Received: May 8, 2020
IURC 30-Day Filing No.:
50331 and 50332
Indiana Utility Regulatory Commission

May 8, 2020

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PNC Center
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Via Electronic Mail (mbecerra@urc.IN.gov)

Re: Reply to Vectren's Response to Objections Made by Indiana DG, Solarize Indiana, and Morton Solar to 30-Day Administrative Filings Nos. 50331 and 50332

Dear Ms. Becerra:

Solarize Indiana, Inc. ("SI") hereby replies to Vectren's Response to Objections Made by Indiana DG ("IDG"), Solarize Indiana ("SI"), and Morton Solar to 30-Day Administrative Filings Nos. 50331 and 50332 filed with the Indiana Utility Regulatory Commission on May 5, 2020. Specifically, Solarize Indiana replies as follows:

1. PURPA and FERC's regulations implementing PURPA are both "applicable law" within the meaning of the Commission's own rule defining permissible Objections to 30-day filings relating to Cogeneration and Renewable Generation Tariffs such as Vectren's proposed CSP Tariff, and Objectors have raised the issue of whether Vectren's filings comply with that statute and those regulations.

Congress enacted PURPA in 1978 to encourage "the development of renewable and inexhaustible energy sources" and reduce our nation's dependence on traditional fossil fuels. H.R. Rep. No. 95-496(IV) at 14 (1978); *FERC v. Mississippi,* 456 U.S. 742, 750-51 (1982); *Indep. Energy Producers Ass'n., Inc. v. Cal. Pub. Util. Comm'n*, 36 F.3d 848, 850 (9th Cir. 1994). Specifically, Congress sought to overcome monopoly utilities' reluctance to buy generation from small renewable energy generators by requiring retail electric utilities to purchase electricity generated by those facilities pursuant to regulations established by the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. § 824a-3(a); 18 C.F.R. § 292.303; *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 (1983) (citing *FERC v. Miss.*, 456 U.S. at 750); *Indep. Energy Producers*, 36 F.3d at 850. This is commonly referred to as PURPA's "must-take obligation." Except for narrow statutory exceptions, nothing supersedes a renewable developer's right under PURPA to make sales to utilities and receive a prescribed price for those sales. *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,314 at P 39 (2008).

PURPA provides clear roles for both federal and state regulators to carry out PURPA's must-take obligation. FERC consults with state authorities and then promulgates rules "necessary to encourage" small renewable power generation. 16 U.S.C. § 824a-3(a); *FERC v. Miss.*, 456 U.S. at 750-51; *Indep. Energy Producers*, 36 F.3d at 856. State regulatory commissions, in turn, implement FERC's policies for state-regulated utilities. 16 U.S.C. § 824a-3(f). State regulators can choose the procedural mechanism to implement FERC's rules: issuing regulations, adjudicating cases, or taking other actions, so long as the implementation gives effect to FERC's rules. *FERC v. Miss.*, 456 U.S. at 751. State regulators act as the fact-finders, applying FERC-specified factors to calculate the price for electricity sold pursuant to PURPA's "must-take obligation" and to determine when that obligation is triggered. *See, e.g.,* 18 C.F.R. § 292.304(e) (providing factors for state regulators to consider when establishing the price, but not mandating how those factors are weighted); *FERC v. Miss.*, 456 U.S. at 759 ("§ 210 has the States enforce standards promulgated by FERC"); and 456 U.S. at 760 ("[T]he statute and the implementing regulations simply require the [state] authorities to adjudicate disputes arising under the statute."). *See also Indep. Energy Producers*, 36 F.3d at 856.

When correctly implemented, PURPA becomes the means to achieve Congress' goal to encourage new small-scale cogeneration and renewable generation. "Overall, PURPA provided a tremendous-and unanticipated-spur to technological innovation on numerous non-traditional technologies for producing electricity. From gas turbines to wind turbines, from solar cells to geothermal generators, PURPA enabled small, startup entrepreneurial firms and larger, established companies to enter the generation business." Richard F. Hirsh, *Powering the Past: A Look Back, The Public Utility Regulatory Policies Act, PURPA's Effect on Technological Innovation*, in Powering A Generation of Change, SMITHSONIAN INSTITUTION (2002), http://americanhistory.si.edu/powering/past/history4.htm. In fact, PURPA is the only policy supporting the transition to smaller-scale renewable electricity generation in some parts of the country. *See* Chris Warren, *Once an Obscure Law, PURPA Now Drives Utility-Scale Solar. Regulatory Conflict Quickly Followed*, GREENTECH MEDIA (Feb. 23, 2017), https://www.greentechmedia.com/articles/read/purpa-is-causing-conflict-in-montana#gs.uh6tWVM.

