

**STATE OF MICHIGAN**

**BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

In the matter on the Commission’s own motion to )  
Examine the changes to the regulations )  
Implementing the Public Utility Regulatory Policies ) Case No. U-20905  
Act of 1978, 16 USE 2601 *et seq.*, pursuant to the )  
Federal Energy Regulatory Commission Final Order )  
No. 872. )  
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Introduction

The Michigan Energy Innovation Business Council (“Michigan EIBC”) and Advanced Energy Economy (“AEE”) (collectively “Michigan EIBC/AEE”) are pleased to submit comments to inform the Michigan Public Service Commission’s (“MPSC” or “Commission”) examination of changes in the regulations implementing the Public Utilities Regulatory Policies Act of 1978 (“PURPA”) pursuant to the Federal Energy Regulatory Commission (“FERC”) Final Order No. 872 (“FERC Order 872”).<sup>1</sup>

Michigan EIBC/AEE appreciate the Commission’s attention to this issue and agree with the clear clarification in the Commission’s Order in Case No. 20905 from January 21, 2021

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<sup>1</sup> *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 172 FERC ¶ 61,041 (“Order 872”).

("Order No. 20905")<sup>2</sup> that FERC Order 872 does not require the modification of any existing PURPA contracts, settlement agreements, or Commission Orders. Michigan EIBC/AEE additionally agree with the Commission's affirmation that "contract date extensions relating to QF contracts entered into prior to the effective date of Order 872 should not be considered new and subject to any changes from Order 872."<sup>3</sup>

### Legally Enforceable Obligation

Before answering the Commission's questions on an expedited review process, we offer some comments on the Commission's approach to LEOs that we feel are relevant to whether an expedited review process to adjudicate disputes related to LEO formation is needed, and if so, what that process would look like. As described by the Commission, FERC Order 872 "requires states to establish objective and reasonable criteria to determine a QF's commercial viability and financial commitment to construction of a generation facility before a QF is entitled to an LEO."<sup>4</sup> As the Commission notes, FERC Order 872 describes "several examples of how a QF can make such a demonstration including: (1) taking meaningful steps to obtain site control adequate to commence construction of the project at the proposed location; (2) filing an interconnection application with the appropriate entity; and (3) submitting all applications, including

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<sup>2</sup> MPSC Order in Case No. U-20905, *In the matter on the Commission's own motion to examine the changes to the regulations implementing the Public Utility Regulatory Policies Act of 1978, 16 USE 2601 et seq., pursuant to the Federal Energy Regulatory Commission Final Order No. 872, dated January 21, 2021* ("Order No. 20905").

<sup>3</sup> *Id.*, p. 24.

<sup>4</sup> *Id.*, p. 4.

filing fees, to obtain all necessary local permitting and zoning approvals.”<sup>5</sup> In addition, FERC Order 872 requires that any criteria that a state adopts for determining whether a QF is entitled to an LEO must be within the control of the QF, rather than the utility. FERC reaffirms

“that requiring a QF to have a utility-executed contract or interconnection agreement, or *requiring the completion of a utility-controlled study places too much control over the LEO in the hands of the utility and defeats the purpose of a LEO and is inconsistent with PURPA. When reviewing factors to demonstrate commercial viability and financial commitment, states thus should place emphasis on those factors that show that the QF has taken meaningful steps to develop the QF that are within the QF's control to complete, and not on those factors that a utility controls.*”<sup>6</sup> (emphasis added)

Michigan EIBC/AEE do not believe that the Commission’s proposal to require regulated utilities to develop their own LEO standards in upcoming PURPA proceedings is consistent with FERC’s directive to the states to establish “standards” on this subject. The term “standards” implies generally applicable policies, not policies that differ by utility. Allowing regulated utilities to set the criteria on their own, rather than comply with “state-determined” criteria, does not sufficiently ensure that a regulated utility's criteria will be objective and reasonable and within the control of the QF rather than the regulated utility.

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<sup>5</sup> *Id.*, p. 29.

<sup>6</sup> *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 172 FERC ¶ 61,041 (Order 872), p. 381.

Moreover, Michigan EIBC/AEE cannot discern a public policy reason to establish different LEO requirements for each utility. Doing so would create an unreasonable and unnecessary burden on QFs and other stakeholders who will have to participate in multiple contested case proceedings and on QFs who would have to conform to different standards for each utility.

