UNITED STATES OF AMERICA
BEFORE THE
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 ELECTRIC POWER SUPPLY ASSOCIATION

The Electric Power Supply Association ("EPSA")[1] hereby submits these comments in response to the Notice of Proposed Rulemaking issued by the Federal Energy Regulatory Commission ("FERC" or "Commission") on September 19, 2019,[2] which proposes to revise the regulations implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA") in light of changes in the energy industry since 1978. EPSA believes that PURPA continues to play an important role in supporting the development of, and preventing discrimination against, qualifying small power production facilities and qualifying cogeneration facilities (together, "QFs"), and that, so doing, it provides tangible benefits to consumers. In particular, PURPA safeguards continue to be important in regions without organized wholesale markets administered by independent system operator ("ISOs") and regional transmission

[1] Launched over 20 years ago, EPSA is the national trade association representing leading competitive power suppliers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. Power supplied on a competitive basis collectively accounts for 40 percent of the U.S. installed generating capacity. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

[2] *Qualifying Facility Rates and Requirements, Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Notice of Proposed Rulemaking, 168 FERC ¶ 61,184 (2019) ("NOPR").

organizations ("RTOs"), i.e., non-ISO/RTO regions, in order to allow QFs to compete on a level playing field with resources owned by incumbent electric utilities.

As a general matter, EPSA supports the Commission's efforts to review its existing policies and regulations and to propose reforms that may be necessary as markets evolve, as this can result in changes that provide increased market efficiency, enhanced competition and reduced regulatory burdens on both the Commission and the industry, while maintaining necessary market oversight and market power protections. The NOPR, however, undercuts the congressional purpose of PURPA as a vehicle to encourage competition and innovative new technologies for the benefit of consumers. EPSA recognizes that many QFs in regions with ISO/RTO-administered markets already have non-discriminatory access to markets that justify exemptions from the mandatory purchase requirement pursuant to Section 210(m) of PURPA. The same cannot be said of other regions, and EPSA has serious concerns regarding the proposed avoided cost rate changes for QFs in these regions. Critically, the NOPR would violate PURPA's mandate that the Commission implement regulations that ensure QFs receive non-discriminatory rates.[3] The NOPR makes no effort to explain how the most sweeping changes proposed therein would comply with that fundamental requirement. Moreover, as explained below, electric utilities have frequently set rates for their own generation based on the same methodologies that the Commission is now proposing to eliminate for QFs. Notwithstanding assertions in the NOPR to the contrary,[4] eliminating the option for QFs to obtain long-term contracts with fixed energy

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3 *See* 16 U.S.C. § 824a-3(b) (2018).

4 *See* NOPR, 168 FERC ¶ 61,184 at PP 69-73.

prices also will make it materially more difficult to finance the development of QFs in non-ISO/RTO regions. It is therefore foreseeable that the proposed changes could have substantial adverse impacts on QF development.

EPSA encourages the Commission to use this proceeding as an opportunity to strengthen competition and facilitate the development of independently owned and privately financed resources at the lowest cost, consistent with the fundamental intent of PURPA. In particular, the Commission should ensure that competitive solicitations are properly designed to ensure that QFs have meaningful opportunities to compete against resources owned by incumbent utilities on a level playing field. Such an approach will provide substantial benefits to consumers in regions that continue to be dominated by utility-owned resources, where consumers are currently saddled with both the cost and the risk of the utility investments. EPSA offers additional thoughts and suggestions below on these critical issues, and urges the Commission to modify the NOPR proposals consistent with these comments.

I. BACKGROUND

Congress enacted PURPA in 1978 to address the national energy crisis by encouraging the development of small power production facilities and cogeneration facilities that would reduce the country's dependence on traditional fossil fuels, many of them imported. Among other things, Section 210(m) of PURPA required utilities to purchase power from QFs at prices equivalent to a utility's avoided cost, referred to as the mandatory purchase obligation. FERC issued its regulations implementing PURPA in 1980. Among other things, these regulations (1) set forth criteria that facilities must satisfy in order to qualify as QFs, including a "one-mile rule" for determining whether generation facilities should be considered to be part of a single facility;[5] (2) require electric utilities to purchase energy and capacity provided by a QF;[6] (3) provide that rates for purchases from a QF shall "(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and (ii) Not discriminate against [QFs],"[7] and that a rate set at the electric utility's avoided cost would satisfy such requirements;[8] and (4) allow QFs to have the choice of making sales on an "as available" basis, or pursuant to "a legally enforceable obligation [("LEO")] for the delivery of energy or capacity over a specified term. . . ."[9]