The Commission's own orders between 1979 and 1984 regarding PURPA implementation render it indisputable that both Ind. Code §§ 8-1-2.4-1 to 5 and 170 IAC 4-4.1-1 to 13 were adopted pursuant to and with the provisions required by PURPA and its implementing regulations. Notably, the caption in the Cause which initially adopted 170 IAC 4-4.1-1 to 13, Cause No. 37394, read:

> IN THE MATTER OF THE ADOPTION AND PROMULGATION BY THE PUBLIC SERVICE COMMISSION OF INDIANA OF RULES AND REGULATIONS WITH RESPECT TO COGENERATION AND ALTERNATE ENERGY PRODUCTION FACILITIES PURSUANT TO TITLE II, SECTIONS 201 AND 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978, AND PUBLIC LAW 72 ENACTED BY THE 102ND INDIANA GENERAL ASSEMBLY (PUBLIC LAW 72-1982).

In addition, the Commission's final order in that same Cause included the following prefatory statement:

> Historical Background. In 1978, Congress was concerned about the "energy crisis" and the rapid increase in the cost of electricity. It concluded that a national

energy program should be developed, and the National Energy Act was enacted. One of the five parts of the National Energy Act is the Public Utility Regulatory Policies Act (PURPA) one intent of which is to encourage conservation of energy and efficient use of energy resources by public utilities. One means of achieving this end is to encourage production of electric power by cogeneration and by small power producers.

Cogeneration is the combined production of power and useful heat by the sequential or simultaneous use of energy from one fuel source--the reject heat of one process becomes the energy input into a subsequent process. For example, approximately three-fourths of the energy used to raise steam for industrial uses actually performs useful work; the rest may be wasted if not captured for cogeneration or like use.

Small power producers are defined as facilities generating not more than 80 megawatts of electric power. They employ renewable resources such as water power, solar energy, wind energy or geothermal energy, or biomass or waste as a primary fuel.

In the past, a developer of cogeneration or small power production facilities faced three major obstacles. First, utilities were not generally required to purchase the electric power generated by these facilities. Second, some utilities charged very high rates for back-up power required by cogenerators and small power producers. Third, a cogenerator or small power producer might be subjected to the same state and federal regulation as an electric utility. Sections 201 and 210 of PURPA were designed to remove these obstacles and encourage cogeneration and small power production.

The Federal Energy Regulatory Commission (FERC) issued final rules under Section 210 of PURPA on February 19, 1980 and Section 201 of PURPA on March 13, 1980. Section 18 CFR 292.401(a) of these rules mandated that each state regulatory authority commence implementation of the new FERC regulations within one year after the effective date of the rules.

This Commission, in order to comply with PURPA and the regulations adopted by the FERC, adopted and promulgated rules and regulations concerning cogeneration and small power production facilities. Those rules became effective March 6, 1981. (See 170 IAC 4-4-1.) In 1982 the Indiana General Assembly enacted Public Law 72-1982 entitled “Alternate Energy Production, Cogeneration and Small Hydro Facilities” codified at I.C. 8-1-2.4. The statute provides that it is the policy of this State to “encourage the development of alternate energy production facilities, cogeneration facilities and small hydro facilities in order to conserve our finite and expensive energy resources and to provide for their most efficient utilization.” IC 8-1-2.4-3 states that the Commission “shall encourage the participation of utilities in alternate energy production facilities, cogeneration, and small hydro facilities.” In our order of February 11, 1983 we determined that our existing rules and regulations concerning cogeneration and small power production facilities were not comprehensive enough to cover all types of transactions addressed in Public Law 72-1982 and do not fully implement the legislative intent set forth therein. Accordingly the Commission issued a proposed rule and commenced the proceeding in Cause No. 37117. The Commission rejected the proposed rule in Cause No. 37117 as being overly technical and complicated.

In addition, the Commission in Cause No. 37117 enumerated several important standards by which this Commission should adjudge the appropriateness of any future proposed rule. First, any proposed rule should be just and reasonable to the electric consumers of the utility when measured in terms of the future benefits from a fully developed cogeneration and small power production technology and when evaluated in terms of the rates which the utility's customers must pay to support the promotion of cogeneration and small power production facilities.

