

**STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD**

IN RE:)	DOCKET NO. TF-2016-0290
)	
INTERSTATE POWER AND LIGHT COMPANY)	RESPONSE TO BOARD ORDERS
)	

The Environmental Law & Policy Center and the Iowa Environmental Council (Environmental Intervenors) provide the following response to the Iowa Utilities Board Order issued on January 19, 2017 identifying an avoided cost methodology, scheduling a workshop and requesting comment on the methodology and the subsequent Order Requesting Comments issued on February 9, 2017.

I. INTRODUCTION.

On June 30, 2016, Interstate Power and Light Company's ("IPL" or the "Company") initiated a docket to revise its Cogeneration and Small Power Producers – Distributed Generation Tariff. *See* TF-2016-0290, Proposed IPL PURPA Tariff (June 30, 2016). On January 19, 2017, the Board rejected IPL's proposed tariff, proposed its own methodology to determine avoided costs and scheduled a workshop to discuss this methodology. *See* TF-2016-0290, Order Scheduling Workshop (Jan. 19, 2017). On February 9, 2017, the Board requested comments regarding the standard offer tariff and its proposed avoided cost methodology for facilities with a capacity of 100 kW and less. *See* TF-2016-0290, Order Requesting Comments (Feb. 9, 2017). On February 16, 2017, the Board opened a new docket at SPU-2017-0003 to accept similar comments for facilities with a capacity over 100 kW. SPU-2017-0003, Memo Opening New Docket for Comments (Feb. 16, 2017).

The Board's January 19th Order proposed an avoided cost methodology that makes avoided energy costs equal to the hourly real time Midcontinent Independent System Operator, Inc. ("MISO"), locational marginal price (LMP) in the appropriate load zone adjusted for transmission and distribution losses to reflect the level at which the QF connects to the system. *Id.* at 4. The Board's proposed avoided cost methodology would set avoided capacity costs as equal to the MISO Zone 3 capacity auction clearing price adjusted for transmission and distribution losses to reflect the level at which the QF connects to the system. *Id.* The Board's proposal would craft the tariff in a way that it simply passes through the energy and capacity values, as set above, to the QF on a monthly basis. *Id.* Lastly, for purposes of computing the cash-out amount specified in net metering tariffs, the amount paid would be a weighted average of the monthly real time LMPs associated with a typical solar or wind resource generation profile. *Id.*

On February 9, 2017, the Board issued an order requesting comments on its proposed tariff, including: (1) whether the proposed tariff provides an interconnecting customer the functional equivalent of access to the MISO market; (2) how accurately the MISO LMP approximates IPL's avoided energy costs and how accurately the MISO Zone 3 capacity auction clearing price approximates IPL's avoided capacity costs; (3) whether the avoided cost methodology is transparent; (4) whether the methodology is administratively efficient; and (5) whether the avoided cost methodology is compliant with PURPA. *See* TF-2016-0290, Order Requesting Comments at 1-2 (Feb. 9, 2017).

The order also sought comment on: (1) whether PURPA requires the standard offer tariff to offer avoided costs calculated at the time the legally enforceable obligation is incurred; (2) whether an index price like the MISO zonal LMP satisfies the requirement of avoided costs

calculated at the time the legally enforceable obligation is incurred; and (3) whether QFs with a capacity of 100 kW or less are required to use the standard offer tariff, i.e., whether they can negotiate their own rates as well. *Id.* at 3-4.

The Environmental Intervenors have previously raised concerns that the IPL's avoided cost methodologies only recognize a very narrow set of costs in its avoided cost methodology while simultaneously relying on a much broader spectrum of costs to justify utility capital investment in new generation. To be compliant with PURPA, it is necessary that the full range of avoided costs are reflected in the avoided cost methodology used by IPL. The staff's proposed methodology does not address this concern and introduces new concerns into the discussion.

As discussed in more detail below and in our initial filing in SPU-2017-0003 also filed today, environmental intervenors make the following recommendations:

- We support the Board staff's proposed methodology for the net metering cash out only. We do not support the methodology for purposes of calculating PURPA avoided costs.
- We support the use of the proxy unit methodology for setting PURPA avoided cost. The Board should advance the use of the proxy unit approach by requiring the utilities to file avoided costs using the proxy unit approach in SPPU-2017-0003.
- The Board should require a contract term of at least 15 years for all PURPA contracts.
- The Board should require the standard tariff be available for all QFs up to 20 MW.

