**Federal—Renewable Energy**

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**— Reporters —**

Congress Extends Tax Credits for Solar and Wind Investment

Congress first approved tax credits for renewable energy projects as part of the Energy Tax Act of 1978, Pub. L. No. 95-618, § 301, 92 Stat. 3174. The Energy Tax Act provided tax incentives for both the production and the conservation of energy. *Id.* Almost three decades later, Congress established an investment tax credit (ITC) of 30% for solar projects as part of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594. Under section 48 of the Internal Revenue Code, when a commercial solar photovoltaic (PV) system or a solar thermal technology is placed into operation, an eligible developer or financer of that solar project may claim a credit on its federal corporate income taxes for a certain percentage of the cost of the PV system during that applicable tax year. 26 U.S.C. § 48(a)(3)(A). The ITC’s annual value is represented as a percentage of the given commercial project’s qualifying investment costs. Solar ITCs help facilitate solar energy development by rewarding investment in solar equipment.

Over the years, Congress has continued to extend the 30% ITC. The ITC was set to step down to 10% on January 1, 2016; however, in December 2015 Congress extended the 30% solar ITC for an additional five years, through December 31, 2019, in its omnibus spending bill, the Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, div. P, tit. III, § 303, 129 Stat. 2242 (2015). The ITC stepped down to 26% in 2020 and was scheduled to step down to 22% in 2021 and 10% in 2022.

As part of the federal government’s recent year-end $2.3 billion spending and COVID-19 relief package, in the Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020), Congress once again extended the commercial solar ITC. The final division of the Act, titled the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Taxpayer Act), Pub. L. No. 116-260, div. EE, 134 Stat. 1182, addresses renewable energy provisions, including the extension of the solar ITC. *Id.* § 132 (Extension and Phaseout of Energy Credit). The Taxpayer Act extended the ITC for not only commercial projects, including industrial and utility-scale level projects, but also residential solar projects. Under the Taxpayer Act, commercial solar projects that commence construction in either 2021 or 2022 (no later than December 31, 2022) will be eligible for the 26% ITC before it falls to 22% beginning in 2023. In 2024, the ITC will be further reduced to 10%. The most recent extension of the ITC is significant, as ITCs continue to remain a critical cost driver of commercial solar projects in the renewable energy space.

The Taxpayer Act similarly extended the federal production tax credit (PTC), which is a corporate tax credit for wind energy development and other eligible renewable sources. The PTC was otherwise set to expire at the end of 2020.

The PTC incentivizes wind turbine projects and other eligible renewable sources by providing a per-kilowatt-hour credit for electricity generated. Pursuant to section 45 of the Internal Revenue Code, a qualified wind energy developer may claim a PTC for each kilowatt hour of electricity that is sold during the decade subsequent to the wind project’s in-service date. 26 U.S.C. § 45.

Congress first enacted the PTC in 1992, a little over a decade prior to the solar ITC’s passage, and it has been extended over a dozen times. *See* Energy Policy Act of 1992, Pub L. No. 102-486, 106 Stat. 2776. For wind facilities that commenced construction in 2019, a developer qualified for 40% of the full credit amount. In 2020, instead of stepping down like the solar ITC in that year, wind projects were able to claim a PTC of 60% of the full credit amount.

With the Taxpayer Act’s extension of the 2020 PTC, all wind energy systems beginning construction in 2020 through the end of 2021 are eligible for a PTC at 60% of the full credit amount of 2.5 per kilowatt hour. *See* Credit for Renewable Elec. Prod., Refined Coal Prod., & Indian Coal Prod., & Publication of Inflation Adjustment Factors & Reference Prices for Calendar Year 2021, I.R.S. Notice 2021-32, 2021-21 I.R.B. 1159.

Order No. 872 Implementing PURPA

The Public Utility Regulatory Policies Act (PURPA), Pub. L. No. 95-617, 92 Stat. 3117, was passed in 1978 in an effort to decrease the country’s dependence on conventional fossil fuel sources such as oil and natural gas, encourage energy diversity, and introduce competition into the electric market. To that end, PURPA, and its implementing regulations, generally require traditional, regulated utilities to purchase power from qualifying cogeneration projects and qualifying small power production facilities (“Qualifying Facilities” or “QF”) at the utilities’ “avoided costs.” 16 U.S.C. § 824a-3(a); 18 C.F.R. § 292.304(a)(2). “Avoided costs” is defined as “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.” 18 C.F.R. § 292.101(b)(6).

