STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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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 USC 2601 *et seq*., pursuant to the Federal Energy Regulatory Commission Final Order No. 872.	Case No. U-20905
In the matter, on the Commission's own motion, establishing the method and avoided cost calculation for **ALPENA POWER COMPANY** to fully comply with the Public Utility Regulatory Policies Act of 1978, 16 USC 2601 *et seq*.	Case No. U-18089
In the matter, on the Commission's own motion, establishing the method and avoided cost calculation for **CONSUMERS ENERGY COMPANY** to fully comply with the Public Utility Regulatory Policies Act of 1978, 16 USC 2601 *et seq*.	Case No. U-18090
In the matter, on the Commission's own motion, establishing the method and avoided cost calculation for **DTE ELECTRIC COMPANY** to fully comply with the Public Utility Regulatory Policies Act of 1978, 16 USC 2601 *et seq*.	Case No. U-18091
In the matter, on the Commission's own motion, establishing the method and avoided cost calculation for **INDIANA MICHIGAN POWER COMPANY** to fully comply with the Public Utility Regulatory Policies Act of 1978, 16 USC 2601 *et seq*.	Case No. U-18092

In the matter, on the Commission's own motion, establishing the method and avoided cost calculation for **NORTHERN STATES POWER COMPANY** to fully comply with the Public Utility Regulatory Policies Act of 1978, 16 USC 2601 *et seq*.	)	Case No. U-18093
In the matter, on the Commission's own motion, establishing the method and avoided cost calculation for **UPPER MICHIGAN ENERGY RESOURCES CORPORATION** to fully comply with the Public Utility Regulatory Policies Act of 1978, 16 USC 2601 *et seq.*	)	Case No. U-18095
In the matter, on the Commission's own motion, to establish MI Power Grid.	)	Case No. U-20645
In the matter, on the Commission's own motion, to commence a collaborative to consider best practices to ensure cost-effective development of new energy resources and to limit procurement barriers for emerging technologies, including processes for competitive bidding.	)	Case No. U-20852

At the July 2, 2021 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Tremaine L. Phillips, Commissioner
Hon. Katherine L. Peretick, Commissioner

ORDER

Background

On October 4, 2019, the Federal Energy Regulatory Commission (FERC) began the process of updating and revising rules under the Public Utility Regulatory Policies Act of 1978, PL 95–617;

92 Stat 3117 (PURPA) by issuing a notice of proposed rulemaking. On July 16, 2020, FERC issued an order, *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of* 1978, 172 FERC ¶ 61,041 (2020) (Order 872), which included significant revisions to the implementation of statutory Sections 201 and 210 of PURPA, 16 USC 824a-3, in the rules set forth in 18 CFR Parts 292 and 375. These revisions impact the areas of rates paid to qualifying facilities (QFs), the so-called "one-mile" rule, a utility's obligation to purchase, legally enforceable obligations (LEOs),[1] and QF self-certification.

With respect to LEOs, Order 872 requires states to establish objective and reasonable criteria to determine a QF's commercial viability and financial commitment to the construction of a generation facility before a QF is entitled to an LEO. The order states that the factors a state may require a QF to demonstrate must be in the QF's control and provides the following non-exhaustive list of examples: (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 filing fees, to obtain all necessary local permitting and zoning approvals. The order also clarifies that a demonstration of financial commitment does not require the QF to show that it has obtained financing and that requiring a showing of obtained financing or a signed power purchase agreement (PPA) is prohibited. Rather, requiring QFs to apply for all relevant permits, to take meaningful steps to seek site control, or to meet other objective and reasonable milestones in the QF's development can sufficiently demonstrate QF developers' financial commitments. Order 872, ¶¶ 684-688.

[1] Pursuant to 18 CFR 292.304(d)(1)(ii), a qualifying facility has the option to provide energy or capacity pursuant to an LEO.

On October 29, 2020, the Commission issued an order in the above-captioned dockets (October 29 order) seeking comments from electric providers and other stakeholders regarding the impact of Order 872 on the Commission's implementation of PURPA. Specifically, the Commission asked the following: (1) to what extent does Order 872 require modification of the Commission's prior orders, contracts, and tariffs, and how; (2) what process, if any, should be used to update approved PURPA tariffs and documents; (3) what are the implications of the directives and guidance in Order 872 pertaining to competitive bidding for Michigan procurement, is there an interest in moving to a competitive bidding model, and how should such a model be adopted; and (4) is further guidance from the Commission necessary to define an LEO whether through a rulemaking or Commission order(s)? October 29 order, pp. 8-9.

On November 19, 2020, FERC issued another order, *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 173 FERC ¶ 61,158 (2020) (Order 872-A) addressing arguments raised on rehearing and clarifying, in part, its final rule, Order 872. In Order 872-A, FERC denied rehearing requests but clarified the following areas addressed in Order 872: (1) tiered avoided cost pricing; (2) variable energy rates in QF contracts and availability of utility avoided cost data; (3) the role of independent entities overseeing competitive solicitations that set avoided cost rates; (4) the circumstances under which a small power production QF needs to recertify; (5) the application of the rebuttable presumption of separate sites for the purpose of determining the power production capacity of small power production facilities; and (6) the PURPA section 210(m) rebuttable presumption of nondiscriminatory access to markets and accompanying regulatory text.

