPA's Contribution to North Carolina

PURPA was enacted in 1978 to help reduce the country's dependence on imported oil and natural gas by promoting renewable energy through the development of qualifying small power production facilities and qualifying cogeneration facilities. The Commission adopted regulations to implement PURPA in 1980. The Commission's decision to revise existing PURPA regulations is partially based on the belief that "the majority of renewable resources in operation today do not rely on PURPA."[3]

Even if that is the case, it is certainly not true in North Carolina. According to a recent report, North Carolina has the most PURPA-qualifying solar capacity in the United States.[4] Indeed, North Carolina's solar energy growth is due in large part to PURPA.[5] Although North Carolina has modified its implementation of PURPA in recent years,[6] North Carolina's qualifying small

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[3] *Qualifying Facility Rates and Requirements; Implementation Issues under the Public Utility Regulatory Policies Act of 1978*, *supra* note 1, at 53247.
[4] U.S. Energy Information Administration, *Annual Electric Generator Report* (August 16, 2018).
[5] U.S. Energy Information Administration, *Annual Electric Generator Report* (August 23, 2016).
[6] *See, e.g.*, An Act to Reform North Carolina's Approach to Integration of Renewable Electricity Generation through Amendment of Laws Related to Energy Policy and to Enact the Distributed Resources Access Act, 2017 N.C. Sess. Laws 2017-192.

power production facilities ("Production Facilities") continue to produce renewable energy that facilitates economic development and assists the state in achieving its clean air and greenhouse gas reduction targets.[7]

NCAGO's Concerns About the Proposed PURPA Regulations

Two aspects of the NOPR, if enacted, could negatively affect the public interest.

First, the NOPR proposes new price methodologies for renewable energy sold under PURPA. For Production Facilities' power sales contracts, States would be enabled to require that energy rates vary in accordance with fluctuations in the electric utility's avoided costs, measured at the time of energy delivery.[8] This could eliminate fixed-rate power sales contracts, making the compensation to Production Facilities more volatile. This would discourage renewable energy financing. *See* § II.A of this comment below.

Second, the NOPR restricts PURPA eligibility for certain renewable energy facilities. The proposal would replace the "one-mile rule," the irrebuttable presumption that affiliated Production Facilities that employ the same energy resource and are at least one mile apart are separate Production Facilities for purposes of PURPA's 80 MW limit. The new proposed rule would upend this standard by (i) implementing new criteria for determining whether Production Facilities are commonly owned and (ii) establishing a rebuttable presumption that affiliated Production Facilities are separate if they generate energy from the same resource and are more than one mile apart but less than ten miles apart. This new standard fails to take into account the complex and

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[7] *See* 2007 N.C. Sess. Laws 2007-397 (establishing renewable energy portfolio standards for North Carolina); *North Carolina's Commitment to Address Climate Change and Transition to a Clean Energy Economy*, Exec. Order No. 80, 33 N.C. Reg. 1103-06 (Dec. 3, 2018) (establishing greenhouse gas emission reduction targets for the state).

[8] Avoided cost is "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d).

regionally specific factors driving the siting, financing, operation, and maintenance of Production Facilities. *See* § II.B of this comment below.

II. ELEMENTS OF THE PROPOSED RULE THAT MAY IMPOSE AN UNDUE BURDEN ON THE PRODUCTION FACILITY

A. Removing Production Facilities' Right to Obtain Fixed Avoided Cost Rates Would Inhibit Renewable Energy Investment by Discouraging Financing.

The proposed requirement of variable energy cost rates in PURPA contracts in lieu of fixed rates would hinder Production Facilities' access to financing and constrain renewable energy production.

Fixed Avoided Cost Rates Under Current Regulations

Pursuant to 18 C.F.R. § 292.304(d)(2)(ii), and subject to certain implementing state laws,[9] many Production Facilities are entitled to enter into contracts or legally enforceable obligations ("LEOs") with electric utilities and sell those utilities energy for specific terms at fixed, avoided cost rates "calculated at the time the obligation is incurred." Accordingly, an eligible Production Facility that opts to sell its energy pursuant to a contract or LEO receives the same price for the entire duration of the contract or LEO. As the Commission has previously recognized, this rule has been pivotal to providing "certainty [to lenders] with regard to return on investment in new technologies." *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. &

[9] Subject to certain limitations, a North Carolina statute provides that a Production Facility with up to 1MW of capacity is entitled to enter into a ten-year, standard offer power purchase agreement with an electric utility. *See* 2017 N.C. Sess. Laws 2017-192, § 1(b), *available at* https://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2017-2018/SL2017-192.html. Producing Facilities with more than 1MW of capacity may enter into negotiated rate power purchase agreements for "fixed five-year-term[s]." *Id.*

Regs. ¶ 30,128 at 30,880 (1980).[10] The thinking, then and now, was that any "overestimations or underestimations [in ascertaining a utility's avoided costs would] balance out." *Id.*

Changes in the Proposed Rule

Despite the centrality of fixed rate contracts to renewable energy financing, the NOPR proposes to modify this rule. If the varied energy rate proposal were implemented, a state regulatory authority could "require that rates for purchases of energy from a qualifying facility . . . vary through the life of the obligation . . . and be set at the as-available energy price applicable to the purchasing electric utility determined at the time of delivery."[11] This proposal would purportedly realign PURPA contract rates with market prices for the benefit of electric consumers.

The Importance of Fixed-Rate Pricing

North Carolina, in its successful experience implementing PURPA, has learned that fixed-rate pricing is a key factor in whether parties can receive financing from the private sector to build new renewable energy projects. As a result, North Carolina has placed in state law that it will continue to offer, for certain Production Facilities, fixed-rate terms as long as ten years.[12] Given the importance of fixed rate contracts to financing, the NOPR's proposed varied rate revision would likely deter renewable energy development.