In 2005, Congress amended PURPA section 210(m) as part of the Energy Policy Act of 2005 ("EPAct 2005") to recognize that PURPA's requirements should account for competition in the wholesale electric markets. The Commission subsequently issued Order No. 688 to incorporate the EPAct 2005 PURPA modifications.[10] Order No. 688 allowed an electric utility to terminate its mandatory purchase obligation under Section 210(m) of PURPA in circumstances where the Commission has found that the QF "has nondiscriminatory access to" markets with certain defined characteristics.[11] For these purposes, the Commission's regulations further established "a rebuttable

5 *Id.* at P 9. *See also* 18 C.F.R. § 292.204(a) (2019).

6 *See* 18 C.F.R. § 292.303 (2019).

7 18 C.F.R. § 292.304(a)(i) (2019).

8 *See* 18 C.F.R. § 292.304(b)(2) (2019).

9 18 C.F.R. § 292.304(d) (2019).

10 *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, 117 FERC ¶ 61,078 (2006), *order on reh'g*, 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).

11 18 C.F.R. § 292.309(a) (2019).

presumption that a [QF] with a capacity at or below 20 megawatts does not have nondiscriminatory access to the market.”[12]

In the NOPR,[13] the Commission proposes a variety of significant reforms to its PURPA regulations, including but not limited to: (1) allowing states to “set the energy component of the rate a purchasing electric utility pays for a QF’s power based on market prices rather than on the purchasing electric utility’s administratively-determined avoided cost rate”[14] or “to require that energy and/or capacity rates be determined through a competitive solicitation process, such as an RFP;”[15] (2) establishing “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;”[16] (3) giving states “the flexibility to require that energy rates under QF contracts and LEOs be based on as-available energy rates determined at the time of delivery rather than being fixed for the term of the contract or LEO;”[17] (4) lowering the size of facilities presumed to have nondiscriminatory access to power markets from 20 MW to 1 MW for small power production, but not cogeneration, facilities with respect to termination of the mandatory purchase obligation;[18] (5) modifying the regulations relating to determining whether facilities are separate

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[12] 18 C.F.R. § 292.309(d)(i) (2019).

[13] The NOPR follows a technical conference and post-conference comments filed in Docket No. AD16-16-000, which FERC established in February 2016 to examine implementation issues under PURPA. The record in Docket No. AD16-16-000 is incorporated into the NOPR proceeding.

[14] NOPR, 168 FERC ¶ 61,184 at P 32.

[15] *Id.* at P 33.

[16] *Id.* at P 87.

[17] *Id.* The NOPR further proposes that a QF could “request a fixed energy rate component calculated at the time a LEO is incurred,” whereby the fixed rates would be “based on forecasted estimates of the stream of revenue flows during the term of the contract.” *Id.* at P 61.

[18] *See id.* at P 118.

facilities, including the "one-mile rule;"[19] (6) modifying the standards for QFs to obtain LEOs for the purchase of their power;[20] (7) providing that "the purchase obligation may be reduced to the extent the purchasing electric utility's supply obligation has been reduced by a state retail choice program"[21]; and, (8) permitting a party to "file a protest of a self-certification or self-recertification of a facility without the necessity of filing a separate petition for declaratory order and without having to pay the filing fee required for a declaratory order."[22]

II. COMMENTS

The NOPR states that the proposed changes constitute a package of reforms that are intended to "continue to encourage QFs while at the same time addressing concerns that have been raised regarding the Commission's current PURPA regulations."[23] Unfortunately, however, where the utility-dominated non-ISO/RTO regions are concerned, EPSA shares Commissioner Glick's concern that the NOPR changes "would effectively gut" PURPA."[24] In particular, EPSA objects to the NOPR proposals with respect to avoided cost rate setting, including the proposal to allow states to eliminate the fixed-price contract option. Eliminating this option might be appropriate, but only if it reflects changes made to how utilities themselves are regulated—a precondition the NOPR does not propose. EPSA therefore encourages

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19 *See id.* at PP 93-117.

20 *See id.* at PP 140-142.

21 *Id.* at P 92.

22 *Id.* at P 148.

23 *Id.* at P 4.