On January 21, 2021, the Commission issued an order (January 21 order) summarizing the comments and reply comments received in response to the October 29 order. In the January 21 order, the Commission: (1) found that Order 872 and Order 872-A apply prospectively and do not impact existing PURPA contracts, and that any potential revisions permitted by Order 872 and Order 872-A will be addressed on a case-by-case basis in a rate-regulated utility's avoided cost review proceeding; (2) directed any utility that receives authorization from FERC to terminate its obligation to purchase from QFs above five megawatts (MW) in size to provide a rationale in its avoided cost review case as to why the standard offer cap should not be set at five MW; (3) adopted the competitive procurement requirements and standards set out in Order 872 (and as clarified by Order 872-A) and directed the Commission Staff (Staff) to incorporate these standards into the competitive procurement workgroup; (4) adopted the factors for consideration of whether a QF has demonstrated commercial viability and financial commitment, indicated that additional guidance from the Commission as to when an LEO is established would be beneficial, and directed each utility to file in its next avoided cost review objective and reasonable LEO criteria consistent with Order 872 and Commission precedent; and (5) sought comment on the potential use of an expedited LEO review process to resolve any potential disputes regarding whether an LEO has been established. January 21 order, pp. 24-34. Specifically, the Commission asked:

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?

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?

Id., pp. 33-34. Comments were due no later than 5:00 p.m. (Eastern time (ET)) on February 11, 2021, with reply comments due no later than 5:00 p.m. (ET) on February 25, 2021.

On February 11, 2021, the Commission received comments from the Staff, Michigan Electric and Gas Association (MEGA), Michigan Energy Innovation Business Council (EIBC), the Environmental Law and Policy Center and Vote Solar (together, ELPC), Consumers Energy Company (Consumers), and DTE Electric Company (DTE Electric). DTE Electric and Consumers also filed reply comments. This order summarizes the comments and reply comments and provides further guidance on how the Commission will proceed with developing an expedited LEO review process. Additionally, this order will provide further guidance to each utility that will be filing its LEO criteria in a standalone proceeding[2] and provide guidance as to the Commission's expectations of what criteria may be relied upon to establish an LEO, consistent with the requirement articulated by FERC in Order 872 and Order 872-A.

Comments and Reply Comments

The Staff, in its comments, asserts that an expedited LEO review proceeding would benefit QF developers and utilities by reducing litigation time and expense when disputes regarding the establishment of an LEO inevitably arise. The Staff notes that time is particularly important for

[2] The Commission has authorized Consumers, Upper Peninsula Power Company (UPPCo), Upper Michigan Energy Resources Corporation (UMERC), and Indiana Michigan Power Company (I&M) to include their respective biennial avoided cost reviews in their upcoming IRP cases. *See*, February 7, 2019 order in Case No. U-18094, p. 2; June 7, 2019 order in Case No. U-20165, Exhibit A, ¶ 1; February 18, 2021 order in Case Nos. U-18095 *et al*., p. 5; and March 19, 2021 order in Case Nos. U-18092 *et al*., p. 5. However, the Commission directed each utility to not include the LEO criteria in its IRP application, as the Commission determined that the IRP proceeding is not the appropriate venue to address the LEO issue. Therefore, each utility that includes its avoided cost review in its IRP case will submit its LEO criteria in a standalone proceeding pursuant to the directions provided in this order.

QF projects that may lose eligibility for federal tax credits, lose contracts with subcontractors, or miss construction seasons because of litigation delays. Staff's comments, pp. 2-3.

The Staff also provides a possible structure for an LEO review process. *Id*., pp. 4-8. First, the Staff emphasizes that the success of any LEO review process depends on the establishment of LEO criteria with which to evaluate in an LEO review proceeding. *Id*., p. 4. The Staff then suggests the following process for an informal LEO review:

1. The QF submits an informal "LEO Review Request" to Staff explaining its position and why it believes an LEO exists. The QF should explain how it has met the utility's LEO criteria approved in the utility's biennial PURPA proceeding and describe the nature of the dispute with the utility. The QF does ***not*** need to hire an attorney to file an informal request or to represent the QF in the expedited process.

2. After the QF submits its LEO Review Request, Staff will have five (5) calendar days to notify the utility and request a response from the utility within fourteen (14) calendar days from the time it received the LEO Review Request from Staff.

3. The utility will send its response to both Staff and the QF, and it will address all the claims in the QF's LEO Review Request. The utility should also explain what steps it believes the QF needs to complete in order to establish an LEO.

4. The QF will then have fourteen (14) calendar days to reply to the utility's response, addressing any perceived inaccuracies, and will send its reply to both Staff and the utility.

5. Staff will schedule a meeting with the QF and the utility, which will occur within fourteen (14) calendar days of the QF's response, and act as a mediator at the meeting.

6. Within 14 calendar days of the mediation meeting, Staff will prepare a memo with its recommendations and send it to the QF and the utility.

