S T A T E  O F  M I C H I G A N

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 |

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| 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 January 21, 2021 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Tremaine L. Phillips, Commissioner
Hon. Katherine 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 (NOPR). 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 (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), and QF self-certification. The following is a summary of the order's revisions to the rules:

- Rates: The order grants states flexibility to require energy rates, but not capacity rates, in QF contracts and LEOs to vary in accordance with changes in the utility's avoided costs; to allow QFs to retain fixed energy rates based on projected energy rates; to set as-available energy rates[1] for utilities located in wholesale energy markets with a rebuttable presumption that the locational marginal price (LMP) in those markets represents avoided cost or allow QFs to sell outside the wholesale market; and to set energy rates based on a competitive solicitation based on transparent and non-discriminatory procedures and

[1] PURPA regulations in effect before the final rule (Order 872) allow a QF to sell its power to an electric utility in two ways: (1) the QF can choose to sell as much of its energy as it chooses when the energy becomes available, with the rate for the sale calculated at the time of delivery (frequently referred to as a so-called ''as available'' sale), or (2) the QF can sell its energy and capacity pursuant to an LEO. 18 CFR 292.304(d).

subject to the standards set out in *Allegheny Energy Supp Co, LLC*, 108 FERC ¶ 61,082 (2004).[2]

- One-Mile Rule: The order modified the one-mile rule that determines whether generation facilities are considered to be the same site for purposes of determining status as a small power production facility QF. The rule is modified such that there continues to be a rebuttable presumption that facilities less than one mile apart constitute a single facility, but parties can show that facilities more than one mile and less than 10 miles apart constitute a single facility. There is also an irrebuttable presumption that facilities 10 miles apart or more are separate facilities.

- Obligation to Purchase: The order revises PURPA regulations such that a utility's obligation to purchase from a QF is terminated when a QF has non-discriminatory access to certain energy markets. The rebuttable presumption that QFs with a net capacity at or below 20 megawatts (MW) do not have non-discriminatory access to energy markets is reduced to 5 MW for small power production facilities. This revision applies prospectively and does not affect rights or obligations under existing PURPA contracts. The obligation to purchase for cogeneration facilities remains the same at 20 MW.

- Retail Choice and Obligation to Purchase: FERC declined to adopt the proposed regulation in the NOPR permitting states with retail competition to allow relief from the purchase obligation and instead clarified that the existing federal PURPA regulations already require states, to the extent practicable, to account for reduced loads in setting QF rates. Specifically, 18 CFR 292.304(e)(3), which will not be revised, allows states, when setting avoided cost rates, to take into account "the ability of the electric utility to avoid costs, including the deferral of capacity additions." FERC interprets 18 CFR

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[2] In *Allegheny*, FERC added four guidelines to a previously articulated principle for evaluating fairness in requests for proposals (RFPs) or competitive solicitations in FERC case, *Boston Edison Co. Re: Edgar Electric Energy Co*., 55 FERC ¶ 61,382 (1991), which held that no affiliate should receive preferential treatment in an RFP. FERC's four added guidelines in *Allegheny* for evaluating RFPs include transparency, definition, evaluation, and oversight. Transparency means that all relevant bid information is provided to each bidder at the same time, the solicitation is widely publicized and open as opposed to the utility inviting bidders, and information provided in communications between the utility and one bidder is provided to all bidders (with the exception of proprietary information). Definition means the utility must clearly and precisely define the product sought in an RFP, which at a minimum should include capacity and term but should also include fuel type, plant technology, transmission requirements, and any other relevant detail. Evaluation means the utility must clearly define the price and non-price criteria under which it will evaluate bids and the importance of each criterion so that no one bidder has an advantage. Lastly, oversight means that an independent third party with no financial interest in the bid or outcome of the bid should design the solicitation, administer the bidding, and evaluate bids prior to the utility's evaluation. A state regulatory commission can also select the independent administrator to ensure independence. *Allegheny*, 108 FERC at ¶¶ 61,417-61,419.

292.304(e)(3) as allowing a state to consider reductions in a purchasing electric utility's supply obligations given retail competition. FERC further stated that this clarification is not intended to be reflected as a MW-for-MW reduction (or increase) based on yearly changes in load and therefore, does not terminate a purchasing utility's mandatory purchase obligation under Section 210(a) of PURPA.

- LEO: The order 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. 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 requiring a showing of obtained financing or a signed power purchase agreement (PPA) is prohibited by the order. Rather, requiring QFs to apply for all relevant permits, take meaningful steps to seek site control, or meet other objective and reasonable milestones in the QF's development can sufficiently demonstrate QF developers' financial commitments.

- Self-Certification: The order allows an entity to protest a QF's self-certification or self-recertification without having to file and pay for a declaratory order. Entities may also protest new certifications that make substantive changes to existing certifications.