II. BACKGROUND ON AVOIDED COSTS.

In 1978, Congress enacted the Public Utilities Regulatory Policies Act ("PURPA") in order to encourage the development of renewable energy and cogeneration and thereby increase American energy independence and reduce reliance on fossil fuels. *See* Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 (1978). Section 210 of PURPA requires large electric utilities to purchase available energy and capacity from qualifying small power

producers and facilities with cogeneration (“qualifying facilities” or “QFs”). *See* 16 U.S.C. § 824a-3 (the “must-buy” requirement). “Section 210 of PURPA was designed to encourage the development of cogeneration and small power production facilities.” *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 (1983).

Congress enacted PURPA because it recognized that the incentive structure faced by utilities would not result in development of these important forms of alternative energy. *Id.* at 404. PURPA combats an inefficient preference for utility self-generation and removes barriers for non-utility generation where such generation is cost-effective. As a result, customers benefit from a broader diversity of energy resources at no higher cost to the utility than the utility would otherwise incur, and both customers and society at large benefit from increased energy independence, increased renewable energy and cogeneration development, and a reduction in fossil fuel dependence.

PURPA’s regulations require utilities to purchase energy from QFs at the full cost that the utility does not incur because of the purchase from the QF—this is most commonly referred to as the “avoided cost.” *See* 18 CFR § 292.303. Avoided costs are “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 CFR § 292.101(b)(6). Under FERC’s implementing regulations, upheld by the U.S. Supreme Court in 1983, avoided cost rates are set at the utility’s “full avoided cost.” *Am. Paper Inst.*, 461 U.S. at 406. PURPA’s cooperative federalism structure delegated to state public utility commissions, such as the Board, the authority to determine what methodology is used to calculate full-avoided costs.

III. GENERAL COMMENTS REGARDING THE BOARD’S PROPOSED AVOIDED COST METHODOLOGY AND STANDARD TARIFF.

1. The Board Approved Standard Tariff Avoided Cost Rate Effectively Sets The Rate For All Qualifying Facilities Regardless of Size.

We have significant concerns about the Board's proposed avoided cost methodology. The Board stated that its proposed avoided cost methodology only "applies to the standard tariff for facilities with a design capacity of 100 kW or less" and "the Board has not made any proposals regarding avoided cost determinations for facilities above 100 kW." TF-2016-0290, Order Requesting Comments at 2-3 (Feb. 9, 2017). As a purely practical matter, the Board's methodology for the standard tariff effectively sets avoided costs for facilities above 100 kW, too.

Renewable energy developers have consistently told us that the utilities use the standard tariff avoided cost rates as the starting point and ending point of negotiations with qualifying facilities above 100 kW. This is consistent with the comments of Sheila Tipton, counsel for Optimum Renewables, at the February 1, 2017 workshop. *See* TF-2016-0290, Workshop Transcript at 43 (Feb. 9, 2017) ("The utilities will always fall back to their avoided cost rates that are published by the Board... they will not agree to a higher rate than that or a lower rate.") While there is a possibility for negotiated rates, the reality is that the standard tariff, and therefore the methodology for the standard tariff, sets the avoided cost rates in negotiated contracts for larger QFs.

2. The Net-Metering Cash-out Amount Should Be Considered Completely Separate From The Board's Efforts to Set an Avoided Cost Methodology.

The Board's workshop did raise another issue related to the scope of this order. Recently, the Board issued an order directing the utilities to file net metering pilot tariffs that would include "an annual cash-out of excess credits at the utility's tariffed avoided cost rate." NOI-2014-0001, Order Directing Filing of Net Metering Tariffs, at 3 (July 19, 2016). This order

connected the net metering pilot tariffs and the PURPA standard tariff. Net metering is separate from PURPA avoided costs.