7. If mediation is unsuccessful, the QF may file a formal complaint, which could also be expedited as described below.

Id., p. 5 (citing Exhibit 1 to the Staff's comments) (emphasis in original). The Staff explains that in the event of a formal complaint, the Staff's memo (which would not include any description of

the parties' negotiation positions or settlement offers, consistent with Rule 408 of the Michigan Rules of Evidence, MRE 408) and the informal complaint document submitted by the QF would facilitate an expedited formal complaint process. *Id*., pp. 6-7. To shorten the length of a formal complaint process, the Staff suggests that the Commission could utilize an expedited or 90-day process that dispenses with pre-filed testimony and briefing and relies on a trial approach with live direct testimony and closing arguments at a single evidentiary hearing. *Id*., p. 7. The Staff notes that in a formal proceeding, the QF would need to be represented by an attorney. *Id*., p. 8.

Before responding directly to the Commission's questions in the January 21 order, EIBC restates the guidance Order 872 provided with respect to the factors a state commission may consider in determining whether an LEO has been formed and the directive for state commissions to establish objective and reasonable LEO criteria. EIBC's comments, pp. 2-3. EIBC then states that it believes the Commission's directive for rate-regulated utilities to develop their own LEO standards is inconsistent with FERC's directive and does not ensure that objective and reasonable criteria are within the control of the QF rather than the utility. *Id*., p. 3. EIBC also notes that it does not see a public policy reason for establishing different LEO standards for each utility and that doing so will not allow for consistent application. *Id*., p. 4. EIBC argues that "formal but flexible" rules are more appropriate to establish LEO criteria. *Id*., p. 5.

Maintaining that its recommended rulemaking proceeding is preferred, EIBC nonetheless states that it believes an expedited LEO review process would be valuable in terms of decreasing litigation times and ensuring certainty for QFs that are incurring expenses for project development. *Id*., pp. 5-6. EIBC also notes that such a process would be beneficial for the smaller, less well-resourced QFs that are likely to make up PURPA projects in Michigan. *Id*., pp. 6-7. As to the structure of an LEO review process, EIBC states that the structure depends on the nature of the

LEO standards that will be established. According to EIBC, the LEO definition should include: (1) applying to the utility's interconnection queue; (2) registration with FERC as a QF; (3) obtaining site control; and (4) submitting formal notice to the utility offering a proposed project with an intent to contract. *Id*., p. 7. With these standards, EIBC explains that the burden should then be on the utility to dispute LEO formation with a 30-day rebuttal period for the QF, after which the Commission could resolve the dispute within 30 days. *Id*., pp. 7-8. In the event utility-specific LEO standards are used, EIBC avers that the QF would explain how it has established an LEO, the utility would then be required to respond within a short timeframe, and that these filings would go before the Commission for a decision issued within 60 days. *Id*., p. 8.

While contending that an expedited LEO review process has value in terms of the harm caused by prolonged litigation that can delay QF projects, ELPC echoes EIBC's comments that a rulemaking is the better venue to establish an LEO definition. ELPC's comments, pp. 1-2. ELPC also comments that the structure of any LEO review proceeding should not be prohibitively time consuming or expensive and should retain a QF's right to file a traditional complaint with the Commission. Additionally, ELPC asks that the Commission establish proceeding guidelines outlining acceptable methods of submitting evidence and standards of review. *Id*., p. 2. ELPC also suggests that any LEO review proceeding take place outside of a utility's biennial avoided cost review proceeding. *Id*., p. 3. Lastly, ELPC recommends that QFs have the opportunity to establish LEOs for capacity and energy at different points in their contracts. ELPC explains:

> For example, if a QF establishes a LEO when a utility has no capacity need, the LEO should be construed as an energy-only LEO and does not obligate the QF to sell, or allow the utility to include in any capacity demonstration, the capacity provided by the project. The utility could either recognize at the time the energy-only LEO is formed that it will convert to a LEO to purchase energy and capacity at such time that the utility has a capacity need, or there could be a procedure for the QF to request a LEO determination for capacity through an expedited proceeding.

Id., pp. 3-4.

MEGA comments that an expedited review process would be beneficial to both utilities and QFs and points out that, with each utility filing its LEO criteria, QFs will have the information necessary to determine how to establish an LEO which will further reduce disputes. MEGA's comments, pp. 3-4. MEGA contends that because these criteria will be available to QFs, an expedited LEO review process should impose the burden on the QF to demonstrate why it meets the utility's Commission-approved LEO criteria. MEGA adds that an expedited LEO process should not foreclose the formal complaint process for a QF. *Id*., p. 4.

Consumers, in its comments, supports the Commission's adoption of FERC's guidance in Order 872 regarding the factors to consider in determining whether an LEO has been established but requests that the Commission clarify that a QF must demonstrate its commercial viability and financial commitment prior to an LEO and that a QF's assertion of meeting these requirements does not by itself establish an LEO. Consumers also suggests that because there is more to learn about QF viability as projects are developed over the years, the Commission should continue to assess additional objective factors on a case-by-case basis and should revisit more prescriptive LEO criteria in the future. As to the expedited LEO process, Consumers supports such a proceeding with clear timing parameters. Consumers' comments, p. 3.