On October 29, 2020, the Commission issued an order in the above-captioned dockets (October 29 order) seeking comments from electric providers and stakeholders regarding the impact of Order 872 on the Commission's implementation of PURPA. Specifically, the Commission asked:

1. To what extent does FERC Order 872 require modification of the Commission's prior orders in the above-captioned cases as well as Commission-approved contracts, tariffs, and agreements to implement PURPA in Michigan? What aspects of those prior orders may need to be modified and how?
    a. Addressing the revisions to allow states flexibility to set energy rates, FERC Order 872 states that: "State regulators may not change rates in existing QF contracts or other existing LEOs. By its terms, the variable energy avoided cost provision adopted in this final rule applies only prospectively to new contracts and new LEOs entered into after the effective date of this final rule. Nothing in the final rule, including in this preamble, should be read as sanctioning the modification of existing fixed-rate QF contracts and LEOs." FERC Order 872, p. 157. When addressing Question 1, please be specific on the applicability of the new rules to existing QFs and associated contract terms (including new provisions

that may alter expiration of existing contracts) and expiring contracts versus new QF facilities or contracts.

2. If revisions are required to the Commission's prior PURPA decisions, what process should the Commission utilize to update Commission-approved tariffs and other Commission-approved documents such as the standard offer contract?

3. FERC Order 872 determines that avoided capacity costs may be priced at zero under certain circumstances, namely when: (1) an electric utility procures all of its supply-side resources through a competitive solicitation that meets the guidelines as set forth in Order 872; (2) the state regulatory authority and independent administrator both certify that competitive bidding meets the guidelines; and (3) the state requires the electric utility's total planned self-build and power purchase options to compete in the competitive solicitations (i.e., no supply arrangements outside of the conforming competitive bidding process).
    a. What are the implications of these provisions given the current status quo in Michigan with respect to procurement and determining capacity needs and associated avoided cost rates?
    b. Is there interest in moving to this model for competitive procurement and associated avoided cost pricing? If so, what actions would be required by the Commission and electric utilities to establish appropriate protocols that align with the guidance issued in FERC Order 872 for conducting fair and non-discriminatory competitive procurements?
        i. What approaches and timing considerations should the Commission take into account to set up a competitive procurement model?
        ii. Should details be addressed through the MI Power Grid competitive procurement workgroup initiated in Case No. U-20852?

4. Is further guidance from the Commission necessary to define an LEO consistent with FERC Order 872? If so, should such guidance be issued through a rulemaking or a Commission order or orders?

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.

Because Order 872-A was issued in November after the October 29 order requesting comments, the Commission recognizes that the comments submitted in this docket may not fully reflect the additional detail contained in FERC's clarification order. Nonetheless, the Commission summarizes and addresses the comments and reply comments filed in this matter.

Comments and Reply Comments

The Commission Staff (Staff); Michigan Energy Innovation Business Council (EIBC); Michigan Electric and Gas Association (MEGA); Pine Gate Renewables LLC (Pine Gate); Independent Power Producers Coalition of Michigan (IPPC); Cadillac Renewable Energy, LLC, Genesee Power Station Limited Partnership, Grayling Generating Station Limited Partnership, Hillman Power Company, LLC, TES Filer City Station Limited Partnership, Viking Energy of Lincoln, Inc., and Viking Energy of McBain, Inc. (collectively, the Biomass Merchant Plants or BMPs); Environmental Law & Policy Center together with Vote Solar (collectively, ELPC); Indiana Michigan Power Company (I&M); Consumers Energy Company (Consumers); and DTE Electric Company (DTE Electric) filed comments. IPPC, Pine Gate, I&M, Consumers, DTE Electric, and ELPC filed reply comments.

1. To What Extent Does Order 872 Require Modification of the Commission's Prior Orders, Approved Tariffs, Contracts, or Implementation of PURPA?

In responding to the Commission's first question in its request for comments, the Staff maintains that Order 872 does not require the Commission to modify any prior approved contracts, tariffs, or agreements, but that the Commission could modify tariffs and standard offer contracts going forward. Staff's comments, p. 6. The Staff contends that any modifications should only be done on a prospective basis. *Id.*, pp. 8-9. The Staff also recommends that the Commission consider directing electric providers to draft a standard offer contract that would apply to small power production facilities up to 5 MW based on the presumption of nondiscriminatory market access. *Id.*, pp. 6-7.

DTE Electric contends that Order 872 essentially altered two PURPA policies: (1) lowered the presumption of nondiscriminatory market access from 20 MW to 5 MW, and (2) allowed states the discretion to adopt variable energy rates for avoided energy costs. DTE Electric explains that its current Rider No. 5 would need to be revised and that these changes would apply to new QF contracts and to existing QFs when the terms of the original contract expire. DTE Electric's comments, pp. 4-7. DTE Electric asserts that there is no basis to continue capacity payments to existing QFs seeking renewed PPAs when the company does not have a capacity need and that doing so would be inconsistent with the statutory avoided cost cap in Section 210(b) of PURPA. *Id.*, p. 7 (citing 16 USC 824a-3(b)).

In its comments, Consumers avers that Order 872 does not require any modification to Consumers' current avoided cost methodology, approved by the Commission in the June 7, 2019 order in Case No. U-20165. However, Consumers asserts that it is appropriate for the Commission to revisit the use of biennial reviews and instead, conduct its PURPA avoided cost reviews in the utility's integrated resource plan (IRP) proceeding. Consumers' comments, pp. 5-6.