24 *Id.*, Statement of Commissioner Glick, Dissenting in Part, at P 1 ("Glick Dissent").

the Commission to use this proceeding as an avenue to promote competition in the non-ISO/RTO regions, rather than adopting revisions that would discourage QFs and tighten the grip of vertically integrated monopolists in the non-ISO/RTO regions.[25]

A. The Commission's Proposal Would Improperly Disadvantage QFs Relative to Utility-Owned Generation

The most significant, and troubling, change proposed by the NOPR is the proposal to eliminate the requirement that QFs must be offered the option of selling their power to utilities pursuant to legally enforceable obligations ("LEOs"), whereby the purchase price is based on "[t]he avoided costs calculated at the time the obligation is incurred."[26] Instead, under the NOPR, "energy rates (but not capacity rates) in QF power sales contracts and other [LEOs will] vary in accordance with changes in the purchasing electric utility's as-available avoided costs at the time the energy is delivered," and "a QF would no longer have the ability to elect to have its energy rate be fixed for the term of the contract or LEO."[27]

1. Offering QFs Only An "As Available" Energy Rate Is Discriminatory When Electric Utilities Are Not Faced With The Same Ratemaking Treatment

EPSA is a strong proponent of competition, and recognizes that the Commission has valid concerns regarding the flaws of using administrative pricing for QF contracts, which is not ideal and is not a long-term proxy for a competitively determined price. Unfortunately, the NOPR proposals with respect to avoided cost rates in the non-

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[25] As noted herein, EPSA takes issue with the NOPR's proposed changes applied in the non-ISO/RTO regions. EPSA takes no position on the proposed changes within ISO/RTO markets. Therefore, the following comments are focused solely on the non-ISO/RTO regions.

[26] 18 C.F.R. § 292.304(d)(ii) (2019).

[27] NOPR, 168 FERC ¶ 61,184 at P 5.

ISO/RTO regions would put QFs at a significant disadvantage to utility-owned resources, thereby undercutting PURPA's goals of promoting competition.

In determining the appropriate rates for QF purchases, it bears emphasis that in EPAct 2005, Congress made no changes to Section 210(b) of PURPA, which orders the Commission to implement regulations for rates for utility purchases from QFs that "shall not discriminate against qualifying cogenerators or qualifying small power producers."[28] Notably, this standard is more restrictive than the Federal Power Act's prohibition against "*unduly* discriminatory" rates.[29]

The NOPR states that changes to the existing avoided cost regime are necessary because long-term QF contracts are substantially above prevailing market prices due to declining wholesale prices over the long term.[30] But this argument does not justify the proposed changes, because utility-owned generation is similarly based on imperfect long-term forecasts of energy prices that oftentimes prove to be too high. Indeed, at least one state public service commission has recognized this parallel, observing that "QFs are offered a levelized price over the course of a contract," and "[a] similar process occurs when a utility arrives at a total revenue requirement for a generating asset in a preapproval docket that is recovered over a given period of

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28 16 U.S.C. § 824a-3(b)(2) (2018).

29 16 U.S.C. § 824e(a) (2018).

30 *See* NOPR, 168 FERC ¶ 61,184 at P 40 (utilities argued that "allowing QFs to fix their avoided cost rates at the time a LEO is incurred has resulted in overpayments as energy prices generally have declined over the years, leaving the fixed energy portion of the QF rate well above the purchasing electric utility's actual avoided energy costs at the time of delivery").

time."[31] Accordingly, "forecasting error is a risk common to both QF and utility-owned assets."[32] State regulators' assumptions regarding costs are, like QF administrative pricing, an administrative bet that may well prove wrong over the course of time. Even if cheaper sources of power become available in the future, the utility will still recover all of the costs associated with its generation. Moreover, this principle applies to the entirety of an incumbent utility's generation fleet, thereby potentially saddling consumers with costs far in excess of the costs associated with a QF contract that is above the prevailing market price.

In short, changing market conditions or imperfections in price forecasts do not affect utilities' ability to recover their investment and the return on it over the life of their generation assets. By contrast, the NOPR proposals would not give QFs the same opportunity. Instead, under the NOPR, states would be able to continually revisit rates, even those under long-term contracts.[33] The NOPR avoided rate proposal must therefore be rejected because it puts QFs at a disadvantage to utility-owned generation, in violation of the non-discrimination mandate under PURPA.

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[31] Montana Public Service Commission, *In the Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1*, Qualifying Facility Power Purchase, Order No. 7500d, ¶ 83, Docket No. D2016.5.39 (Nov. 24, 2017).