As to the structure of an LEO review proceeding, Consumers recommends that the Commission clearly define the timing parameters and rights and obligations of each party and, to allow for a full and complete record, establish a proceeding at least 180 days in duration. *Id*., p. 4. The company then contends that the QF must be required to provide all evidence it intends to rely on to demonstrate it has established an LEO, such as evidence that it has presented its LEO claim to the utility and made good faith efforts to contract with the utility. An opportunity for reasonable

discovery and a response would follow. *Id*., pp. 4-5. Acknowledging the burden that may arise from litigating multiple LEO claims from different QFs, Consumers suggests that the expedited review process could be structured like a comment period, compliant with the Michigan Administrative Procedures Act of 1969, MCL 24.201 *et seq*. (APA), with an opportunity for discovery to enable the Staff and the utility to fully examine the claims of the QFs. *Id*., p. 5. Additionally, Consumers asks that the Commission include a means to revisit the existence of an LEO should the circumstances of a QF project change such that it may no longer be commercially viable or financially committed. *Id*., pp. 5-6. Lastly, Consumers observes that any expedited review process should reduce litigation costs and to do so, a QF must be required to make a prima facie showing with adequate evidentiary support. *Id*., p. 6.

To begin its comments, DTE Electric states that further "properly developed" guidance may help developers understand their obligations and reduce unnecessary disputes but notes that in PURPA's 40-year history, there has been relatively little PURPA litigation. DTE Electric's comments, p. 2. Turning to the Commission's first question, DTE Electric states that it does not see the need to establish an expedited LEO review process because: (1) there have been no LEO challenges establishing an LEO with DTE Electric since the inception of PURPA; (2) the findings in *Greenwood Solar, LLC v DTE Electric Co*, unpublished per curium opinion of the Court of Appeals issued December 17, 2020 (Docket No. 351223) inform QFs of their responsibility to

demonstrate commercial viability and financial commitment; and (3) LEO guidance will likely be addressed in DTE Electric's April 5, 2021 biennial avoided cost review filing.[3] *Id*., pp. 3-4.

DTE Electric adds that, if the Commission determines an expedited LEO review process is warranted, the Commission could develop an informal review process to ensure that developers have established prima facie evidence before moving on to a formal proceeding. The company explains that such prima facie evidence could be based on the LEO criteria developed in a utility's biennial avoided cost review case. *Id*., p. 4. DTE Electric requests that any proceeding developed by the Commission be sufficiently flexible to accommodate changes related to emerging technology and regulatory changes, be compliant with the APA, the Rules of Practice and Procedure Before the Commission, and other law, and be permissive of appeals to federal or state courts. *Id*., p. 5.

In its reply comments, Consumers responds to the comments submitted by EIBC, ELPC, and the Staff. First, Consumers notes EIBC's comments regarding the requirement for each utility to file LEO criteria in its next avoided cost review and shares its concern that this requirement will be problematic for a utility that has been permitted to include its avoided cost review in its integrated resource plan (IRP) case. The company explains that addressing the LEO issue in an IRP brings an additional complex issue into a time-sensitive proceeding and requests that the Commission, instead, should affirm FERC's guidance in Order 872 and clarify that a QF must demonstrate its

[3] DTE Electric filed testimony and exhibits in support of its biennial avoided cost review on April 5, 2021, in Case No. U-18091, and subsequently filed an application for its biennial avoided cost review on April 21, 2021. In its application, DTE Electric noted that its April 5, 2021 evidentiary filing included "the criteria the Company will use to evaluate a QF's commercial viability and financial commitment so that the Company can confidently make electrical system planning decisions as well as with respect to whether a legally enforceable obligation (LEO) has been formed." DTE Electric's application in Case No. U-18091, p. 2.

commercial viability and financial commitment, which the Commission will evaluate on a case-by-case basis using objective factors. Consumers' reply comments, pp. 2-3. Consumers adds that the company does not support different LEO standards for each utility that may lead to forum shopping by QFs for the most lenient LEO standard. *Id*., p. 3. As to EIBC's suggested requirements for forming an LEO (i.e., a place in the interconnection queue, obtaining site control, etc.), Consumers finds these requirements to be too simplistic and do not demonstrate viability. Consumers recommends that the Commission avoid developing simplistic standards and make LEO determinations on a case-by-case basis. *Id*., p. 4. Additionally, the company disagrees with EIBC that the burden of proof rests with the utility in any LEO review proceeding; the evidentiary burden for establishing an LEO, according to Consumers, should be assigned to the QF, similar to the evidentiary burden that falls on the complainant in a formal complaint process. *Id*., pp. 4-5 (citing the Rules of Practice and Procedure Before the Commission, Mich Admin Code, R 792.10446). Lastly, Consumers disagrees with EIBC's suggested timing for an expedited LEO proceeding, arguing that 180 days rather than 60 days is an appropriate amount of time. *Id*., pp. 6-7.