Similar to DTE Electric and Consumers, I&M states that Order 872 does not require the Commission to alter its current PURPA implementation for I&M and that the Commission is prohibited from modifying existing contracts. However, I&M explains that Order 872 presents the opportunity to consider alternative approaches to avoided costs and related issues that could be applied to new or existing contracts once they expire. I&M's comments, p. 3.

EIBC requests that the Commission not make any modifications to its PURPA implementation until all appeals of Order 872 have been exhausted. EIBC's comments, pp. 1-2. However, EIBC also notes that any changes should be made prospectively and that the Commission should preserve the settlement agreement approved in Case No. U-20165. *Id*., pp. 2-6. EIBC also raised the issue that generators smaller than 100 kilowatts (kW), should be able to sell energy as-available to a utility without a written contract and that utility tariffs should specify the services for which a QF is compensated to avoid double compensation for a QF that is selling in another market. *Id*., p. 3. EIBC also takes note of the COVID-19 pandemic, stating that the pandemic has caused disruptions outside of the QFs' control resulting in contract date extension requests and that these extensions should not be considered "new" and subject to any changes from Order 872. *Id*., p. 6.

MEGA contends that Order 872 and any required changes apply prospectively only and do not impact existing contracts. MEGA's comments, p. 3. As to revisions required in the future, MEGA notes the need to reduce the non-discriminatory access presumption from 20 MW to 5 MW and to incorporate competitive procurements to determine avoided costs. *Id*., pp. 3-4.

Pine Gate similarly contends that no modifications, apart from establishment of an LEO standard, are required by Order 872 at this time and that the Commission should refrain from taking any action until the appeals of Order 872 have concluded. Pine Gate's comments, pp. 2-3. However, should the Commission make any changes, Pine Gate asserts that all revisions should be prospective and that existing contracts, including the settlement agreement in Case No. U-20165, should be preserved. *Id.*, pp. 3-6. Like EIBC, Pine Gate states that COVID-19 has caused disruptions outside of a QF's control resulting in contract date extension requests and that these extensions should not be considered "new" and subject to any changes from Order 872. *Id.*, p. 7.

IPPC maintains that any revisions based on Order 872 do not apply to existing or approved PURPA contracts and argues that the terms of the settlement agreement in Case No. U-20165, which resolved many PURPA issues for Consumers, should be preserved. IPPC's comments, p. 5.

BMPs similarly maintain that any changes resulting from Order 872 do not apply to existing contracts or approved orders related to those contracts. BMPs' comments, pp. 3-4.

ELPC states that Order 872 does not require modification to existing contracts, LEOs, or settlement agreements, but argues that, in light of Order 872, the Commission should review any competitive bidding method used to set avoided costs to ensure compliance with Order 872 and should review any avoided cost method based on a proxy plant for QFs at or below 5 MW. ELPC's comments, p. 2. ELPC further contends that the Commission should not authorize any updates until the utility commits to using competitive solicitations for all supply-side resources and conducts a solicitation compliant with Order 872. ELPC goes on to recommend that the Commission convene a workgroup to develop a single standard offer contract and approve the contract applicable to all regulated electric utilities in Michigan. *Id*.

In reply comments, IPPC disagrees with DTE Electric's contention that there is no reasoned basis to provide capacity payments to existing QFs after the expiration of the existing PPAs and, in support, points to the Commission's December 20, 2018 order and September 26, 2019 order in DTE Electric's PURPA docket, Case No. U-18091, and the May 31, 2017 order in Consumers' PURPA docket, Case No. U-18090. IPPC's reply comments, pp. 1-3.

Pine Gate repeats its arguments in its reply comments that Order 872 requires only that the Commission establish LEO standards and that no further action is required or should be taken. Pine Gate's reply comments, pp. 1-2. Pine Gate also notes the consensus among most commenters that Order 872 does not require the Commission to determine how avoided energy costs are calculated. *Id*., p. 4.

In response to EIBC's position that QFs smaller than 100 kW must be able to sell energy as-available without entering into a contract, Consumers states that it does not object to an as-available avoided cost rate without a contract, but there are accompanying issues that must be examined in the company's 2021 IRP proceeding prior to implementation. Consumers' reply comments, pp. 2-3. Consumers also notes that a simplified agreement or form for as-available avoided costs may be a reasonable option. *Id*., p. 3. Consumers agrees that double compensation for QFs selling into different markets should be avoided and states that a QF could forgo selling capacity at the Midcontinent Independent System Operator, Inc. (MISO) planning reserve auction rate to the company and instead, coordinate with the company to sell capacity into the MISO market. *Id*., pp. 3-4.

In response to ELPC and the Staff, Consumers opposes a single standard offer contract applicable to all utilities. Consumers explains that the company currently has an approved standard offer contract that was achieved after extensive negotiation and litigation and such an imposition would infringe on a utility's management decisions. *Id*., pp. 4-7. Lastly, Consumers disagrees with ELPC's contention that the Commission must establish rules for determining avoided costs if a utility commits to the use of competitive bidding and argues that such a process is duplicative of avoided cost reviews that have already taken place. Rather, the company argues that case-by-case determinations are appropriate for a scenario in which a utility opts to use competitive bidding and then retracts that decision. *Id*., pp. 5-6.

