Can IOUs Now Monitor QFs For Technical Standards Compliance?

FERC Has Issued the First "Yes"

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The Federal Energy Regulatory Commission ("FERC") has handed investor-owned utilities a major victory in their continuing disputes with owners of independent electric power plants certified as Qualifying Facilities ("QFs"). In a decision issued July 30, 1997, FERC upheld virtually all of a New York Public Service Commission program requiring owners of QFs to provide data to their utility customers to allow the utilities to monitor their continuing compliance with the technical requirements for QF status.

AVOIDED COST RATES PRODUCE "STRANDED COSTS," UTILITIES SAY

Investor-owned utilities have long chafed at the requirement that they must purchase electric power from QFs at "avoided cost" rates. That requirement was imposed by a 1978 Federal statute, the Public Utility Regulatory Policies Act ("PURPA"). Spokesmen for investor-owned utilities have claimed that the avoided cost rates were far above the prevailing market prices for electricity, thus imposing billions of dollars of additional costs upon the utilities, costs which

they have sought to pass along to their ratepayers.

It has been argued, for instance, that payments to QFs represent almost 80% of the so-called "stranded costs" that utilities will incur once their retail customers are free to purchase their power needs on the open market.

FERC ADMINISTERS QF PROGRAM

PURPA gave FERC the job of deciding what facilities qualify for QF status and of policing the avoided-cost purchase program. FERC regulations establish a number of technical requirements that power production equipment must meet in order to be considered Qualifying Facilities.

For example, a cogeneration unit must meet operating standards—devoting at least five percent of its energy output to the production of industrial steam—and efficiency standards—producing an energy output that is no less than 42.5 percent of the energy input of its fuel.

FERC also has responsibility for deciding whether to revoke the QF status of a facility for failure to meet applicable standards. As utilities, and the state regulatory commissions responsible for retail rate-setting, sought to reduce the costs of buying power from QFs, they attempted to revoke the qualifying status of these independent power producers.

In California, the state's Public Utilities Commission authorized a "monitoring program" under which investor-owned utilities could simply refuse to pay full avoided-cost rates to owners of facilities they regarded as being in violation of the applicable FERC technical criteria.

CALIFORNIA PROGRAM NULLIFIED BY NINTH CIRCUIT

The QF owners, with the support of FERC, successfully sued to have the California program set aside. In Independent Energy Producers Association, Inc. v. California Public Utilities Commission. 36 F.3d 848 (9th Cir. 1994), the U.S. Court of Appeals ruled that only

FERC could determine whether a facility's QF status should be revoked. Hence, said the Ninth Circuit Court of Appeals, states cannot decide on their own that a facility is no longer a QF and ineligible to receive the full avoided cost rate for its output.

UTILITIES STRIKE OUT AT FERC

Investor-owned utilities next tried to persuade FERC to look behind applications for QF status and deny certification of facilities that, said the utilities, had only "paper qualifications" and would not meet the operating and efficiency standards once built. But FERC refused to do so. It said the eligibility of a proposed facility must be judged solely on the technical representations in the application, on the assumption that the applicant would build and operate the plant as it said it would—no matter how unlikely that seemed.

NEW YORK PSC ADOPTS MONITORING PROGRAM

That is how things stood when the New York Public Service Commission, responding to a petition from Niagara Mohawk Power Corporation, issued two orders establishing its QF monitoring program. (Case 95-E-0775 and Case 95-E-0264, Declaratory Ruling and Order on Monitoring of Qualifying Facility Status (Aug. 30, 1996); Order Denying Petitions for Rehearing (Jan. 9, 1997)).

Under the New York Commission's orders, owners of QFs located in New York were required to submit to their utility customers, on an annual basis, data pertaining to their compliance with FERC's technical requirements.

The investor-owned utilities were also empowered to require QFs to supply additional information when it was deemed necessary to ascertain whether the QF met FERC standards. QFs, for their part, could insist on the utility's execution of a confidentiality agreement, but they could not refuse to supply the information. If the data show that the facility is out of compliance, the utility can petition FERC to revoke its QF status.

