UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION

The Electric Power Supply Association ("EPSA")[1] respectfully submits these comments supporting the August 23, 2016 petition of Southern Maryland Electric Cooperative ("SMECO") and Choptank Electric Cooperative ("CEC") (collectively, the "Cooperatives") for a declaratory order finding that the treatment of excess power under the Maryland Public Service Commission's ("MD PSC") Community Solar Energy Generation System ("CSEGS") program does not comply with federal law, including the Public Utility Regulatory Policies Act ("PURPA") and the Federal Power Act ("FPA").[2]

EPSA supports the Petition and agrees with the Cooperatives that the Federal Energy Regulatory Commission (the "Commission") should act to ensure that the CSEGS program aligns with the jurisdictional boundaries established by the FPA and PURPA and complies with the Commission's PURPA regulations. In particular, the Petition correctly explains that, unless a solar generation facility participating in the CSEGS program is a qualifying facility ("QF") under PURPA and the Commission's

[1] EPSA is the national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. 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] *Petition for Declaratory Order of Southern Maryland Electric Cooperative, Inc. and Choptank Electric Cooperative, Inc*., Docket No. EL16-107-000 (filed August 23, 2016) ("Petition").

implementing regulations, sales of power excess to the needs of a CSEGS's subscribers are wholesale sales subject to the Commission's exclusive jurisdiction under the FPA, and therefore relieves the electric utility of mandatory purchases. And to the extent that a CSEGS solar generation facility does obtain certification as a QF and the State has jurisdiction to establish the rate for such a wholesale sale, it can only do so in accordance with the Commission's PURPA regulations, meaning that any such sales by a CSEGS QF must be priced at no more than the purchasing utility's avoided cost.

Accordingly, the Petition should be granted as the relief sought by the Cooperatives is consistent with existing law, and provides necessary clarity regarding the treatment of solar generation facilities participating in CSEGS in accordance with the FPA and PURPA. At the same time, EPSA would urge the Commission to focus on the narrow and clear concerns raised and the discrete remedies proposed by the Cooperatives. Moreover, the Commission should resist any attempts to inject issues into this proceeding that are outside the scope of the Petition, including broader issues about renewable and distributed energy resource integration.

I. INTRODUCTION AND BACKGROUND

The Petition requests that the Commission review CSEGS regulations adopted by a June 2016 MD PSC decision. The Cooperatives explain that they repeatedly attempted to clear up the ambiguities in the MD PSC's regulations at the state level but

were unsuccessful.[3] Consequently, they seek clarity from the Commission regarding their responsibilities under FPA and PURPA.

As explained in the Petition, under the MD PSC regulations, if a community solar project produces more energy than is needed by its subscribers, the local electric company must purchase and use that generation. However, neither the Maryland statute nor the MD PSC's regulations stipulate that a CSEGS must be a QF in order to obligate an electric company to purchase such excess generation. In addition, the MD PSC regulations require that, to the extent the electric company "records subscriber credits as kilowatt hours,"[4] it must pay for such excess power at "the lesser of the subscriber[']s retail supply rate or the Standard Offer Service rate in effect at the time of the payment."[5]

The Petition asks the Commission to issue a declaratory order finding that two discrete aspects of the MD PSC regulations violate federal law. First, the Petition argues that "to the extent that the CSEGS regulations require Maryland electric companies to purchase energy from a CSEGS solar facility at a particular price, Maryland regulations are preempted by the FPA unless those CSEGSs solar facilities are QFs under PURPA."[6] Second, the Petition asserts that "CSEGS regulations that

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3 Petition at 9, 12-14.

4 MD. Code Regs. § 20.62.02.07A.

5 *Id.*, § 20.62.02.07B.

6 Petition at 16.

require payment to CSEGSs at prices higher than the utility's avoided costs violate, and are preempted by, PURPA."[7]

II. COMMENTS

A. The MD PSC's Requirement That Maryland Electric Companies Purchase Excess Energy From A CSEGS Is Preempted By Federal Law Unless The CSEGS Is A QF

EPSA agrees that to the extent the MD PSC's regulation requires Maryland electric companies to purchase excess energy from non-QFs, the MD PSC has exceeded the bounds of its jurisdiction. Such purchases involve wholesale sales by the CSEGSs, and the only wholesale sales subject to regulation by the MD PSC are sales pursuant to PURPA.