In its reply comments, DTE Electric repeats its opposition to the implementation of what it characterizes as inflexible administrative rules and a one-size-fits-all approach for all Michigan electric utilities. DTE Electric's reply comments, pp. 1-2. The company also opposes the Staff's recommendation for a single standard offer contract applicable to all utilities. *Id*., p. 3. As to EIBC's request that QFs under 100 kW be permitted to sell as-available energy without a written contract, DTE Electric notes that even though some as-available energy transactions are less complex, the utility must still plan for and predict system needs, which necessitates contracts. *Id*., pp. 3-4. Addressing EIBC's request for specificity in tariffs to account for the recent FERC order, *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and*

*Independent System Operators*, 172 FERC ¶ 61,247 (2020) (Order 2222)[3] and the QF's ability to sell capacity in a wholesale market, DTE Electric states that PPAs are the more suitable venue to specify services for compensation but agrees with EIBC that the Commission should examine this issue in light of Order 2222. *Id*., p. 4. DTE Electric also repeats its opposition to capacity payments for renewed QF contracts. *Id*., p. 6.

In its reply comments, ELPC contends that while it is premature to assume that utilities will be relieved of their obligation to purchase power from small power production facilities between 5 MW and 20 MW, it agrees with the Staff's recommendation that the Commission should adopt a single standard offer contract. ELPC's reply comments, p. 3.

2. What Process Should the Commission Utilize if Modifications are Required?

The Staff recommends that, if any revisions need to be made to the Commission's current implementation of PURPA, the Commission should direct each utility to file proposed revisions to its current standard offer contracts and tariffs, as well as any relevant FERC order reducing the utility's purchase obligation to QFs 5 MW and under, in its biennial review proceeding. Staff's comments, p. 10.

DTE Electric states that MCL 460.6v, which requires the Commission to conduct a contested proceeding for PURPA avoided costs at least every five years, provides a process to address the limited actions the Commission must take to comply with Order 872. Given that

[3] Order 2222 enables distributed energy resources (DERs) to participate in regional organized wholesale markets through aggregations and finds that such participation provides a variety of benefits including: lower costs for consumers through enhanced competition, more grid flexibility and resilience, and more innovation within the electric power industry. The rule allows several sources of distributed electricity to aggregate in order to satisfy minimum size and performance requirements that each may not be able to meet individually. 172 FERC ¶ 61,247 (2020).

the Commission recently issued a final order in DTE Electric's PURPA case on June 10, 2020, in Case No. U-18091, the company argues that there is no urgency to again address avoided costs and related issues. DTE Electric's comments, pp. 7-8. The company also maintains that the Commission has limited authority to approve or not approve the recovery of costs associated with PURPA contracts and that the Commission does not have the authority to approve any PURPA contract. *Id*., pp. 8-10.

Maintaining that modifications are not required to Consumers' current avoided cost methodology approved in Case No. U-20165, the company argues that, nonetheless, any modifications could be addressed in an IRP proceeding. However, Consumers notes that any substantial change or overhaul of the standard offer contract would not be well-suited for a 10-month IRP proceeding, given the lengthy negotiations and litigation that went into the company's current standard offer. Consumers contends that should substantial changes be required, the standard offer should be addressed in a stand-alone proceeding. Consumers comments, pp. 6-7.

I&M repeats that Order 872 does not require the Commission to modify its current implementation of PURPA, but should the Commission consider alternative implementation methods, the Commission could do so in the utilities' biennial review proceedings. I&M's comments, p. 4. I&M contends that a one-size-fits-all approach is not appropriate for PURPA issues and therefore, in terms of the standard offer contract and tariffs, any updates would not be well-suited for a workshop or rulemaking. *Id*. Should the Commission utilize a workshop process to explore PURPA updates reflective of Order 872, I&M argues that it should be limited to exploring universal principles with flexibility left to the individual utilities to determine avoided costs, calculations, and capacity need. *Id*.

To allow for stakeholder involvement in any updates to tariffs or related PURPA documents, EIBC recommends that these issues be addressed in a contested proceeding. EIBC's comments, p. 6.

MEGA asserts that utilities should be permitted to propose any necessary changes in their individual cases based on their unique needs. MEGA's comments, p. 4.

Pine Gate contends that any revisions should be addressed in a contested proceeding to enable a complete review of tariffs and documents by stakeholders. Pine Gate's comments, p. 7.

IPPC also contends that any revisions to future PURPA contracts and rates should be addressed in each utility's contested case proceedings. IPPC's comments, pp. 7-8.

In its comments, BMPs explain that avoided cost determinations are time and fact sensitive, and therefore, application to new QF contracts should be decided upon request to ensure the necessary flexibility. BMP's comments, pp. 4-5.

While maintaining that Order 872 does not require the Commission to modify its past PURPA orders or existing tariffs, ELPC comments that the Commission should address changes in each utility's biennial avoided cost review case. ELPC's comments, p. 3.

I&M, in its reply comments, states that some commenters overlooked the differences between utilities, including a utility's capacity needs, and that ignoring these differences would result in unreasonable avoided costs. I&M's reply comments, p. 3.