It is important that the Board recognize that a methodology that may be appropriate for the net metering cash out and would be considered fair by the parties is wholly separate from a proper PURPA avoided cost methodology. The long-term certainty of the net metering tariff and the availability of retail crediting makes the cash out rate less important for achieving policy goals to encourage renewable energy development. Conversely, for QFs that do not net meter, the rates set under PURPA for energy and capacity are the primary means to achieve the policy goals of encouraging renewable energy development.

We think that the Board's proposal to use an energy cost set at the hourly real time MISO locational marginal price plus a capacity cost equal to the MISO Zone 3 capacity auction clearing price would be appropriate for the net metering cash out but not as a stand-in for an avoided cost methodology. As discussed below, we continue to have significant concerns about that methodology as a PURPA avoided cost rate for the standard tariff for systems that are 100 kW or less and that effectively set the negotiated PURPA rates for larger QFs.

3. The Board Should Consider Other Aspects of the Standard Offer Tariff Such As Contract Length and Availability for QFs above 100 kW.

PURPA's dual policy goals are to promote "the development of cogeneration and small power production facilities" and to reduce "reliance on fossil fuels." *Am. Paper Inst.*, 461 U.S. at 417. To effectuate this, PURPA ensures that QFs are provided a guaranteed avoided cost rate and requires utilities to buy their energy and capacity at those rates. However, there are also other important aspects of a standard offer tariff that impact Iowa's ability to further PURPA's dual policy goals. Additional standard contract terms in the tariff, such as contract length and the availability of qualifying facilities with a design capacity above 100 kW to use the standard

offer tariff, will further Iowa's ability to comply with PURPA's policy mandate. Standard contract terms for qualifying facilities are essential to put these small power producers in an equal bargaining position with utilities, which promotes PURPA's dual goals. As proposed, the staff methodology does not address other standard terms such as the required length of a contract.

Adding a standard contract term of sufficient length in the standard offer tariff would reduce transaction costs, further PURPA's goals, and benefit the public interest by promoting renewable energy generation. Long-term standard contract lengths prevent discrimination against QFs, because a contract term of sufficient length puts the QF in a position that approximates the position of the utility in resource planning. *See Windham Solar LLC and Allco Finance Limited*, 157 F.E.R.C. P61,134, ¶ 8 ("[A] legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors."). A standard offer term that is too short prejudices QFs when competing at avoided cost rates because utilities adding their own capacity would be based on financing models that are amortized over 20 years or longer, and avoided costs are supposed to be considered with, in part, the deferral of capacity additions. *See* 18 C.F.R. 292.304(e).

While we acknowledge that the Board is focused on the standard tariff for QFs of 100 kW or less in TF-2016-0290 and TF-2016-0294, in the absence of further action by the Board, these tariffs will set the avoided cost rates for larger QFs as well. Expanding the availability of the standard offer tariff for QFs with a design capacity up to 20 MW also promotes the goals of PURPA, reduces transaction costs, and promotes the public interest. FERC gave the Board the discretion to establish standard rates for larger QFs precisely because standard rates reduce transaction costs and are consistent with PURPA's goals to encourage cogeneration and small

power production. 45 Fed. Reg. 12214, at 12223. PURPA's implementing regulations explicitly allow setting avoided cost rates for QFs with a design capacity above 100 kW, while requiring it for facilities at 100 kW and below. 18 CFR § 292.304(c)(2).

4. Environmental Intervenors Prefer a Resource Specific Proxy Method for Setting Avoided Cost Rates.

The Environmental Intervenors continue to believe the best methodology for establishing avoided cost rates is the proxy method. A proxy unit approach focuses the determination of avoided costs on the levelized cost of a utility's next planned generating asset or on a generic generating asset such as new wind. The proxy method would reflect a utility's full cost of deploying the next MWh of generation, including capital costs.¹ When IPL and MidAmerican recently made their own cases for the construction of new wind generation, they bundled many of the benefits that PURPA requires into the overall project. The contract price of those projects would fairly and transparently address avoided costs without requiring a breakdown by each avoided cost component. If a utility chooses a proxy that is consistent with its generation goals and plans, then the rate would be cost-neutral for consumers and offer QFs an opportunity to sell their power to utilities at the going market rate, not a disadvantaged rate based on an opaque and highly theoretical modeling process.

