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Termination of Mandatory Power Purchase Obligations Under the Public Utility Regulatory Policies Act of 1978

Services

Corporate

Energy Regulation

At its monthly open meeting on April 15, 2010, the Federal Energy Regulatory Commission issued two orders terminating certain mandatory power purchase obligations or contracts to purchase electric energy and capacity from qualifying co-generation and small power production facilities (QFs) of the Detroit Edison Company (Detroit Edison) and the Public Service Company of New Hampshire (PSNH).

The Commission granted the companies' requests to terminate their purchase obligations from QFs with net capacity in excess of 20 MW on a service territory-wide basis and denied without prejudice PSNH's request to terminate its purchase obligation for QFs with a net capacity of 5 MW through 20 MW. These orders provide important guidance on the circumstances under which the Commission will relieve a public utility of its power purchase obligations under the Public Utility Regulatory Policies Act of 1978 (PURPA).

1. The Detroit Edison Order

Detroit Edison sought to terminate its obligation to purchase power from QFs with net capacity in excess of 20 MW (a "large" QF) on a service territory-wide basis for its interconnected system.

Detroit Edison asserted that as a member of the Midwest ISO, QFs larger than 20 MW net capacity have non-discriminatory access to wholesale markets for the sale of capacity and electric energy under the rebuttable presumption previously established by the Commission and codified under its regulations. Only one potentially affected QF challenged Detroit Edison's filing, concerned that the utility may be proposing to aggregate the capacity of individual QF

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projects within its service territory that are under common ownership and that together have a collective net capacity of over 20 MW.

The Commission held that Detroit Edison could terminate its purchase obligation limited to QFs that "individually have a net capacity larger than 20 MW." According to the Commission, "that threshold is measured on an individual QF-by-QF basis, rather than by aggregating the net capacity of all QFs owned by a single entity." QF's net capacity, said the Commission, "is determined by its certification, whether self-certified or Commission certified" for purposes of "applying the rebuttable presumptions" of whether the QF has non-discriminatory access to wholesale markets under the Commission's regulations.

With respect to Detroit Edison's announcement that it may exercise its rights "to challenge future generation projects that appear designed to evade the 20 MW capacity limitation," the Commission stated that Detroit Edison:

> *must do so in a Commission proceeding certifying the facility as a QF, or in the context of a petition for declaratory order seeking a ruling that the self-certified net capacity or the Commission-certified net capacity of a QF is not accurate. Alternatively, Detroit Edison may file a new section 210(m) of PURPA proceeding*.

The Commission sent a clear message that without more facts, it was unwilling to make a ruling at this time.

2. The PSNH Order

The key issue addressed in the PSNH order was the rebuttable presumption that a "small" QF - that is, a QF with a capacity at or below 20 MW - does not have non-discriminatory access to markets. PSNH was the first utility to attempt to overcome this presumption.

The Commission rejected PSNH's attempt to rebut the presumption by arguing that all QFs 5 MW and larger have access to competitive markets on a non-discriminatory basis. The Commission reiterated its previous determination that an electric utility must demonstrate on a facility-specific basis that each small QF has non-discriminatory access to the market.

The Commission also addressed grandfathering QF rights and confirmed that a QF that initiates:

> *a state PURPA proceeding that may result in a legally enforceable contract or obligation prior to the applicable electric utility filing its petition for relief … will be entitled to have any contract or obligation that may be established by state law grandfathered.*

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In this instance, the Commission determined that a complaint filed by the QF prior to the time the utility filed its petition to be relieved of its PURPA purchase obligation established a legally enforceable obligation for the sale of energy and capacity by the QF.

What This Means to You
These paired orders provide powerful confirmation that the Commission intends to examine PURPA purchase obligations on a QF-by-QF basis and that 20 MW remains the agency's bright line. Large QFs are vulnerable to the termination of their PURPA sales contracts in competitive wholesale markets, but small QFs will continue to enjoy protection under the Commission's rebuttable presumption that they do not have non-discriminatory access to the marketplace.

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