In reply comments, Pine Gate repeats its position that any revisions should involve all stakeholders, including third-party developers. Pine Gate's reply comments, p. 4. Pine Gate also disagrees with DTE Electric to the extent the company contends the Commission does not have the authority to review and approve standard offer PPAs. *Id.*, pp. 4-5.

Responding to Consumers' request to address avoided costs in IRP proceedings, ELPC states that even though IRPs inform biennial reviews, the five-year IRP schedule is too infrequent for avoided cost reviews. However, ELPC states that it would support a biennial review schedule that is initiated a defined number of months after an IRP proceeding concludes. ELPC's reply comments, pp. 3-4.

3. Competitive Procurement

In its comments, the Staff contends that a Commission-established competitive bidding process that determines capacity need and administratively sets the avoided cost rate would provide efficiency in what is currently a "thorny" issue. Staff's comments, pp. 10-11. The Staff states that there is interest in adopting a competitive procurement model as demonstrated by certain utilities' movements towards adopting competitive solicitations (i.e., Consumers' competitive procurement adopted in the settlement agreement in Case No. U-20165). The Staff recommends that the MI Power Grid competitive procurement workgroup is the proper place to examine the competitive procurement criteria set forth in Order 872 and specify the steps that utilities should take to conform their competitive solicitations to these criteria. *Id*., pp. 11-13. The Staff further recommends that once the MI Power Grid workgroup concludes, the competitive procurement criteria developed therein could be adopted for utilities that opt to rely on competitive solicitations to set avoided costs. *Id*., p. 13.

DTE Electric lists the following high-level implications associated with using a competitive "all-in solicitation" process to set avoided costs: (1) QFs would be eligible to participate in all competitive solicitations regardless of capacity need; (2) avoided capacity costs would be set at zero; (3) additional solicitation requirements would be imposed on utilities; and (4) competitive solicitations could still be designed to meet specific capacity needs. DTE Electric's comments, pp. 10-11. In response to the Commission's inquiry as to whether there is an interest in moving to a competitive solicitation model, the company states that it would consider using a competitive solicitation model but emphasizes that the manner in which a utility conducts a procurement is a management decision to be made by the utility. According to DTE Electric, the Commission's authority to restrict management decisions pertaining to setting PURPA avoided costs is not unfettered and the following decisions are not to be restricted by the Commission: (1) with whom a utility contracts; (2) what type of resource a utility selects; (3) contract terms; (4) considerations in bid evaluation and selection criteria; (5) what types of resources to include in a solicitation; and (6) which independent third-party the utility will chose to provide general oversight. *Id*., pp. 11-12. With respect to the independent third-party administrator, DTE Electric agrees that the Commission must apply the *Allegheny* principles consistent with FERC precedent, but the company contends that the independent evaluator cannot, by itself, complete the entire evaluation process or have final selection authority. *Id*., p. 13.

Consumers argues that its current implementation of PURPA complies with the competitive solicitation criteria set out in Order 872 and no changes are necessary. Citing the differences in each utility's resource procurement plans, Consumers goes on to state that a one-size-fits-all approach for an avoided cost methodology is unreasonable, especially since Order 872 allows for numerous methodologies for arriving at avoided costs. Consumers' comments, p. 8. Consumers requests continued flexibility from the Commission for each utility's procurement plans and avoided costs. *Id*.

I&M argues that Order 872 specified that using a competitive solicitation is one, but not the only, circumstance where avoided capacity costs may be set at zero. I&M points to its currently approved avoided capacity cost that is set at zero due its lack of a capacity need. I&M maintains that the status quo remains an appropriate means to determine capacity needs and avoided costs. I&M's comments, p. 4. As to whether there is an interest in adopting a competitive solicitation model, I&M states that it is open to considering such a model, but has some concerns given its status as a multi-jurisdictional utility subject to different states' PURPA rules. *Id*., p. 5. According to I&M, any adoption of a competitive procurement model should be careful, deliberate, involve stakeholders, and provide ample notice. I&M further states that a model could be addressed in the MI Power Grid competitive work but notes that not all QF-related procurement guidelines should apply to all utility procurement and not every utility procurement should be open to QFs. *Id*.

EIBC states that it is currently involved in the MI Power Grid competitive procurement workgroup and that the workgroup is the appropriate venue to determine guidelines for competitive bidding that conform with Order 872. EIBC's comments, p. 7.

MEGA comments that Order 872 allows for competitive procurement to set avoided costs, which can be set to zero when capacity is not needed, but FERC does not require it. Therefore, according to MEGA, each utility should be left to determine its procurement approach. MEGA's comments, p. 4. However, MEGA also states that developing competitive solicitation criteria compliant with FERC's minimum requirements would be helpful. *Id*.

Pine Gate supports application of a competitive bidding model to other Michigan utilities and recommends that the design of such a model is best suited for the MI Power Grid competitive procurement workgroup given the current level of stakeholder involvement. Pine Gate's comments, p. 8.