In response to ELPC, Consumers rejects the recommendation that the biennial avoided cost review should be used to determine if specific QFs have established an LEO, notably because some avoided cost reviews will be addressed in a utility's IRP, which is a time-sensitive proceeding. *Id*., pp. 7-8. As to ELPC's suggestion that QFs should have the opportunity to establish LEOs for capacity and energy at different points in their contracts, Consumers states that it does not disagree entirely. Consumers explains that a QF that has accepted payment for energy and capacity should not be able to obtain a new contract until the first contract expires and that allowing a QF to "jump to different rates and terms mid-contract" would be problematic for

capacity planning. *Id*., p. 8. The company further states that if a QF declines compensation for capacity, it is possible the QF could sell capacity to the company at a different rate in the future, provided there is a clear process for how these transactions would occur. *Id*.

In response to the Staff's recommendations for the structure of an informal mediation process that includes the reliance on established LEO criteria for each utility, Consumers repeats its concerns with addressing LEO standards in an avoided cost proceeding and differing LEO standards for each utility. *Id*., pp. 8-9. Consumers also disagrees that additional LEO criteria will simplify any review process and cautions the Commission against approving any specific timelines for milestones until a decision is made regarding the establishment of additional LEO standards. *Id*., p. 9. Turning to the Staff's proposed second step of an informal mediation process, in which the Staff has five days to notify the utility following a QF's submission of an LEO review request, Consumers suggests that the Staff instead should first make a prima facie determination that the QF has established an LEO. As to the Staff's proposed third step requiring the utility to explain what steps the utility believes the QF must take to establish an LEO, Consumers contends that the utility would need at least 21 days to adequately respond, especially if facts asserted in the response could be used in the Staff's memo to the Commission. *Id*., pp. 10-11. Consumers also disagrees with the Staff's recommendation to dispense with pre-filed testimony and briefing in a formal proceeding as well as the Staff's proposed 90-day timeline for a formal proceeding, arguing that 180 days is more appropriate. *Id*., pp. 11-12.

DTE Electric argues, in its reply comments, that none of the other commenters provided evidence of a compelling need for an expedited LEO review process, and therefore, DTE Electric maintains that such a proceeding is unnecessary. The company avers that the Commission's directive for each utility to file LEO criteria in its next avoided cost case will further reduce the

need for an expedited review process and that, until experience is gained with the new criteria, an expedited review process is premature. DTE Electric's reply comments, pp. 2-3. In response to potential structure recommendations, DTE Electric argues that there are existing procedures available to QFs seeking an expedited LEO review. The company also argues that due process and APA compliance must be adhered to. *Id*., pp. 3-4. DTE Electric then responds to ELPC's comment that a QF should have the opportunity to establish LEOs for capacity and energy at different points in its contract. The company contends this proposal creates unjust entitlements for the QF and complicates utility resource planning and requests that the Commission reject ELPC's recommendation. *Id*., pp. 4-5.

Discussion

The Commission thanks the participants in this docket for their thoughtful and informative comments on this matter. The Commission acknowledges the complexity surrounding the LEO issue and appreciates the time and efforts of the parties to develop a workable solution that benefits developers, utilities, and customers alike. After review of the comments and consideration of the relevant statutes and rules pertaining to proceedings before the Commission, the Commission finds it appropriate to provide the following guidance relating to the development of the objective and reasonable criteria required by FERC in determining whether a QF has established an LEO, including a demonstration of commercial viability and financial commitment to the construction of the proposed generation project. The Commission also finds it appropriate to move forward with the development of an expedited LEO review proceeding to resolve any remaining disputes regarding whether an LEO has been established pursuant to the criteria ultimately approved by the Commission for each utility. This proceeding will be distinct from but will not foreclose the traditional complaint process pursuant to Mich Admin Code, R 792.10439 *et*

seq.

A. Legally Enforceable Obligation Criteria

As mentioned above, in Order 872, FERC tied the establishment of an LEO to the ability of a QF to demonstrate both commercial viability and financial commitment to the construction of a generation facility. Order 872, ¶ 684. In addition, FERC provided a number of examples on how a QF could satisfy these requirements, 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 filing fees, to obtain all necessary local permitting and zoning approvals. Order 872, ¶ 685. FERC also reinforced that the factors relating to the establishment of an LEO must be within the control of the QF, and not dependent on any action from the utility, and further stated that a QF did not need to demonstrate either that it already had financing in place or that it had a signed PPA with the utility in order to establish an LEO. Order 872, ¶ 687.

In the January 21 order, the Commission adopted these FERC criteria and directed each rate-regulated utility, as part of its next biennial review application, to provide clear guidance on the criteria it will use to evaluate a QF's commercial viability and financial commitment in determining whether an LEO has been formed, consistent with FERC and Commission precedent. January 21 order, p. 32. As stated in the January 21 order, the purpose of requiring each utility to file the reasonable and objective criteria is to provide as much unambiguous direction as possible to a QF as to the steps that must be taken in the project development process to establish an LEO. *Id*., pp. 31-32. Subsequently, the Commission indicated that for a utility incorporating its biennial avoided cost review into its IRP proceeding, the utility should file its LEO criteria in a standalone proceeding. With this order, the Commission provides further guidance as to the standalone

proceeding for the LEO criteria. Each utility utilizing the standalone proceeding for the LEO criteria, namely, Consumers, UPPCo, UMERC, and I&M, shall file an application in a new docket no later than 5:00 p.m. (ET) on September 1, 2021. The application shall be limited to the LEO criteria the utility proposes to use to evaluate a QF's commercial viability and financial commitment in determining whether an LEO has been formed. These proceedings shall be conducted as contested cases pursuant to the APA and the Rules of Practice and Procedure Before the Commission, Mich Admin Code, R 792.10401 *et seq*.