Second, the proposed rules should not discriminate against any qualifying facilities and should provide sufficiently definite guidance concerning the rates which will be paid for energy and capacity from qualifying facilities so as to allow for successful negotiation of long term contracts. Third, this Commission's rules should be sufficiently broad and flexible to facilitate compliance with the rules in light of specific circumstances and unique characteristics for individual utilities and qualifying facilities. Fourth, any rule should recognize that rates for energy and capacity from qualifying facilities should embrace the “avoided cost concept” so as to optimize efficiency and the use of scarce resources, avoid unnecessary or excessive subsidies to qualifying facilities and avoid unnecessarily increased rates to electric consumers throughout the State of Indiana. Finally, any rule should be understandable, practicable and applicable by utilities and qualifying facilities of varying size and varying levels of sophistication.

Based on these standards the Staff of the Commission issued a proposed rule and we commenced Cause No. 37312. The proposed rule in that Cause was rejected because it was found to need revision. A new rule was issued and this proceeding was commenced. . . .

<u>Conclusion</u>: The proposed rule requires electric utilities to enter into long term contracts to purchase electricity from alternate energy production facilities, cogeneration facilities, or small hydro-facilities located in the utility's service territory under the terms and conditions that we find are just and reasonable to the utilities ratepayers, nondiscriminatory to alternate energy producers and encourage the development of alternate energy production facilities. The proposed rule meets the requirements as set forth in I.C. 8-1-2.4-1, et seq. and should be approved.

IT IS THEREFORE ORDERED BY THE PUBLIC SERVICE COMMISSION OF INDIANA that:

1. The proposed rule concerning the alternate energy production, cogeneration, small hydro and small power production facilities as set out in Appendix A attached hereto be, and hereby is, approved for adoption.

Final Order, Cause No. 37394, 1984 WL 994597 (Ind.P.S.C.), at *4-5, 8-9.

2. PURPA requires that each qualifying renewable generator be offered three options for selling electricity to the utility, but Objectors have fairly raised the issue of whether Vectren is doing that.

Pursuant to its Congressional mandate to set requirements for the "must-take obligation" sufficient to encourage renewable generation development, FERC's rules require that each generator be offered three options for selling their electricity to utilities. First, the generator can opt to simply sell electricity as it becomes available, with no obligation to continue doing so in the future. 18 C.F.R. § 292.304(d)(1). Second, the generator can opt to enter a long-term contract and receive a price determined at the time the electricity is delivered. 18 C.F.R. § 292.304(d)(2)(i). Third, the generator can opt to enter a long-term contract with prices over the contract term determined at contract formation (i.e., pre-determined). 18 C.F.R. § 292.304(d)(2)(ii).

The third option -- the option at issue in this case -- requires a projection (or forecast) of future prices before the contract is executed and "enables a qualifying facility to establish a fixed contract price for its energy and capacity at the outset of its obligation." 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980). A long-term contract with prices set in advance provides price certainty over the life of an investment in renewable generation, which is necessary to obtain financing and, therefore, critical for most projects. 45 Fed. Reg. at 12,224 (explaining the basis for the mandate to offer the option of a long-term contract with prices determined at contract formation); *Windham Solar LLC and Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at P 8 (2016) (recognizing that price certainty is needed for new investment); *New York State Elec. & Gas Corp.*, 71 FERC ¶ 61,027 at *14-15 (the right to prices set at contract formation is intended to provide developers with needed "certainty with regard to return on investment in new technologies"). State regulators like the IURC and state-regulated utilities like Vectren must make all three options available to each renewable energy developer under PURPA. 18 C.F.R. § 292.304(d); *Indep. Energy Producers*, 36 F.3d at 851-52, 858 (describing the three pricing options required by 18 C.F.R. § 292.304(d), expressly including the option for developers "to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed"). *See also Windham Solar and Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at P 4 and *In re FLS Energy, Inc. et al.*, 157 FERC ¶ 61,211 at P 21 (2016). States and utilities who deprive renewable energy developers of the long term price security guaranteed by FERC rules violate PURPA. Vectren's failure to offer long term contracts with predetermined prices to all developers at the time the contract is signed is one of the bases for SI's Objections to Filing Nos. 50331 and 50332.

3. PURPA requires that a utility pay a qualifying renewable generator an "Avoided Cost" price based on the electricity that the utility would have purchased "but for" the

PURPA purchase, but Objectors have fairly raised the issue of whether Vectren is doing that.