On September 19, 2019, the Federal Energy Regulatory Commission (FERC) issued a notice of proposed rulemaking seeking to modify key aspects of the regulations implementing PURPA. *See* Qualifying Facility Rates and Requirements Implementation Issues Under PURPA, 168 FERC ¶ 61,184 (2019). FERC cited three changes since the passage of PURPA that prompted the rulemaking: (1) the United States has seen an increase in the supply of natural gas due to technological advances; (2) there has been a growth of alternative energy sources, particularly with respect to renewables, which have become cost competitive and provide a significant share of the electricity generated in the United States; and (3) the introduction of QFs as competitors to traditional utilities has led to the significant development of larger independent power production facilities. *See* 85 Fed. Reg. 54,638, 54,647–48 (Sept. 2, 2020) (to be codified at 18 C.F.R. pts. 292, 375). According to FERC, the changes to PURPA’s implementing regulations were intended to continue to encourage the development of QFs while better aligning PURPA’s regulations with the changes in the modern energy landscape.

On July 16, 2020, FERC issued its final rulemaking in Order No. 872. *See* 172 FERC ¶ 61,041 (July 16, 2020). FERC affirmed Order No. 872 on November 19, 2020, *see* 173 FERC ¶ 61,158 (Nov. 19, 2020), and the rule took effect on December 31, 2020. Although it has been in place for several months now, the implications of Order No. 872 for the renewable energy sector cannot be understated, and thus a summary of the Order’s key changes to PURPA are appropriate for this first Renewable Energy section of this *Newsletter*.

**Changes to Rates**

Under the prior regulations, a QF had two options for how to sell its power to a traditional electric utility: (1) a QF could sell as much of its energy as it chose, when such energy became available, at the rate calculated at the time of delivery; or (2) the QF could sell its energy pursuant to a contract (known as a legally enforceable obligation or “LEO”) over a specified term, at either the purchasing utility’s avoided cost calculated at the time of delivery, or the utility’s avoided cost calculated at the time the LEO was incurred. 18 C.F.R. § 292.304(d)(1)–(2). However, FERC determined that long-term fixed price contracts sometimes exceeded the utilities’ actual avoided costs at the time of delivery. 85 Fed. Reg. at 54,643.

Although the new rule maintains fixed avoided cost rates for QF capacity contracts, states now have the flexibility to require variable *energy* rates for QF sales. That is, state regulatory authorities can now require that energy rates (but not capacity rates) in QF power sale contracts vary based on the utilities’ as-available avoided costs at the time of energy delivery, rather than being fixed for the term of the contract. 18 C.F.R. § 292.304(d)(2). States are not required to adopt variable energy contracts permitted by Order No. 872, but if they choose to do so, QFs no longer have the ability to elect to have fixed energy rates. 85 Fed. Reg. at 54,648. According to FERC, this change gives states the flexibility “to ensure that the avoided cost rate will be closer to the actual rate the purchasing electric utility and its customers would have paid if the purchasing electric utility had generated this electric energy itself or purchased such electric energy from another source.” *Id.* at 54,645.

Order No. 872 also established a rebuttable presumption that the locational marginal price (LMP) established in the Western Energy Imbalance Market and the organized electric markets defined in 18 C.F.R. § 292.309(e), (f), or (g)—i.e., Midcontinent Independent System Operator, Inc. (MISO), PJM Interconnection, L.L.C. (PJM), ISO New England Inc. (ISO-NE), and New York Independent System Operator, Inc. (NYISO); Electric Reliability Council of Texas (ERCOT); and California Independent System Operator and Southwest Power Pool, Inc., respectively—represent the as-available avoided energy cost of electric utilities located in these markets. *Id.* § 292.304(b)(6), (e)(1); 85 Fed. Reg. at 54,663. In areas outside of these RTO/ISO markets, FERC also established a rebuttal presumption that prices established using liquid market hubs or, in the absence of such hubs, based on formulas from natural gas prices indices and proxy heat rate appropriately establish the as-available energy avoided cost rate. 18 C.F.R. § 292.304(b)(7), (e)(1). An aggrieved QF may challenge a state’s decision to set avoided costs in these ways, in proper relevant state commission proceedings, in a judicial review action under PURPA § 210(g), or filing an enforcement petition with FERC, and later against the state in federal district court if FERC declines under PURPA § 210(h)(2)(B).