The Commission also directs Alpena Power Company (Alpena) to include its proposed LEO criteria as part of its next biennial avoided cost review, scheduled to take place in October 2022.

As to the criteria to be used to evaluate commercial viability and financial commitment in determining whether an LEO has been formed, the Commission finds that providing its expectations for what the criteria could entail will serve as a helpful common starting point for utilities. Thus, the following criteria could be used to evaluate whether an LEO has formed:

1. Documentation of having obtained "qualifying facility" status from FERC pursuant to the certification procedures set out in 18 CFR 292.207.

2. Documentation provided to the electric utility of all of the following: (i) a description of the location of the project and its proximity to other projects within one mile of the project and within 10 miles of the project, which are owned or controlled by the same developer, and (ii) an estimated, non-binding, good faith estimate of the energy production for the project that includes the kilowatt-hours or megawatt hours to be produced by the QF for each month and year of the entire term of the project's anticipated power purchase agreement.[4]

[4] *See*, Order 872, ¶ 472 (revising the "one-mile" rule used in determining whether generation facilities are considered to be at the same site for purposes of determining whether it is a qualifying small power production facility in that: (1) there continues to be an irrebuttable presumption that facilities one mile apart or less constitute a single facility; (2) parties can show that facilities that are located more than one mile apart but less than 10 miles apart constitute a single facility, and (3) there will be an irrebuttable presumption that facilities 10 miles apart or more are separate facilities).

3. Demonstration of the submission of an interconnection application with the appropriate electric utility, and proof of payment of applicable application fees.[5]

4. Demonstration of meaningful steps to obtain site control[6] adequate to commence construction of the project at the proposed location.[7]

5. Submission of all applications, including filing fees, to obtain all necessary local permitting and zoning approvals.[8]

6. If qualifying as a "cogeneration facility" as defined by 18 CFR 292.202(c), written proof, provided to the electric utility, of a steam host that is willing to contract for steam over the full term of the project's anticipated power purchase agreement for a cogeneration facility.

[5] *See*, Order 872, ¶ 685 (finding that submission of an interconnection application by a QF is an example of a reasonable and objective criterion that could be required by a state commission in determining whether an LEO has been established).

[6] The Commission defines site control as the enforceable right of uninterrupted access to the property necessary for the development of the QF's project for the full term of the obligation(s) between the QF and the utility. Means of demonstrating site control can include proof of ownership of a leasehold interest in, or right to develop a site; an option to purchase or acquire a leasehold for development purposes; or a legally binding agreement transferring a real property right to specified real property along with the right to construct and operate a QF project on the specified property. Notably, FERC found that "it is appropriate for states to require a QF to demonstrate that it is *in the process* of obtaining site control or has applied for all local permitting and zoning approvals, rather that requiring a QF to show that it has obtained site control or secured local permitting and zoning." Order 872, ¶ 685 (emphasis added).

[7] *See*, Order 872, ¶ 685 (finding that taking meaningful steps to obtain site control by a QF is an example of a reasonable and objective criterion that could be required by a state commission in determining whether an LEO has been established).

[8] *See*, Order 872, ¶¶ 687, 694 (finding that taking steps to obtain relevant permitting for a project are reasonable and objective indicators of a QF's financial commitment).

7. Proof of a deposit,[9] paid in full, to cover the estimated costs for a system impact or facilities study,[10] such as an engineering review or distribution study, should a study or studies become necessary.[11]

The Commission emphasizes that this list does not represent the final and approved criteria that will be relied upon by each utility to determine when an LEO has been established. Each utility will file its own criteria that will be subject to the contested case proceeding and, ultimately, the Commission's determination. Rather, the Commission provides this list to aid utilities in developing their own criteria and provide an idea of the Commission's expectations for what the LEO criteria could entail. Utilities can either adopt these criteria as their own or propose other objective and reasonable criteria for review by the Commission. With respect to the deposit specifically, the Commission directs each utility in filing its proposed LEO criteria to propose a deposit amount reflective of the estimated cost of the studies, a method for truing up actual costs, and to thoroughly justify the basis and reasonableness of the proposed deposit amount.

[9] Similar to other LEO criteria provided in this order, each utility shall propose a deposit amount reflective of its study costs for review as part of its biennial avoided cost review or standalone LEO proceeding.