N.Y. PROGRAM "A LEGITIMATE EXERCISE" OF STATE AUTHORITY

The trade association of New York QFs, the Independent Power Producers of New York, Inc. ("IPPNY"), attacked the New York Commission's program by filing a petition with FERC, asking the federal agency to declare the program unlawful under PURPA and take enforcement action to nullify New York's data-filing requirements.

In an order issued July 30, 1997, FERC refused to set aside the New York Commission's program, describing it as "a legitimate exercise of the state's ability under PURPA... to require QFs to provide purchasing utilities with sufficient information to make a reasoned decision whether a particular facility continues to satisfy the [Federal Energy Regulatory] Commission's requirements for QF status." Independent Power Producers of New York, Inc., 80 FERC¶ 61,125 (1997).

The New York program, said FERC, was consistent with the Ninth Circuit's decision striking down the California program because, unlike the California Commission, New York's Commission did not authorize utilities unilaterally to determine that independent producers no longer meet the standards for QF status.

Instead, the New York program envisaged that utilities could use the data to seek revocation of QF status from FERC. "By design and in practice," FERC stated, "the New York program appropriately respects the complementary responsibilities of this Commission and the states in ensuring that facilities that receive the economic and regulatory benefits accorded QFs under PURPA actually comply with the requirements for QF status as established by Congress and this Commission."

N.Y. PROGRAM NOT UNDULY BURDENSOME, FERC RULES

FERC also rejected an IPPNY argument that the New York Commission's monitoring program imposed an excessive burden on QFs. The information being extracted from QFs, FERC noted, was virtually identical to the data that QFs were required to provide to FERC at the time they sought QF status. Hence, the agency con-

cluded, there was no significant burden in requiring similar information to be supplied to utilities on an annual basis.

RETROACTIVE APPLICATION OF MONITORING PROGRAM HELD UNREASONABLE

IPPNY won a small victory, however, when FERC refused to allow the New York Commission to apply its monitoring program retroactively. Under the Public Service Commission's orders, QFs would have been required to supply monitoring data going back to January 1, 1994. This was unreasonable, FERC ruled. The information disclosure requirement cannot be applied to a period earlier than the date on which the New York Commission first announced it was considering such a requirement, according to FERC.

THE ENERGY WORLD HAS MOVED ON

FERC's decision undoubtedly was a surprise to the independent power community, which had relied on the Commission to support its members' efforts to retain their PURPA benefits without interference from the investor-owned utilities or state regulatory agencies. Upholding the New York monitoring program seems like a radical about-face to those who recalled the FERC's full-throated support of QF owners in the Independent Energy Producers litigation in California.

What these observers have missed, of course, is an appreciation of the fact that the energy world has moved on in the three years that have elapsed since the Ninth Circuit struck down the California Commission's attempt to domesticate independent power producers.

Today's regulators are intensely concerned about the stranded investment bills that will come due when states follow FERC's lead and adopt retail wheeling programs. In a competitive environment, saddling investor-owned utilities with the burden of absorbing "avoided cost" rates for power purchased from QFs when those same utilities cannot resell the power for anything approaching such rates presents a very troublesome problem for regulators.

Who will pay for PURPA's subsidy to owners of independent power plants? And what can be done to reduce the bill? In the context of questions like these, a program of allowing investor-owned utilities to monitor the QF status of independent power producers on a continuous basis seems rather benign.

QF OWNERS MUST SHARPEN DATA-COLLECTION SKILLS

It seems likely that other state regulatory commissions will follow New York's lead and adopt their own QF monitoring programs, modeled on the one that FERC upheld in its recent order. The pressures that induced the New York Commission to act as it did occur throughout the country.

Owners of Qualifying Facilities have little choice other than to sharpen their data collection skills and retain the best engineering expertise they can to make sure that they produce accurate information about their compliance with FERC's technical standards. Most facilities were built to comply with those standards and still do so. The marginal ones will have to litigate their status before the FERC.

The war between QFs and investor-owned utilities is about to enter a new stage.

ABOUT THE AUTHOR

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