In addition, Order No. 872 gives state commissions the authority to set energy and capacity rates in a competitive solicitation process conducted pursuant to transparent and nondiscriminatory procedures, consistent with the principles articulated in *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082, at P 18 (2004) (establishing four guidelines for competitive solicitations: (1) transparency, (2) clearly defined products, (3) standardized evaluations, and (4) oversight). 18 C.F.R. § 292.304(b)(8), (e)(1). Such a competitive solicitation must be conducted in a process that includes, but is not limited to, the following factors:

(A) The solicitation process is an open and transparent process that includes, but is not limited to, providing equally to all potential bidders substantial and meaningful information regarding transmission constraints, levels of congestion, and interconnections, subject to appropriate confidentiality safeguards;

(B) Solicitations are open to all sources, to satisfy that [purchasing] electric utility’s capacity needs, taking into account the required operating characteristics of the needed capacity;

(C) Solicitations are conducted at regular intervals;

(D) Solicitations are subject to oversight by an independent administrator; and

(E) Solicitations are certified as fulfilling the above criteria by the relevant state regulatory authority or nonregulated electric utility through a post-solicitation report.

*Id.* § 292.304(b)(8)(i). Solicitations that do not comport with these standards are presumptively in violation of PURPA’s implementing regulations.

**Modification to FERC’s “One-Mile Rule”**

Under PURPA, to qualify as a QF, a renewable energy facility cannot have a power production capacity, together with any other facilities located at the same site, that is greater than 80 megawatts. 16 U.S.C. § 796(17)(A). In 1980, FERC established the one-mile rule, which determined that facilities that are owned by the same or affiliated entities and use the same energy resource should be deemed to be at the same site for QF purposes if they are located within one mile of the facility for which QF status is sought. *See* 45 Fed. Reg. 17,959 (Mar. 20, 1980) (codified as amended at 18 C.F.R. § 292.204(a)(2)(i)). During the rulemaking, several parties argued that QF developers of small power production facilities were evading FERC’s one-mile rule, and circumventing PURPA, by siting their facilities that used the same energy resource just over one mile apart to qualify as separate facilities for QF purposes. *See* 85 Fed. Reg. at 54,696.

Order No. 872 amended the one-mile rule such that if a small power production facility seeking QF status is located one mile or less from an affiliated power producer using the same energy source, an irrebuttable presumption will be established that it is at the same site for purposes of the 80 MW cap. Likewise, if two power production facilities are located more than 10 miles apart, there is an irrebuttable presumption that they are at separate sites. However, for a small power production facility seeking QF status that is located more than one mile but less than 10 miles from an affiliated facility using the same power source, FERC’s new rule creates a rebuttable presumption that they constitute separate sites. 18 C.F.R. § 292.204(a)(2).

**Restrictions on a Utility’s Obligation to Purchase**

In 2005, PURPA was amended to relieve utilities of their obligation to purchase energy from a QF if the QF had nondiscriminatory access to the market. *See* 16 U.S.C. § 824a-3(m). In a subsequent rulemaking, FERC established a rebuttable presumption that a QF with a net power production capacity below 20 MW would not have access to competitive markets because of its small size. *See* 18 C.F.R. § 292.309(d)(1) (2007). Order No. 872 reduced this threshold, finding that “small power production facilities with a net power production capacity at or below 5 MW will be presumed *not* to have nondiscriminatory access to markets, and, conversely, small power production facilities with a net power production capacity over 5 MW will be presumed to have nondiscriminatory access to markets.” 85 Fed. Reg. at 54,715; *see also* 18 C.F.R. § 292.309(d)(2). FERC amended this rule in part because it determined QFs have better access to today’s energy markets and are better able to compete with other energy producers than they were when PURPA was first enacted.

**Challenges to QF Status**

Prior to Order No. 872, a party wishing to challenge a QF’s certification would have to file a petition for declaratory order and pay a substantial filing fee. FERC’s new rules create a new procedural mechanism whereby interested parties may now file a protest in QF certification proceedings before FERC within the time limits imposed by the rule. 18 C.F.R. § 292.207(c).

**Legally Enforceable Obligation**

Under PURPA, after a QF is certified, the mandatory purchase obligation is created when the QF enters into a legally enforceable obligation (LEO) with a utility. Order No. 872 places additional restrictions on when PURPA’s must-purchase obligation is triggered. It adds the additional requirement that QFs demonstrate that a proposed project is commercially viable and has a financial commitment, pursuant to objective state-determined criteria, in order for the QF to be eligible for a LEO. 18 C.F.R. § 292.304(d)(2). According to FERC, this new requirement will ensure that no electric utility’s obligation to purchase is triggered for QF projects that are not sufficiently advanced in their development, such that it would be unreasonable for a utility to include it in its resource planning. 85 Fed. Reg. at 54,721.