[32] *Id.*, ¶ 93. As the Montana Commission noted, "each time" the electric utility it regulates "has asked the Commission to approve its acquisition of a power plant, it has established the rates consumers will pay in a manner similar to, or even identical to, the way in which the Commission forecasts the avoided-cost rates paid to QFs." *Id.*, ¶ 86.

[33] *See* NOPR, 168 FERC ¶ 61,184 at n.5 ("any state—whether located in regions where energy prices are competitively based or whether located in regions where they are not—would be permitted to require that the fixed energy rate established at the time of the contract include provisions, established at the time the contract is established, providing for revisions to the energy rate at regular intervals, consistent with, for example, a purchasing electric utility's integrated resource plan, to reflect updated avoided cost calculations").

Accordingly, the NOPR proposal to allow states to price QF contracts based on "as available" energy pricing should not be adopted unless utility-owned assets are also subjected to a similar regime of cost recovery. In the non-ISO/RTO areas where utilities are paid for generation investments in rate base through rates fixed by regulation and not market prices, the manner by which QFs and utilities are compensated should be largely symmetrical. The NOPR instead goes the other way and places incumbent utilities, who in many cases already receive guaranteed cost recovery and a return on their investment, at an even greater advantage relative to independent power producers.

2. The Commission's Proposal is Arbitrary and Capricious Because It Does Not Address, Much Less Justify, The Issue of Discrimination Between QFs and Utility-Owned Generation

As described above, the Commission is under a legal duty to adopt regulations under PURPA that result in non-discriminatory rates for QFs. In this respect, the reference to discriminatory rates under PURPA necessarily requires a comparison to utility-owned generation in those markets where, as in PURPA's early days, utility-owned generation dominates the sector. Nonetheless, the Commission "entirely failed to consider an important aspect of the problem,"[34] and did not conduct any such comparison or otherwise consider whether the proposed changes are in fact consistent with the statutory mandate. The word "discriminate" appears a single time in the NOPR, and then only in reiterating PURPA's statutory requirements.[35] In the one place where the NOPR grapples with this requirement, the Commission simply emphasizes the need

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[34] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[35] NOPR, 168 FERC ¶ 61,184 at P 36.

for “non-discriminatory” treatment in circumstances where competitive solicitations are relied upon to set the rate paid under PURPA.[36] As discussed in Section II.B below, EPSA agrees that, if implemented with appropriate direction and safeguards, competitive solicitations may yield positive results. At the same time, the NOPR’s other avoided cost proposals ignore the cardinal statutory requirement that these rates not “discriminate.” Such proposals must, therefore, be withdrawn.

3. Allowing Utilities To Eliminate The Fixed Price Contract Option Will Impact QFs Ability To Obtain Financing

The proposed changes that will allow unequal treatment between QFs and utility-owned generation are particularly problematic because, in broad swaths of the country without ISOs and RTOs, incumbent utilities continue to favor their own generation and self-build. Accordingly, for QFs that are looking for sales opportunities, “PURPA is often the only game in town.”[37] In addition, and as was highlighted in the technical conference and comments in Docket No. AD16-16, competitive power suppliers assume higher risks than incumbent utilities with respect to the development of capital-intensive generation facilities, and must secure project financing for the construction and ongoing viability of generation resources.[38] Such financing is not available on a short-term basis; instead, developers must convince investors that there is a long-term, predictable revenue stream. Accordingly, PURPA and the Commission’s regulations permitting QFs to obtain LEOs based on “[t]he avoided costs calculated at the time the obligation

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[36] *See, e.g., id.* at P 87; proposed new subsection § 292.304(b)(8).

[37] Glick Dissent at P 19.

[38] *See* Comments of LS Power Associates, L.P. on PURPA Implementation Issues at 7, Docket No. AD16-16-000, (filed Nov. 7, 2016).

is incurred,"[39] have played – and continue to play – a critical role in placing QFs on an even footing with utilities with respect to obtaining access to capital.

Conversely, the proposed elimination of the ability for QFs to obtain a long-term, fixed rate for energy would create roadblocks for QFs that are seeking financing.[40] Although the NOPR claims that "fixed capacity and variable energy payments" are sufficient to secure financing,[41] it simultaneously acknowledges that "[a]n electric utility is not required to pay for QF capacity that the state has determined is not needed."[42] These proposed changes, taken together, would therefore create substantial uncertainty for QF developers and investors in non-ISO/RTO regions.