[10] System impact study or facilities studies refer to studies that may be necessary in the interconnection process under the Commission's Electric Interconnection and Net Metering Standards, Mich Admin Code, R 460.601a *et seq*., and may include an engineering review or distribution system study. Engineering review means a study to determine the suitability of the interconnection equipment including any safety and reliability complications arising from equipment saturation, multiple technologies, and proximity to synchronous motor loads. Mich Admin Code, R 460.601a(u). Distribution system study means a study to determine if a distribution system upgrade is needed to accommodate the proposed project and to determine the cost of an upgrade if required. Mich Admin Code, R 460.601a(q).

[11] *See*, Order 872, ¶ 695 (finding that proof of a deposit paid by the QF towards a system impact, interconnection, or other necessary study is an example of reasonable and objective criteria used to determine whether an LEO has been established).

The Commission acknowledges some comments in response to the January 21 order expressing concern that Order 872 requires the Commission, not utilities, to set objective and reasonable criteria for establishing an LEO. In response and noting that the Commission acknowledges the diverse nature and needs of the regulated utilities in the state, the Commission finds it appropriate to allow each utility to propose LEO criteria that the utility views as suitable for its unique circumstances. However, it is the Commission that is ultimately tasked with implementation of numerous sections of PURPA.[12] This includes establishing objective and reasonable LEO criteria.[13] Therefore, the Commission clarifies that it will make a final determination as to the LEO criteria, including the proposed deposit amount, based on a fully developed record in a contested proceeding. Additionally, to comply with FERC's requirements articulated in Order 872 and Order 872-A, the ability to meet any criteria proposed by a utility must be within the QF's exclusive control.

Finally, the Commission notes FERC's statement in Order 872 that "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." Order 872, ¶ 695. This situation was at issue in the September 26, 2019 order in Case No. U-20156 (September 26 order), in which the Commission found that no LEO existed because the QF in that case had not yet received a distribution study performed by the utility, and therefore could not commit to pay costs for any distribution upgrades found to be required by the study. September 26 order, p. 54. In light of the language of Order 872, the Commission clarifies here that while a deposit for a study may be

[12] *See*, 16 USC 824a-3(f).

[13] *See*, Order 872, ¶ 684.

required to be paid in full as part of demonstrating a QF's financial commitment to the project, the completion of the study is not required in order to establish an LEO. However, the Commission also notes that the finding of an LEO is only one part of the process in that an LEO effectively provides a QF with a contract to sell to the utility the output of its generation project and gives the QF a path to move forward with the project. The establishment of an LEO does not, however, obviate other responsibilities connected with the ultimate completion of the project, including the payment of system upgrade costs necessary to interconnect the project.

B. Expedited Legally Enforceable Obligation Review Process

The Commission anticipates that, once approved, the LEO criteria will serve as a blueprint for forming an LEO. As noted in the January 21, order, "the applicable criteria should allow both the utility and the QF to unambiguously determine whether an LEO has been formed based on factors within the control of the QF." January 21 order, p. 32.

As a preliminary matter, the Commission agrees with the Staff that the expedited LEO review proceeding is dependent on the establishment of LEO criteria in each utility's upcoming biennial avoided cost review or standalone proceeding.[14]

In structuring the expedited LEO review proceeding, the Commission largely adopts the Staff's proposed structure for an expedited LEO review, with some amendments. The Commission also notes that this process is neither a formal nor informal complaint process, but

[14] The Commission further clarifies that the expedited LEO proceedings may be available for QFs to utilize at different times for different utilities depending on the timing of the Commission's approval of the utility's LEO criteria. As a hypothetical example, the Commission may establish LEO criteria for Consumers prior to completing its approval of LEO criteria for DTE Electric. The expedited LEO review process would then be open for developers to utilize with respect to Consumers but would not be available to DTE Electric developers until the Commission completes its approval of LEO criteria for DTE Electric.

rather a forum for resolving the narrow question of whether an LEO has been established between a utility and a QF, subject to appeal to the Commission for an expedited order.

Turning to the specific procedural elements, the Commission finds the review proceeding shall be structured as follows:

1. The QF submits an LEO review request to the Staff, utilizing a standardized form to be made available on the Commission's website, not later than September 1, 2021, explaining its position and making a prima facie showing that an LEO exists. In its review request, the QF shall provide the information requested on the form, explain how it has met the utility's approved LEO criteria, and describe the nature of the dispute with the utility. The QF is not required to hire an attorney to file a review request or to represent the QF in the LEO review conducted by the Staff.

2. After the QF submits its LEO review request, the Staff will have five calendar days to notify the QF whether it has made a prima facie showing of an LEO with the utility. Should the Staff determine that the QF has made the required prima facie showing that an LEO exists, the Staff will then have five calendar days to notify the utility of the QF's LEO review request. As proposed by Consumers, the utility will have 21 calendar days from the date it received the notice from the Staff to respond to the claim(s) presented in the QF's LEO review request.

3. The utility will send its response to both the Staff and the QF, and it will address all the claims in the QF's LEO review request.

4. The QF will then have 14 calendar days to reply to the utility's response, addressing any perceived inaccuracies, and will send its reply to both the Staff and the utility.

5. The Staff will schedule a meeting with the QF and the utility, which will occur within 14 calendar days of the QF's response. At that meeting, the Staff will act as a mediator.