Retail utility customers are held harmless under PURPA because utilities pay only the amount it would cost to generate or purchase the electricity from another source - known as the "avoided cost" price. 16 U.S.C. § 824a-3(d); 18 C.F.R. §§ 292.101(b)(6), 292.304(d); 45 Fed. Reg. at 12,216; *Indep. Energy Producers*, 36 F.3d at 858. "In plain English, this means that public utilities purchase [renewable] power at the same rate the utility would have paid in acquiring or producing the same power through other means." Ellis-Hall Consultants, LLC v. Pub. Serv. Comm'n of Utah, 2014 UT 52, ¶ 23, 342 P.3d 256, 261. FERC regulations specify the factors that state commissions apply to calculate the "avoided cost" price, 18 C.F.R. § 292.304(e), but generators and purchasing utilities are free to negotiate, rather than litigate, the price. 18 C.F.R. § 292.301; *Public Service Co. of New Hampshire v. New Hampshire Elec. Coop. Inc.*, 83 FERC ¶ 61,224 at 62,001 n.19 (1998) ("A negotiated rate for the QF sale is always permitted."). The avoided costs to be considered depend on the source of electricity that the utility would obtain "but for" the PURPA generator. 18 C.F.R. § 292.101(b)(6). Here, as Morton Solar points out, the generation provided by the PURPA generator would avoid not only alternate generation cost but the transmission and line loss costs between the locations of the alternate generator and the PURPA generator -- but those avoided costs are not included in the price to be paid under proposed rate CSP to the PURPA generator.

4. PURPA requires that the interconnecting utility offer each qualifying renewable generator the opportunity to sell generation on terms otherwise compliant with the statute and its implementing regulations without preference or discrimination, but Objectors have fairly raised the issue of whether Vectren is doing that.

16 U.S.C.A. § 824a-3 requires that FERC's rules shall assure that the prices paid by a utility to a PURPA generator for its electricity must be both just and reasonable to consumers of the utility and non-discriminatory to the PURPA generator. These just, reasonable and non-discriminatory prices are generally determined to be equal to the buying utility's "avoided costs," i.e., the costs the utility would have otherwise incurred in procuring the same quantity of electricity from another source. *See* 18 U.S.C. § 824a–3(b) and 18 C.F.R. § 292.304(b)(2); see also *Otter Creek Solar LLC v. Green Mountain Power Corp. & VEPP, Inc.,* 2016 WL 5349739, *2-*3 (D.Vt. 2016). Here, Solarize Indiana squarely raises the issue of whether the CSP rates proposed by Vectren in Filing No. 50331 are discriminatory to PURPA generators in that they are significantly less than prices paid by Vectren to an affiliate, namely Ohio Valley Electric Corp. Additionally, SI squarely raises the issue of whether the additional multi-year standard contract proposed by Vectren in Filing No. 50332 is preferential to one large (publicly unidentified) PURPA co-generator interconnecting at the transmission level at avoided cost rates appropriate to its circumstances when Vectren is refusing to negotiate long-term contracts with multiple small PURPA alternate energy generators interconnecting at the distribution level at avoided cost rates appropriate to their circumstances.

5. Under the Commission's rules, Objectors have raised issues regarding the Vectren 30-day filings nos. 50331 and 50332 sufficient to render them "controversial" under 170 IAC 1-6 and thus to require their review by the Commission in a docketed proceeding.

According to 170 IAC 1-6-1(b), "only noncontroversial filings may be approved under this rule." According to 170 IAC 1-6-2(10), "'Noncontroversial filing'" means any filing regarding which no person or entity has filed an objection as provided under section 7 of this rule. Under 170 IAC 1-6-7(b), an "objection" within the meaning of 170 IAC 1-6-2(10) includes one made in writing, submitted in electronic format, and including a statement that the filing violates an applicable law. Here, SI made an objection in writing which was submitted in electronic format and included multiple statements that filings nos. 50331 and 50332 violated PURPA and its implementing regulations in multiple respects. Accordingly, these filings are "controversial" and may not be approved under the 30-day filing rule.

6. As Vectren expressly concedes, there is no specific number of days following a 30-day filing set by the Commission rules after which an objection to the filing cannot be considered by the Commission prior to either summarily approving or requiring the docketing of the filing.

As Vectren expressly concedes in its response, the Commission's 30-day filings rules sets no specific number of days following the filing after which an objection cannot be considered by the Commission prior to either summarily approving or requiring the docketing of the filing. Instead, Vectren effectively argues that the Commission's rules *should* include such a time limit since it is "illogical" that an objection to a 30-day filing could be made more than 30 days after the filing. Yet, the Commission rules are express that 30-days are the statutory *minimum* time which the Commission must have the filing under advisement prior to summarily approving it or requiring it to be docketed and that "additional time may be required." See 170 IAC 1-6-1(d). In addition, the only objections which the rule expressly states need not be considered by the Commission are those filed less than three (3) days before a filing is actually approved. See 170 IAC 1-6-7(e). Plainly, all the objections filed here are timely and should be considered by the Commission in determining whether Vectren's filings are "non-controversial" as required by its 30-day filing rules.

Respectfully submitted,

/s/ Russell Ellis

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