IPPC supports the improvement of a competitive bidding model through the MI Power Grid competitive procurement workgroup and takes note of the clarification provided by FERC in Order 872-A regarding the requirements for an independent administrator. IPPC asserts that the current practice of using independent administrators in requests for proposals will have to be revised to ensure that independent administrators are independent from the utility, separate, unbiased, unaffiliated, and not subject to utility influence. IPPC's comments, p. 9 (relying on Order 872-A, ¶ 200).

BMPs support consideration of a competitive solicitation model and explain that capacity needs as well as operational requirements must be clearly defined in bid specifications. BMPs' comments, p. 6. Further, any competitive solicitation model should require bids to constitute an "all in" price to remedy past avoided cost methods that failed to account for future capital expenses in addition to plant construction costs. *Id*., pp. 6-7.

In its comments, ELPC expresses support for the use of a competitive solicitation for all Michigan utilities but states that, to comply with Order 872, utilities must execute all-source solicitations at regular intervals subject to independent administrator oversight and procure all supply-side resources through such a process in order to exclude QFs from obtaining avoided capacity costs. ELPC's comments, p. 4. ELPC also contends that:

> unless the Commission is willing to order competitive solicitations as the sole method of capacity acquisition for a particular utility (or all utilities), the Commission needs to have rules in place for determining avoided capacity costs in the event: (1) a utility does not use competitive solicitations to acquire capacity or (2) a utility that committed to competitive solicitations, at some point in the future, changes direction and no longer acquires all capacity through competitive solicitations.

*Id*., p. 5. ELPC states that the MI Power Grid competitive procurement workgroup is an appropriate venue to establish competitive bidding guidelines. *Id*., p. 6.

I&M repeats its concern that, even though there is an interest in a competitive procurement framework, a competitive procurement method could present challenges for multi-jurisdictional utilities. I&M's reply comments, p. 3.

Consumers objects to BMPs' recommendation for a competitive procurement model that requires bids with an all-in price contending that the proposal is not related to Order 872 and because under Consumers' current avoided cost construct, bidders are free to include all necessary costs in their bids. Consumers' reply comments, pp. 7-8. Consumers additionally rejects the proposal by EIBC, Pine Gate, IPPC, and the Staff to use the competitive procurement workgroup to develop mandatory competitive bidding rules because a one-size-fits-all approach is not appropriate for the unique needs of utilities. Consumers' reply comments, pp. 8-9. However, Consumers expresses its support for continuing the workgroup to develop guidelines. *Id*., p. 9. In response to IPPC's comments regarding an independent administrator, Consumers states that IPPC's comments do not properly represent Order 872 and that it is incorrect that current utility practices must be revised as a direct result of Order 872. *Id*., pp. 9-10. Consumers goes on to state that any recommendation for an independent administrator to complete the entire evaluation process or have final selection authority should be rejected. *Id*., p. 10.

DTE Electric repeats its position regarding competitive solicitations. DTE Electric's reply comments, p. 7.

In its reply comments, Pine Gate responds to DTE Electric's objection to Commission involvement in a utility's competitive procurement decisions and argues that the requirements in Order 872 make it plain that a utility cannot object to Commission involvement. Pine Gate's reply comments, p. 6.

Noting the agreement among many commenters that the competitive workgroup is the most appropriate venue to develop competitive solicitation guidelines, ELPC adds that the Commission should encourage the workgroup to consider how competitive solicitation processes could be tailored to reflect the costs of smaller distributed generation that allows utilities to avoid costs different from those of large, utility-scale solar. ELPC's reply comments, p. 2. Responding to Consumers' concerns about the unique circumstances of each utility, ELPC suggests that the Commission use the workgroup to set foundational requirements for competitive bidding aimed at best positioning utilities to comply with their MCL 460.6t and PURPA obligations. Additionally, the Commission should consider technology-specific factors related to distributed generation and other unique circumstances. *Id*., pp. 2-3.

4. Legally Enforceable Obligation

The Staff recommends that the Commission adopt FERC's LEO criteria in Order 872 and asserts that further guidance from the Commission that is consistent with Order 872 and that explains how LEO requirements will be applied will provide parties with needed direction. Staff's comments, p. 14. The Staff also suggests that the Commission develop a process to address QFs' LEO claims in each utility's biennial review case, which the Staff claims is a suitable forum to determine whether the criteria of commercial viability and financial commitment have been met. *Id*.

DTE Electric observes that, with Order 872, FERC sought to strike a balance between a utility's and a QF's obligations with respect to the LEO commercial viability and financial commitment criteria. DTE Electric argues that the determination of whether a QF has met these criteria is fact dependent and, therefore, recommends that the Commission continue to address LEO claims on a case-by-case basis. DTE Electric's comments, pp. 14-15.

Similar to the Staff, Consumers agrees that the Commission should affirm FERC's guidance in Order 872 as to the minimum requirements of commercial viability and financial commitment but should also make clear that a QF meeting these requirements, in and of itself, does not mean an LEO has formed. Consumers' comments, p. 9. Like DTE Electric, Consumers requests that the Commission clarify that it will continue to assess whether a QF has an LEO on a case-by-case basis. *Id*., p. 10.

I&M affirms that further guidance on when an LEO arises, but not what an LEO reflects, is needed from the Commission and could be addressed in a rulemaking. I&M suggests that the Commission resume its LEO rulemaking efforts. I&M's comments, pp. 5-6.