6. Within 14 calendar days of the mediation meeting, the Staff will prepare a memo with its findings and send it to the QF and the utility. The Staff's memo should include a finding as to whether an LEO exists; when the LEO was formed; whether an LEO exists for energy, capacity, or both; as well as any other information deemed relevant by the Staff.

7. Should the Staff find that an LEO exists, the QF's project may proceed to provide energy and/or capacity to the utility and the utility shall proceed with its

obligation to purchase energy and/or capacity from the QF pursuant to the LEO.

Following the LEO review process detailed above, either party may appeal the Staff's finding to the Commission. Such appeals will be heard on an expedited basis with the Commission reading the record in a contested proceeding and issuing an order as to whether an LEO has been established not later than 120 days from the date of appeal, as permissible by the Commission's meeting schedule.[15] Upon the filing of an appeal by either party, the Staff's finding of an LEO shall be held in abeyance until a final order is issued by the Commission. As part of any appeal, the Staff shall file with the Commission the memo with its findings and the QF's completed LEO review request form from the LEO review proceeding (if utilized by the parties), which will aid in providing background on the parties' positions and expediting the proceeding.[16] Additional testimony and an opportunity for cross-examination of witnesses will also be afforded the parties, consistent with the requirements of the Michigan Constitution, MI Const of 163; the APA, MCL 2.201 *et seq*.; the Rules of Practice and Procedure Before the Commission, Mich Admin Code, R 792.10401 *et seq*.; and any other applicable statute or regulation.

The Commission directs the Staff to develop a standard LEO review request form that will be made available on the Commission's website not later than September 1, 2021. The form shall include the following requests for information:

1. Proof of FERC certification as a QF pursuant to 18 CFR 292.207;

2. Contact information of the QF and a description of the project with details to be determined by the Staff;

[15] Given that Commission meetings are scheduled months in advance, the Commission may issue a final order at the first meeting that takes place following the end of the 120-day time period.

[16] In compliance with MRE 408, the Staff memo shall not include evidence of any offer, acceptance, or negotiation of settlement by any party.

3. The name of the utility with which the QF is seeking interconnection and proof of an application to or position in the utility's interconnection queue;

4. A showing of the steps taken by the QF to meet the approved LEO criteria for the utility;

5. A showing of a good faith effort to communicate an intent to enter into a contract or establish an LEO with the utility; and

6. A description of the nature of the conflict between the QF and the utility.

As noted above, the Commission clarifies that the LEO review process is not a prerequisite to utilizing the formal complaint process, and that a potential complainant may proceed to the formal complaint process available pursuant to the Rules of Practice and Procedure Before the Commission, Mich Admin Code, R 792.10439 *et seq*. Additionally, the LEO review proceeding does not foreclose any avenue of appeal, to a state or federal court, that is otherwise available to any party.

C. Other Issues

In response to Consumers' comment that the LEO criteria should continue to be assessed with gained experience or as circumstances change, the Commission finds that, to the extent that changes in technology or other factors require reconsideration of LEO criteria in the future, utilities may propose revisions to their LEO criteria as part of their regular avoided cost reviews or in a standalone LEO proceeding.

In response to ELPC's comment that QFs should have the opportunity to establish LEOs for capacity and energy at different points in their contracts, the Commission adds that PURPA and its implementing regulations treat the sale of energy and capacity separately[17] and therefore, the

[17] *See*, 18 CFR 292.304.

Commission agrees with Consumers' responsive comments that a QF may opt to sell capacity pursuant to an LEO at a later time but cannot "jump to different rates and terms mid-contract." Consumers' reply comments, p. 8. For example, a QF may establish an LEO for energy at one point in time and later establish an LEO for capacity, should a capacity need arise for that utility. However, the Commission agrees that a QF cannot unilaterally amend its contract to include capacity or new rates that were not included in the original contract. A QF and utility, however, are free to amend a contract for energy and/or capacity at any point by mutual agreement.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company, Upper Peninsula Power Company, Upper Michigan Energy Resources Corporation, and Indiana Michigan Power Company are directed to file in a new docket an application containing their respective legally enforceable obligation criteria no later than 5:00 p.m. (Eastern time) on September 1, 2021, as described in this order.

B. Alpena Power Company is directed to file an application containing its legally enforceable obligation criteria as part of its next biennial avoided cost review, as described in this order.

C. The Commission shall utilize a legally enforceable obligation review proceeding to review claims pertaining to the establishment of a legally enforceable obligation, as described in this order.

D. The Commission Staff shall develop and make available on the Commission's website, not later than September 1, 2021, a standardized legally enforceable obligation review request form to be utilized for initiating a legally enforceable obligation review proceeding, as described in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Daniel C. Scripps, Chair

Tremaine L. Phillips, Commissioner

Katherine L. Peretick, Commissioner

By its action of July 2, 2021.

Lisa Felice, Executive Secretary

P R O O F O F S E R V I C E

STATE OF MICHIGAN)

Case No. U-20905 *et al.*

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on July 2, 2021 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).

Brianna Brown

Subscribed and sworn to before me
this 2nd day of July 2021.

Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2024

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