While the States are empowered to regulate wholesale sales by QFs within the confines of the Commission's PURPA regulations, nothing in the Maryland statute or the MD PSC regulations require a CSEGS to have obtained QF status in order to mandate sales to Maryland electric companies. Absent a requirement that each and every CSEGS is a QF, the MD PSC cannot attempt to use PURPA as a basis for defending its CSEGS regulations. EPSA notes that such a requirement should not pose an insurmountable obstacle to implementation of the CSEGS initiative, because the CSEGS facilities are, by definition, solar-powered facilities that should have little difficulty satisfying the requirements for QF status.[8] Importantly, however, QF status will not be automatic for any CSEGS whose facilities have a net power production capacity of one MW or more, and such a CSEGS facility will, instead, have to qualify as a QF,

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7 *Id.*

8 *See* 18 C.F.R. §§ 292.203, 292.204 (2016).

just as any other non-CSEGS QF would be required to do.[9] Moreover, and as explained below, even to the extent that the MD PSC modified its regulations to stipulate that CSEGS facilities must obtain QF status before making sales to electric companies, the MD PSC's regulations must be modified to ensure that the rates for such sales comply with the Commission's PURPA regulations.

B. Any Purchases from CSEGS QFs Must be Compensated at a Rate Equal to the Avoided Cost of the Electric Company

Under Section 210 of PURPA, the Commission is required to promulgate and enforce rules obligating all electric utilities, which are defined broadly to include entities such as the Cooperatives, to purchase electric energy from QFs.[10] State authorities and nonregulated electric utilities, in turn, are required to implement the Commission's rules.[11] PURPA's statutory structure therefore makes clear that any State regulations regarding PURPA sales must be consistent with those adopted by the Commission.[12] The MD PSC regulations identified in the Petition, however, conflict with PURPA and the Commission's regulations.

Under the Commission's PURPA regulations, electric utilities are required to purchase power from QFs, either pursuant to a legally enforceable obligation or on an as available basis, at a rate that is equal to the purchaser's avoided cost.[13] To the

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9 *See* 18 C.F.R. § 292.203(a)(3) (2016).

10 *See* 16 U.S.C. § 824a-3(a).

11 *See* 16 U.S.C. § 824a-3(f).

12 *See id.*; *American REF-FUEL Company of Hempstead*, 47 FERC ¶ 61,161, at 61,533 (1989) ("states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with our regulations").

13 *See* 18 C.F.R. § 292.304.

extent that the QF elects to make sales on an "as available basis," the Commission's regulations provide that "the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery."[14] Moreover, consistent with language in the statute stating that "[n]o … rule prescribed [by the Commission] shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy,"[15] the Commission's regulations make clear that "nothing in [the regulations] requires any electric utility to pay more than the avoided costs for purchases."[16]

By contrast, under the MD PSC's regulations, the Cooperatives and other electric companies are required to purchase excess power generated by CSEGS facilities at the lesser of the full retail rate or standard offer service rate. This regulation will result in CSEGS facilities receiving payments that may be higher (potentially significantly higher) than the avoided costs of the purchaser as calculated at the time of delivery, which is contrary to the avoided cost standard under PURPA. Moreover, the Cooperatives point out that this regulation is not even aligned with the Maryland statute, which reflects the PURPA requirements by stating that excess CSEGS power "shall be purchased under the electric company's process for purchasing the output from qualifying facilities at the amount it would have cost the electric company to procure the energy…."[17]

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14 18 C.F.R. § 292.304(d)(1).

15 16 U.S.C. § 824a-3(b).

16 18 C.F.R. § 292.304(a)(2).

17 Md. Pub. Utils. Code §7-306.2(d)(7).

EPSA agrees with the Cooperatives' assertion that any regulation of wholesale sales under State initiatives, including Maryland's solar initiatives, must be firmly grounded in the avoided-cost standard in order to comply with PURPA and to avoid undue discrimination against other QFs. The Petition also stresses the importance of getting the compensation provisions right during the early stage of the pilot program to avoid "permanent arrangements that are not economic."[18] Therefore, by granting the Petition, the Commission can help foster a strong and economically sustainable program in Maryland that properly reflects the requirements of the FPA and PURPA.

II. CONCLUSION

WHEREFORE, EPSA supports the Cooperatives' Petition and respectfully requests that the Commission issue an order finding that, unless the CSEGSs are QFs, sales by CSEGSs are wholesale sales subject to the Commission's exclusive jurisdiction under the FPA, and that any sales by CSEGS QFs cannot be priced above the purchasing electric company's avoided cost.

Respectfully submitted,

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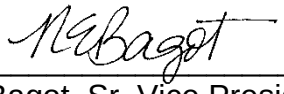
[18] Petition at 13-14.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., October 7, 2016.



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