The proxy unit approach would also simplify the development of resource-specific avoided costs. A standard rate for wind would be different than a standard rate for solar and both would be different than a standard rate for a methane digester. The different rates would reflect that each resource provides different benefits that are useful to the utility and customers. Without

¹ Carolyn Elefant, *Reviving PURPA's Purpose: The Limits of Existing State Avoided Cost Ratemaking Methodologies in Supporting Alternative Energy Development and a Proposed Path for Reform*, at 17 (2011). States using the proxy unit approach include Oregon, Idaho, Montana, and Utah.

resource-specific standard rates, utility avoided cost rates will not reflect the same value that utilities place on the various resources when it makes investments.

IV. COMMENTS ADDRESSED TO SPECIFIC QUESTIONS POSED BY THE BOARD'S JANUARY 19, 2017 ORDER

1. Does the Board's approach provide an interconnecting customer the functional equivalent of access to the MISO market?

We have several concerns with the premise underlying this question. PURPA does not require the utility to provide market access. PURPA requires the utility to purchase power at the full avoided cost. As will be discussed below, market prices do not reflect full-avoided costs. Furthermore, "functionally equivalent access" does not equate to non-discrimination for small qualifying facilities as compared to utility-scale generators.

Functionally equivalent access to the market requires addressing more than just market prices. As Karl Rabago noted:

The PURPA provision which authorizes utilities to opt out of the mandatory purchase obligation for large qualifying facilities is premised in part on the ease and well-managed processes under which generators may enter, participate, and look in, and leave organized markets. There's no showing in the record that the contracting process that the utilities in Iowa would use is as efficient as those market price processes.

Transcript at 20-21.

In fact, the staff proposal is silent on standard contract terms that would address these issues. Independent power producers typically need longer-term agreements in order to attract project financing. Standard contract terms with a long-term contract agreement for qualifying facilities are essential to put these small power producers in an equal bargaining position with utilities. These standard contract terms support growth of non-utility generation, and that is one of the core purposes of PURPA. This is an issue that needs to be addressed for QFs of 100 kW and less, and it may be even more important to be addressed for QFs above 100 kW.

In the absence of standard contract terms and evidence that the contracting process with the utility will be as efficient as participation in the MISO market, the record does not support a conclusion that the Staff proposal would be the functional equivalent of access to the market.

2. How accurately does the Board's proposed avoided cost methodology approximate the utility's avoided cost?

The Board staff's proposed methodology does not accurately capture the utilities' avoided costs because MISO market prices do not adequately capture utility avoided costs. The undervaluing of avoided costs is a fundamental concern that we have consistently expressed as part of the avoided cost tariff dockets and in INU-2014-0001. A proposed avoided cost methodology that looks *only* at wholesale market prices for energy and capacity fails to capture real and important costs that qualifying facilities will help the utility avoid.

FERC practice has explicitly recognized that market-based rates are wholly different from avoided cost rates. *See Bright Light Capital, LLC*, 157 F.E.R.C. P61,046, ¶ 12 (2016) (differentiating between market-based rates and avoided cost rates for purposes of refund remedies under section 205 of the Federal Power Act); *Weyerhaeuser NR Company, International Paper Company*, 156 F.E.R.C. P62,028, 64,054 (2016) (differentiating between market-based rates and avoided cost rates for purposes of section 203 of the Federal Power Act).

FERC regulations implementing PURPA require utilities to account for a range of factors in determining the avoided cost rates, including "deferral of capacity additions" as well as "estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour." 18 C.F.R. §§ 292.304(e), 292.302(b).

MISO market prices do not adequately account for the capital costs that are now and will be paid in the future by customers, and therefore rates based solely on MISO market prices do

not adequately reflect avoided costs. MISO market prices for the current year do not account for the avoided capital cost of adding resources. An avoided cost methodology based on MISO market prices undervalues the benefits QFs provide to utilities, especially at a time when both MidAmerican and IPL have been adding new generation and when IPL has a long-term capacity shortfall. *See* RPU-2016-0005, Direct Testimony of Brent R. Kitchen, at 8 (July 27, 2016).