As discussed above, the Commission must adhere to the principle of non-discrimination, and reject any changes to its regulations that would place QFs at a disadvantage to resources owned by incumbent utilities. The following are several principles for consideration if the Commission believes some reforms or modifications are required:

- As discussed above, the avoided cost calculation for QFs should be the same that the utility uses for cost recovery of its own utility-owned assets. It may be necessary to analyze a utility's cost recovery mechanism to ensure that energy costs are not "hidden" in other costs, but this should ultimately be a determinable number. There are a number of models to determine actual costs, including rates filed with the Commission and state commissions, and ISO/RTO cost calculation formulas. Regardless

39 18 C.F.R. § 292.304(d)(ii) (2019).

40 As Commissioner Glick notes in his partial dissent: "I am concerned that the commission's proposal to allow utilities to eliminate the fixed-price contract option will make it more difficult – or in some cases impossible – for QFs to obtain financing." Glick Dissent at P 9.

41 NOPR, 168 FERC ¶ 61,184 at P 70.

42 *Id.* at n.58 (citations omitted). *See also id.* at P 67 ("To the extent that a QF is not entitled to capacity payments because a purchasing electric utility is not avoiding any capacity as a consequence of entering into a contract with a QF, the QF's contract could be limited by a state under the proposed rule to variable energy payments." (footnote omitted)).

of whatever model is used, there must be a fair "apples to apples" comparison between QF and utility cost calculations.

- The Commission could also require avoided cost rates to be calculated based on the integrated resource plans ("IRPs") of incumbent utilities, or the costs of a reference resource. For example, utilities could be required to develop offer curves of the marginal cost of energy when they file their IRPs, and QFs would then be permitted to choose the IRP rate for energy as the avoided cost rate. Alternatively, states could be required to set avoided costs based on an independent analysis of the projected costs of an appropriate reference resource, similar to the analyses conducted by ISOs/RTOs in setting demand curves for capacity markets.

- The Commission should continue to permit QFs to lock-in the current avoided cost rate for a contract length that is equivalent to the remaining service life for generating plant that is used by the relevant electric utility for ratemaking and reporting purposes.

B. The Commission Should Implement Reforms By Strengthening Competitive Solicitation Processes

There is a better way to reform the Commission's PURPA regulations. As mentioned above and in the technical conference docket, there continue to be substantial challenges in gaining market access and a meaningful ability to compete to sell in the non-ISO/RTO regions.[43] Indeed, many utilities continue to prefer to develop their own renewable projects, which can be included in rate base and on which they can earn a return, and therefore remain averse to QF development and signing long-term PURPA contracts.[44] FERC should therefore take the concept of competition, which is at

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[43] *See, e.g.*, Comments of Northwest and Intermountain Power Producers Coalition, Docket No. AD16-16-000 (filed June 8, 2016); Comments on behalf of the Solar Energy Industries Association ("SEIA"), Docket No. AD16-16-000 (filed June 7, 2016); SEIA Post-Technical Conference Comments and Request for a Policy Statement on PURPA Implementation, Docket No. AD16-16-000 (filed Nov. 7, 2016); Speaker materials of Laura Chappelle, on behalf of the Independent Power Producers Coalition of Michigan, Docket No. AD16-16-000 (filed June 30, 2016); Post-Technical Conference Comments of the California Cogeneration Council, Docket No. AD16-16-000 (filed Nov. 7, 2016); Comments of the North Carolina Clean Energy Business Alliance and the North Carolina Sustainable Energy Association, Docket No. AD16-16-000 (filed Nov. 11, 2016).

[44] "*Dominion throws the challenge flag on the Energy Freedom Act*," by Tim Sylvia, pv magazine USA, October 18, 2019 ("It would appear that the utility is attempting to undermine PURPA

the core of PURPA, and adapt it to current circumstances. In this respect, the Commission should be guided by the approach taken in EPAct 2005, where Congress implemented reforms in recognition of changing wholesale electric markets, but nonetheless maintained utilities' obligations to purchase energy and capacity at the avoided cost rate where competitive markets are not sufficiently developed. Similarly, this Commission should promote competition while continuing to ensure that there are robust protections for QFs in non-ISO/RTO regions.