EIBC contends that further LEO guidance from the Commission would be valuable in terms of consistency and certainty but that any guidance should be prospective and not affect existing LEOs. EIBC's comments, p. 8.

MEGA explains that FERC set out two criteria for an LEO: demonstration of commercial viability and demonstration of financial commitment. MEGA's comments, p. 4. Because the ways these criteria can be demonstrated may change over time, MEGA asserts that establishing the criteria through a Commission order allows the flexibility to make needed changes over time. *Id*., pp. 4-5.

Pine Gate asserts that Order 872 requires the Commission to take action to establish standards for an LEO and that the Commission should resume its LEO rulemaking efforts that will apply prospectively. Pine Gate's comments, p. 2, 8-10. Pine Gate mentions two notable LEO requirements in Order 872 that the Commission rules should adopt: (1) the utility must not be able to prevent an LEO through its control of the interconnection process and (2) a QF cannot be required to obtain all necessary permits and regulatory approvals as a condition of LEO formation. *Id*., pp. 9-10.

IPPC contends that the appropriate means of establishing an LEO standard is through a rulemaking. IPPC's comments, p. 9.

ELPC urges the Commission to resume its LEO rulemaking, with minimum changes to achieve compliance with Order 872 and states that an LEO rule will reduce the confusion and need for formal litigation that has accompanied the case-by-case LEO determinations currently used by the Commission. ELPC's comments, p. 6. ELPC points out that the most recent LEO draft rules proposed by the Staff require removal of the requirement for an executed construction agreement in order to comply with the requirement in Order 872 to ensure that an LEO cannot be blocked by actions outside of the QF's control. *Id*., pp. 7-8.

In its reply comments, I&M repeats its support for a standardized approach for determining when an LEO has formed. I&M's reply comments, p. 3.

Consumers agrees with DTE Electric's comments and largely agrees with the Staff that the Commission should affirm the Order 872 guidance for the minimum criteria of establishing an LEO but should clarify that meeting these requirements, on its own, does not establish an LEO. Consumers repeats its support for the continuation of case-by-case LEO determinations by the Commission. Consumers' reply comments, pp. 11-12. In response to the Staff's request to develop a process for LEO claims, Consumers argues that avoided cost proceedings should focus on the manner for a QF to bring an LEO claim rather than developing prescriptive LEO rules. *Id*., p. 12. Lastly, while Consumers does not support an LEO rulemaking, the company states that any rulemaking should avoid rules that are difficult to modify given that the manner in which a QF may demonstrate commercial viability or financial commitment may change over time. *Id*.

DTE Electric recommends that the Commission allow each utility to develop minimum standards necessary for consideration of an LEO which would be based on reasonable and objective criteria and would be approved by the Commission. DTE Electric's reply comments, p. 8.

Pine Gate disagrees that the Commission should continue to address LEOs on a case-by-case basis as suggested by DTE Electric explaining that such an approach would be inconsistent with Order 872, waste resources, and reduce predictability. Pine Gate's reply comments, pp. 6-7.

ELPC maintains its position that the Commission should resume its LEO rulemaking and expresses interest in Consumers' proposal for QFs to have the opportunity to assert an LEO claim in a utility's biennial review and whether this would be a viable option provided QFs are not barred from the traditional complaint approach.

Discussion

The Commission appreciates the participation from the commenters in this docket providing insights in response to the Commission's questions that are helpful in evaluating the impacts of Order 872 on the Commission's implementation of PURPA in Michigan. The Commission's intent with this order is to provide utilities and stakeholders notice as to how the Commission intends to comply with Order 872 and adopt guidance provided therein in its implementation of PURPA going forward. As the Commission noted in the October 29 order, it appears that many aspects of the Commission's current PURPA implementation already comply with Order 872, and therefore, the Commission clarifies that this order does not make changes to any

Commission order currently in effect. That being said, the Commission addresses the issues raised in response to each question in turn.

1. To What Extent Does Order 872 Require Modification of the Commission's Prior Orders, Approved Tariffs, Contracts, or Implementation of PURPA?

There is consensus among the commenters that Order 872 does not require modification to any existing PURPA contracts or settlement agreements currently in effect and that any revisions made as a result of Order 872 should apply prospectively. Order 872-A also speaks to prospective application in various parts of the order and, specifically, with respect to rates:

> Finally, [FERC] determined that state regulators may not change rates in existing QF contracts or other existing LEOs. [FERC] emphasized that these changes are effective prospectively for new contracts or LEOs and for new facility certifications and recertifications filed on or after the effective date of the final rule; [FERC] stated that it does not by the final rule permit disturbance of existing contracts or LEOs or existing facility certifications.

Order No. 872-A, ¶ 83. The Commission agrees that the rights and obligations contained in any existing contracts between a QF and utility should be preserved in their original terms and should not be modified by the Commission as a result of Order 872. Similarly, the Commission agrees that the settlement agreement approved by the Commission in Consumers' IRP proceeding, Case No. U-20165, shall be preserved and enforced. The Commission also agrees with EIBC and Pine Gate 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.