While the Board's methodology provides some acknowledgment of benefits from reducing transmission constraints and line losses, the proposed methodology does not directly factor in benefits related to improving hedging and fuel diversity, providing quantifiable environmental benefits and other PURPA requirements, including those found in 18 C.F.R. § 292.304(e). The only environmental costs that show up in an LMP are short-term compliance costs. This does not account for future compliance costs. One of the benefits that MidAmerican and IPL tout related to wind that the utilities build is the ability to help with compliance in a future carbon constrained world – that benefit and avoided cost is not reflected in current MISO market prices.

More fundamentally, MISO market based rates do not adequately reflect avoided costs because they are short-term balancing markets and do not fund long-term costs of generation.

MISO's current resource adequacy construct efficiently balances capacity developed or procured on a forward basis through local or state jurisdictional planning processes. . . . As the landscape changes, however, it is now evident that MISO's markets also need to effectively and efficiently signal the need to maintain existing and/or invest in new resources necessary to assure resource adequacy in competitive retail areas that rely exclusively on markets. Given the existing PRA was not designed to meet this need, narrowly focused reforms are required to complement the existing market construct while also preserving the benefits currently derived by most of MISO's region from simple capacity balancing. . . . Without targeted enhancements the current market will continue to provide only a balancing function and will fail to efficiently support resource investment decisions in those areas of MISO that rely upon MISO's market price signals for those decisions.

MISO, Competitive Retail Solution MISO Staff Proposal, at 2 (March 18, 2016).² MISO recognizes that its capacity prices have shortcomings, and thus relying on the capacity auction as part of the avoided cost rate undervalues resource investment and creates avoided cost rates that do not provide the right signal to QFs.

A similar shortcoming exists for the energy price. In Michigan Public Service Commission proceedings very similar to the present proceeding, Karl Rabago's testimony elaborated on these shortcomings:

PURPA is focused on cost, not price. The market price for energy embodied in the MISO locational marginal price is an artifact of market operations, the bidding strategies of numerous market participants, the influence of tax incentives, and a structure designed to address very short-term congestion price conditions. The full cost of a utility resource, and hence, the full avoided cost that should be reflected in PURPA rates, includes capital investment costs, portfolio requirements, long-run resource costs—all the costs associated with the purchase from the qualifying facility, but for that purchase, the utility would incur. Markets are not designed to reveal these costs. Full avoided cost does not equate to the *price* that the utility might pay to buy one kilowatt of energy in the market; it reflects the full panoply of *costs* that the utility avoided by not generating that kilowatt itself. . . . the focus on avoided *costs* and not on *price* requires the Commission to take into account a variety of factors that are not, and likely cannot be, reflected in current markets.

In RE: Establishing the method and avoided cost calculation for Consumers Energy Company to fully comply with PURPA, MPSC Case U-18090, Dkt. #48, Rabago Direct Testimony at 8-9 (Oct. 27, 2016).³

Environmental Intervenors believe that an avoided cost methodology should place the energy and capacity benefits of QFs on an even playing field with a utility constructing its own capacity or purchasing it from sources other than QFs because this accurately captures a utility's full-avoided cost as required by PURPA. The best method is often called the "proxy plant"

² Available at <https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/CRSTT/Draft%20CR%20FCA%20Proposal%20CoreDesign.pdf>.

³ Available at <http://efile.mpsc.state.mi.us/efile/docs/18090/0048.pdf>.

methodology.

The Proxy Plant methodology is a popular methodology of calculating avoided cost rates. For instance, in the Michigan avoided cost proceedings, the Michigan Public Service Commission's Staff proposed an avoided cost methodology that calculates energy rates based on an avoided Natural Gas Combined Cycle proxy plant and calculates capacity rates based on an avoided Natural Gas Combustion Turbine proxy plant. *See e.g., In RE: Establishing the method and avoided cost calculation for Consumers Energy Company to fully comply with PURPA, MPSC Case U-18090, Dkt. #98 (Jan. 13, 2017).*⁴

In sum, MISO market prices are fundamentally different from avoided costs. Staff's proposed avoided cost methodology fails to capture avoided costs because MISO market prices do not address the myriad of factors required by PURPA's regulations and were not designed to do so.