In particular, even in vertically integrated regions, successful competitive solicitations have yielded significant benefits for consumers by procuring renewable resources at competitive prices.[45] The Commission should therefore use this opportunity to do a full assessment of how competitive solicitations are working and could be enhanced, while providing continued protections to prevent discrimination against QFs.[46]

The Commission should also set guidelines for competitive solicitations to provide an even playing field for all resources, particularly if the Commission determines that RFPs may be used to set avoided cost rates.[47] EPSA has previously been active at the federal and state level in numerous individual and generic proceedings to promote the use of standard criteria for competitive solicitations or RFPs. Given its past

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implementation after being forced to actually interconnect projects in its PURPA backlog…."), *available at* https://pv-magazine-usa.com/2019/10/18/dominion-throws-the-challenge-flag-on-the-energy-freedom-act/.

[45] *See* Supplemental Comments of the National Association of Regulatory Utility Commissioners, Attachment A at 4, Docket No. AD16-16-000, (filed October 17, 2018).

[46] *See* Supplemental Comments of the Solar Energy Industries Association, Docket No. AD16-16-000, (filed August 28, 2019).

[47] *See* NOPR, 168 FERC ¶ 61,184 at P 33; *id.* at PP 82-86.

experience in this area, EPSA suggests that, at a minimum, competitive solicitations must be assessed using the following four criteria set forth in *Allegheny Energy Supply Co., LLC*,[48] to determine whether there has been affiliate abuse in transactions between franchised public utilities and market-regulated affiliates:

> a. Transparency: the competitive solicitation process should be open and fair.
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> b. Definition: the product or products sought through the competitive solicitation should be precisely defined.
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> c. Evaluation: evaluation criteria should be standardized and applied equally to all bids and bidders.
>
> d. Oversight: an independent third party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection.[49]

While the *Allegheny* principles provide a good starting point, EPSA is concerned that additional protections will be required to level the playing field between independent generators (who have higher risks and rely on their sales) and utilities (who receive guaranteed cost recovery, even if incremental capital investments are necessary to keep their facilities operational). Utility-owned resources receive favorable regulatory treatment that could skew RFP participation and results. For example,

- A utility may enjoy the privilege of rate-basing cost overruns in initial construction or in eventual incremental capital re-investment in the facility. An independent developer, meanwhile, may have no way of recouping these incremental costs.

- The utility may enjoy a fuel and purchased power tracker that allows it to pass through the risk of fuel price volatility, even while a merchant contract may have to offer a fixed price or bear some risk of fuel cost recovery.

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48 108 FERC ¶ 61,082 (2004) ("*Allegheny*"). *See also Boston Edison Co. re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991).

49 *Allegheny*, 108 FERC ¶ 61,082 at P 22.

- A plant outage, regardless of fault and except in extraordinary instances, will frequently require an independent generator either to purchase energy from the open market to meet its contractual obligations or to pay liquidated damages to the utility and its customers. Meanwhile, a utility may have regulatory treatment (such as an aforementioned fuel and purchased power tracker) that allows it to pass through to consumers incremental costs resulting from non-performance of its generator.

- A utility offering a tax-advantaged power plant may benefit from the normalization of tax benefits it receives from the United States and state tax authorities under state public utility regulation. Independent generators receive tax benefits but do not have the privilege of offering a rate subject to these extraordinary provisions which allow, over time, a lower price to be offered with a hidden subsidy from consumers through rate regulation.

These are only some of the myriad examples that would have to be addressed in the attempt to get to an apples-to-apples comparison between utility- and independent-owned generation. Accordingly, the Commission should require further proceedings, including another technical conference, to discuss the protections that would be necessary in order to have a genuinely level playing field for competitive solicitations. This is particularly true because the NOPR suggests that RFPs could potentially be used as a basis for relieving a utility of its mandatory purchase obligation under PURPA section 210(m)(1)(C).[50] That would be a dramatic step, and the Commission should initiate a separate proceeding to thoroughly explore the potential pitfalls of using RFPs and other competitive solicitations for such a purpose, rather than attempting to address it here with a vague request for comments.[51] EPSA also emphasizes, regardless of whatever RFP rules the Commission ultimately adopts, it must continue to exercise its

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[50] *See* NOPR, 168 FERC ¶ 61,184 at PP 131-133.

[51] *See id.* at P 133 ("the Commission seeks comments on any specific factors that would be useful to consider in determining how a utility or utilities may satisfy PURPA section 210(m)(1)(C)").

“backstop” oversight and enforcement authority to ensure that any requirements are implemented in a consistent and appropriate manner by individual states.

III. CONCLUSION

WHEREFORE, EPSA respectfully requests that the Commission consider the comments submitted herein in evaluating its proposed actions in this proceeding.

Respectfully submitted,

/s/Nancy Bagot

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