[10] *See also* June 29, 2016 Technical Conf. Tr. at 26-27 (Solar Energy Industries Association) ("The Power Purchase Agreement is the single most important contract of the development and financing of an energy project that's not owned by a utility. Without the long-term commitment to buy the output of that agreement at a fixed price, there is no predictable stream of revenue. Without a predictable stream of revenues, there is no financing. Without any financing, there is no project.").
[11] *Qualifying Facility Rates and Requirements; Implementation Issues under the Public Utility Regulatory Policies Act of 1978*, *supra* note 1, at 53271.
[12] *See* 2017 N.C. Sess. Laws 2017-192, § 1(b).

Further, fixed-rate contracts provide stability to end users, especially given the frequent fluctuation in market prices. If natural gas prices are the basis for these variable rates, end users could not only be exposed to natural gas price increases, but also renewable energy price hikes.

The Commission makes several arguments to suggest that financing would not be impacted, but for several reasons, these arguments are inapposite to North Carolina. Whether Regional Transmission Organization or Independent System Operator markets prohibit fixed energy rates is not relevant for the vast majority of North Carolina consumers, who are neither within — nor have access to — such markets and instead receive their energy from one of three vertically integrated electric utilities.[13] Similarly, most North Carolina Production Facilities do not have access to the types of developed market price forecasts the Commission identifies. Moreover, notwithstanding national trends, PURPA Production Facilities continue to contribute a sizeable portion of North Carolina's renewable resource capacity.[14]

B. <u>**The Replacement of the One-Mile Rule Could Unfairly Impact Production Facilities.**</u>

The proposed replacement of the one mile rule with new common ownership criteria and a rebuttable presumption of separateness for nearby, affiliated Production Facilities fails to take into account the complex and regionally specific factors driving the siting, financing, operation, and maintenance of Production Facilities.

<u>**The Current One-Mile Rule**</u>

Under 18 C.F.R. § 292.204(a)(1), a Production Facility, "together with the power production capacity of any other small power production facilities that use the same energy

[13] *Electricity*, North Carolina Utilities Commission, www.ncuc.net/Industries/electric/electric.html (last visited Nov. 29, 2019).
[14] U.S. Energy Information Administration, *supra* note 4.

resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts." Production Facilities "are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought." *Id.* § 292.204(a)(2).

Proposed Changes to the Rule

In pertinent part, the NOPR suggests modifying § 292.204(a) to provide that "there is an irrebuttable presumption that facilities located ten miles or more from the facility for which qualification is sought are facilities located at separate sites from the facility for which qualification is sought."[15] Additionally, the NOPR submits that there should be a "rebuttable presumption that facilities located over one and less than ten miles from the facility for which qualification is sought are facilities located at separate sites from the facility for which qualification is sought."[16] When determining whether nearby Production Facilities are commonly owned, the Commission could consider factors related to the facilities' "property ownership," ownership or control by the same person or affiliated person, or operation and maintenance by the same or affiliated entities.[17] Collectively, these proposals aim to address concerns that certain developers are installing Production Facilities slightly more than one mile apart to remain PURPA eligible. NCAGO appreciates the concerns raised by other commenters regarding gamesmanship.

Concerns About the Proposed Changes

However, the NOPR proposals fail to consider the complexity and regional specificity of renewable energy production under PURPA. The proposed rule would make many more projects

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[15] *Qualifying Facility Rates and Requirements; Implementation Issues under the Public Utility Regulatory Policies Act of 1978*, *supra* note 1, at 53269.
[16] *Id.*
[17] *Id.* at 53261.

potentially subject to being deemed as the same site. As a result, whether those projects share common control would be critical. This can be a challenging question because of the limited number of companies available to operate renewable energy facilities. For example, a handful of firms are responsible for the operation and maintenance work for close to half of the country's solar energy production facilities.[18]

The proposed rules, by discouraging facilities from being placed close to one another, also run counter to a North Carolina policy based on efficient use of electric resources. North Carolina rules incentivize the installation of Production Facilities close to substations.[19]

Depending on how the Commission elects to assess or weigh the proposed ownership criteria, there is the possibility that many North Carolina Production Facilities could lose their PURPA eligibility and federal and state regulatory exemptions. In sum, the proposed standard fails to take into account the facts on the ground and could deter renewable energy production.

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[18] Chris Meehan, *Three Companies Dominate Solar Maintenance in US*, Solar Reviews (June 30, 2016), https://www.solarreviews.com/news/three-companies-maintain-solar-us-063016/.

[19] *See, e.g.*, North Carolina Utilities Commission, *North Carolina Interconnection Procedures, Forms, And Agreements* 18 (2019), *available at* https://www.duke-energy.com/_/media/pdfs/rates/ncinterconnections-dec.pdf?la=en (providing that distance from a substation is a factor that will determine whether certain generating facilities are eligible for fast track interconnection).

III. CONCLUSION

NCAGO appreciates the opportunity to submit these comments on the NOPR. While there are areas where the existing PURPA regulations can be improved, the proposed revisions that are discussed above may not strike the appropriate balance between addressing any implementation issues and staying true to the PURPA statute's goal, encouraging the growth of renewable energy. NCAGO encourages the Commission to reconsider these aspects of the proposed regulations and study alternatives.

Respectfully submitted this the 3rd day of December, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. Section 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Munashe Magarira
Munashe Magarira

Dated at Raleigh, North Carolina this 3rd day of December, 2019