3. Is the Board's proposed avoided cost methodology transparent?

The proposed methodology is transparent in that the MISO LMP and MISO Zone 3 capacity auction clearing price is publically available, but that is the only way it is transparent. Public availability and transparency are not the same thing. Environmental Intervenors think that the transparency that matters in this proceeding is whether an avoided cost methodology provides customers, utilities, and QFs the ability to understand how an avoided cost rate is determined and developed.

Arguably, knowing the market sets the price means that if one understands the market one knows how the rate was developed. On the other hand, the MISO market price is not transparent, because it is based solely on behind-the-scenes bidding which take into account each

⁴ Available at <http://efile.mpsc.state.mi.us/efile/docs/18090/0098.pdf>.

individual bidder's own proclivities and business interests. There is no way to look at a MISO wholesale rate and be able to extrapolate any meaningful information. What do we know, at any given time, about how the market is reflecting the individual utility's avoided cost?

As a point of comparison, if we use a proxy plant method, it is transparent because it is based on the utilities' actual cost of constructing new capacity and actual forecasts of energy costs. This is something that utilities do all the time and something that can be effectively probed by staff and stakeholders in a proceeding.

The Board's question for comment is further complicated by the difference between an avoided cost rate as delivered or forecasted. PURPA gives a qualifying facility the choice of selecting an "as delivered" rate or a forecasted contract rate:

Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

- (i) The avoided costs calculated at the time of delivery; or
- (ii) The avoided costs calculated at the time the obligation is incurred.

18. C.F.R. § 292.304(d).

The staff's proposed methodology does not appear to address how to develop a forecasted methodology, which is required by 18 CFR § 292.304(d)(ii). Even if the MISO LMP and capacity auction are used as a basis for a forecasted rate, which Environmental Intervenors believe conflicts with PURPA, the forecast would need to be modeled. There is no discussion of how this modeling would be conducted or how to forecast MISO LMP and capacity auction

prices. It would seem that this type of modeling would be significantly less transparent and more complicated than the modeling required for a resource specific proxy methodology.

4. Is the Board's proposed avoided cost methodology administratively efficient?

Tying avoided cost rates to real time MISO market prices may be efficient by some metrics, but this efficiency comes at the cost of failing to comply with PURPA. As discussed above, PURPA requires consideration of many factors not reflected or accounted for by the real time MISO LMP or capacity auction clearing price, such as the factors required to be considered at 18 CFR § 292.304(e).

Another piece of the proposed methodology's apparent administrative efficiency is that it relies on the use of a rate calculated solely at the time of delivery—the real time MISO LMP and the capacity auction clearing price—but this does not fully comply with PURPA because there's no option for a QF to select a forecasted rate. As discussed and cited above, PURPA regulations are clear that the QF shall have the option to select rates based on time of delivery or forecasted rates. See 18 CFR § 292.304(d). The process of developing a forecasted rate based on the staff's proposed methodology would eliminate any administrative efficiency since such a calculation would likely be more complicated than the modeling required for other methodologies such as a resource specific proxy methodology.

5. Is the Board's proposed avoided cost methodology compliant with PURPA?

The Board's approach does not comply with PURPA because it does not capture the full avoided costs to the utility, it does not provide a forecasted rate, and it unduly discriminates against QFs. As discussed above, the proposed methodology does not account for a number of the factors PURPA requires states to consider, such as capacity deferrals, avoided environmental compliance costs, dispatchability of the QF, etc.

The absence of a forecasted avoided cost rate violates PURPA. PURPA gives the qualifying facility the option to select either avoided cost at the time of delivery or a forecasted avoided cost at the time the obligation is incurred. 18 C.F.R. § 292.304(d). The Board's proposed avoided cost methodology and tariff is almost identical to the one recently struck down by a federal court in Massachusetts. *See Allco Renewable Energy, Ltd. v. Mass. Elec. Co.*, 2016 U.S. Dist. Lexis 130617 (D. Mass. Sept. 23, 2016).