Michigan EIBC/AEE are also concerned that establishment of guidelines by individual regulated utilities for a continued case-by-case assessment may not allow for consistent application of these requirements across the state and may give regulated utilities unreasonable control over when an LEO is formed. For example, as indicated by FERC Order 872, “requiring the completion of a utility-controlled study places too much control over the LEO in the hands of the utility ... and is inconsistent with PURPA.”<sup>7</sup> However, some regulated utilities in Michigan have often required QF’s to complete utility-controlled studies in order to establish an LEO. Such utility-controlled requirements are unreasonable and violate PURPA as well as FERC Order 872.

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<sup>7</sup> *Id.*

Instead, Michigan EIBC/AEE argue that the Commission should establish formal but flexible rules with respect to the range of demonstrations that may be made by a QF to establish an LEO. Such rules would be binding on all regulated utilities, rather than giving regulated utilities the discretion to set their own requirements on a case-by-case basis. Michigan EIBC participated in the MI Power Grid Interconnection workgroup including providing multiple sets of comments on the proposed LEO rulemaking. Throughout that process, Michigan EIBC maintained that any demonstrations required to establish that a QF is entitled to an LEO should be within the control of the QF and should not require any action to be taken by the regulated utility. FERC Order 872 similarly establishes that establishment of an LEO should require actions that are within the QF's sole control.

### Response to Questions

As described above, Michigan EIBC/AEE have concerns with the process by which the Commission intends to establish that an LEO has been formed, and believe that this approach has a bearing on our responses below to the two questions posed by the Commission. Setting aside those concerns, Michigan EIBC/AEE respond to these questions sequentially below.

*1. Whether an expedited Commission review process to adjudicate any disputes that may arise as to whether an LEO has been formed in a particular instance has merit?*

Michigan EIBC/AEE believe that an expedited Commission review process to adjudicate any disputes that may arise regarding whether a QF is entitled to an LEO would be very valuable. Such a process would be particularly important in the absence of uniform statewide guidance regarding the requirements for a QF to establish an LEO. With the continuation of a utility-by-utility case-by-case determination process, it is likely that disagreements will arise between QFs and regulated utilities on a relatively frequent basis. (If, as we request above, the Commission adopts generally applicable LEO standards, the potential for disputes would be greatly reduced.) It would be highly undesirable if QF development could be held up for years while these disputes are being litigated. Moreover, it should be noted that the price that a QF will receive for its output is determined by when it forms an LEO. In the absence of certainty on this issue, QFs cannot confidently incur major expenditures required in the development of their projects, such as for facility design and engineering, land-use and environmental approvals, and interconnection studies.

In addition, it is worth noting that it is more likely that smaller, less well-resourced companies will propose PURPA projects in Michigan as opposed to large transmission-

connected projects. Unfortunately, many of those QFs will not have the knowledge, financial resources, or legal expertise to file a formal complaint with the Commission regarding these disagreements. Additionally, QFs may not have the option to spend months litigating an LEO issue with a regulated utility. As such, if the Commission proceeds with the LEO determination process outlined in Order No. 20905, Michigan EIBC/AEE support the establishment of an expedited review process to adjudicate disputes as to whether a regulated utility must offer the QF an LEO.

*2. To the extent that such a process would enhance certainty and reduce unnecessary transaction costs, how should such an expedited review process be structured?*

The design of the dispute resolution process is dependent on the nature of the LEO standards. Under the sort of generally applicable, objective LEO standards that Michigan EIBC/AEE would favor, there would be little potential for factual dispute about whether the standards had been met. There are several general requirements that should be included in such standards defining the formation of an LEO: file the project in the utility's interconnection queue, register with FERC as a QF, obtain site control, and submit formal notice to the utility offering a proposed project and the intention to negotiate a contract with the regulated utility under PURPA. With this sort of objective standard established by the Commission, the burden should be on a utility that challenges LEO formation to file an objection with the Commission including a sworn statement documenting that one or more

of these requirements has not been met, and to carry the burden of proof on this issue. The QF should be given 30 days to present a rebuttal with supporting evidence and the Commission should resolve the dispute on the paper record within 30 days unless it determines that an evidentiary hearing is necessary.

On the other hand, if the Commission were to allow for utility-specific LEO standards, it would be difficult to design a dispute resolution procedure without knowing what the elements of those standards will be. However, in general, in the case of such a dispute, the QF should be required to lay out all of the items it has done to secure an LEO to the Commission. The utility should then be required within a short time period (e.g., 14 business days) to respond as to why they do not agree that the QF has established an LEO. These filings should go before the Commission at their next scheduled meeting. In general, Michigan EIBC/AEE believe that disputes should generally be decided on a paper record within 60 days.