In *Allco Renewable Energy*, the Massachusetts Department of Public Utilities ("MDPU") promulgated a standard offer tariff that set the avoided cost rate as equal to the "Shortrun Rate." *Id.* at *5. The short-run rate is the "hourly market clearing price for energy and the monthly market clearing price for capacity, as determined by" ISO New England, Inc.. The Board's proposed methodology provided a purchase rate "equal to the payments received by [National Grid] from the ISO power exchange for such output for the hours in which the QF generated electricity in excess of its requirements." *Id.*

The MDPU argued that its standard offer tariff properly interpreted 18 CFR § 292.304(d), which requires that each qualifying facility shall have the option either to sell on an as available basis or pursuant to a legally enforceable obligation. *Id.* at *17. MDPU argued that the initial choice of whether the sale is "as available" or "pursuant to a legally enforceable obligation" belongs to the state regulatory authority, and that because the MDPU has chosen for sales to occur on only an "as available basis," the only rate to which Allco is entitled is the avoided cost calculated at the time of delivery. *Id.* at *18. The Court flatly rejected this "strained reading" of FERC regulations. *Id.* at *17.

The Massachusetts federal court held that the plain language of FERC's regulation conflicts with a standard offer tariff that does not contain a forecasted rate option. *Id.* at *22. The

court reasoned that “an hourly market rate does not allow calculation of avoided costs at the time the obligation is incurred.” *Id.* at *23. The court also rejected MDPU’s argument that their tariff effectuated Congress’ intent in enacting PURPA, because the court found that PURPA’s intent was to allow “a QF to establish a fixed contract price for its energy and capacity at the outset of its obligation.” *Id.* at *21.

The Environmental Intervenors also think the Board’s proposed avoided cost methodology is discriminatory. The proposed methodology sets an avoided cost rate that provides different time horizon and valuation than is provided in proceedings for utility generation, which conflicts with PURPA’s regulations that requires avoided cost rates not discriminate against QFs. *See* 18 CFR 292.304(a). Furthermore, as discussed above, the MISO market provides only a balancing function and MISO market prices do not reflect the utility’s full avoided costs, as required by PURPA.

IV. COMMENTS ADDRESSED TO SPECIFIC QUESTIONS POSED BY THE BOARD’S FEBRUARY 9TH, 2017 ORDER

1. Does PURPA require that the standard tariff offer avoided costs calculated at the time the legally enforceable obligation is incurred?

PURPA explicitly requires that a qualifying facility have the ability to choose avoided costs calculated at the time the legally enforceable obligation is incurred:

Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery;

or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

18. C.F.R. § 292.304(d). In order to meet this requirement, the standard tariff must have both a method for calculating the rate at the time of delivery and a method of calculating at the time a legally enforceable obligation to sell power is incurred, e.g., a rate forecasted at the time the QF elects to exercise its rights under the standard offer tariff.

For a more detailed analysis of this specific question and why PURPA regulations require a forecasted rate, refer to our comments addressed to question 5 from the Board's January 19th Order above. *See infra* § IV.5.

2. If the answer to the first question is “yes,” does the specification of an index price as the price to be paid (such as a MISO zonal LMP) satisfy the requirement?

The specification of an index price does not satisfy the requirement to provide an option for a forecasted rate, which has been discussed at length above. This question goes to the fundamental purpose of PURPA.

FERC has stated that the purpose behind PURPA [is] furthered by allowing a QF to establish a fixed contract price for its energy and capacity at the outset of its obligation. A Fixed contract price provides a potential investor in a QF with reasonable certainty about the expected return on a potential investment. As such, FERC has consistently affirmed the right of QFs to long-term avoided cost contracts or other legally enforceable obligations with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred.

Allco Renewable Energy, Ltd., 2016 U.S. Dist. LEXIS 130617, at *21 (internal citations omitted). The option for a QF to elect a rate calculated at the time the obligation is incurred is designed to provide a QF the certainty needed to attract financing and develop a project. An indexed price fails to provide the certainty that will lead to investment in QFs. The *Allco* court, in holding that an index rate does not meet PURPA requirements, explained that “an hourly market rate does not allow calculation of avoided costs at the time the obligation is incurred.” *Id.*

at *23.

3. Are facilities with a design capacity of 100 kW or less that are not electing net metering required to use the standard tariff or are they allowed to negotiate an avoided cost rate with the utility?

PURPA allows QFs and utilities to negotiate their own rates outside of the avoided cost published by the Board:

Nothing in this subpart: 1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart.

18. C.F.R. § 292.301.

Respectfully submitted this 27th day of February, 2017.

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