However, the Commission agrees that Order 872 sets out the possibility for some revisions to Michigan's PURPA implementation. Some of those revisions being that a QF must demonstrate commercial viability and financial commitment according to objective and reasonable standards set by a state regulatory commission to be eligible for an LEO, and that the rebuttable presumption for non-discriminatory market access for small power production facilities has been lowered from 20 MW to 5 MW. Order 872, ¶¶ 625, 684. As to the rebuttable presumption, the Commission notes that the reduction in the must-purchase obligation for utilities to purchase power from QFs over 5 MW does not automatically apply; a utility whose obligation has been terminated for QFs over 20 MW may reapply with FERC, according to the procedures set out in 18 CFR 292.310, to terminate its obligation for QFs over 5 MW. Order 872, ¶ 645. Because a utility must first apply to FERC to terminate its must-purchase obligation for QFs over 5 MW, the Commission does not find that any immediate action is required. Should a utility complete this process with FERC, the Commission will address the needed revisions to that utility's tariffs on a case-by-case basis. The Commission addresses the LEO standards in a later section of this order.

As discussed in some of the comments, Order 872 also allows, but does not require, states to adopt several PURPA implementation options in terms of setting energy and avoided costs. Comments in this docket made several suggestions as to potential revisions the Commission could apply to tariffs and future QF contracts, including adopting a single standard offer tariff applicable to all utilities and revising tariffs to clarify that a QF may forgo selling capacity to a utility and sell capacity into the market as enabled by Order 2222. At this time, the Commission declines to adopt the Staff's recommendation to develop a single standard offer contract to apply to all rate-regulated electric providers. As noted by Consumers and DTE Electric, the standard offer contracts in effect for both utilities were implemented after a protracted negotiation and litigation process. The Commission is not inclined at this time to replace those standard offer contracts that were so recently put into effect. Further, the Commission is not convinced that a one-size-fits-all approach is appropriate for a standard offer contract. Therefore, the

Commission will continue to review, approve, or reject standard offer contracts for utilities individually in avoided cost review proceedings.

The issue of adjusting the standard offer cap was also raised in comments. Similarly, the Commission finds that determinations on the proper cap level should be made in each utility's avoided cost review. However, the Commission agrees that the Staff's recommendation to set the standard offer cap at 5 MW may be a viable option given the lowering of the presumption of non-discriminatory market access from 20 MW to 5 MW. Therefore, should a utility receive authorization from FERC to terminate its obligation to purchase from QFs above 5 MW, the Commission directs the utility, in its next avoided cost review that follows the termination, to explain and support its position on the standard offer cap. Should a utility not propose a standard offer cap being set at 5 MW, it should provide a rationale as to why such a standard offer cap is not appropriate.

As to the recommendations to clarify tariffs to accommodate Order 2222 and a QF's ability to opt to sell capacity into the wholesale market, the Commission finds that such clarification may be beneficial but will leave potential revisions to be addressed in a utility's biennial avoided cost review. Also, with respect to the request in EIBC's comments for utilities to explicitly provide an opportunity for QFs to sell as-available energy without a written contract, the Commission observes that Consumers' suggestion of a simplified form may be a reasonable solution, given the less complex nature of as-available energy sales. However, this issue should be addressed in an avoided cost review proceeding.

Some comments suggested that the Commission should refrain from making any changes to its PURPA implementation until the appeals of Order 872 have been exhausted. With the caveat that the Commission is not making any changes with this order, the Commission finds that delaying implementation of Order 872 going forward is not the appropriate course of action given the uncertainty and time-consuming nature of an appeals process. Order 872 became effective on December 31, 2020, and therefore, to the extent the Commission must comply with Order 872, it shall do so.

2. What Process Should the Commission Utilize if Modifications are Required?

As explained above, the Commission does not find that it should modify Commission orders currently in effect, approved settlement agreements, or QF contracts entered into prior to the effective date of Order 872, including, as noted above, contract date extensions relating to QF contracts entered into prior to the effective date of Order 872. However, as to any modifications or updates to PURPA tariffs or documents that will govern future QF contracts, the Commission finds that the most appropriate approach is to address potential revisions in each utility's biennial avoided cost review. As pointed out in comments, the Commission takes an individualized approach for many aspects of its PURPA implementation which allows for consideration of the unique facts and circumstances of each electric utility. Any revisions reflecting the changes or guidance included in Order 872 should similarly utilize an individualized approach.

In comments, Consumers and DTE Electric proposed a less frequent avoided cost review process than the biennial schedule currently used by the Commission. With this order, the Commission declines to adjust the biennial avoided cost review schedule but will consider in the next biennial review for each utility whether review on a biennial basis or a less frequent review is appropriate. The Commission encourages any utility that desires to adjust its biennial review schedule to include such a request in its next biennial avoided cost review filing with adequate support.

3. Competitive Procurement

On August 20, 2020, the Commission issued an order in Case No. U-20852 (August 20 order) directing the Staff to convene a competitive procurement workgroup 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. August 20 order, pp. 6-9. Also, in the August 20 order, the Commission recounted its efforts to address, refine, and implement a competitive solicitation model in Case Nos. U-15800 (providing Detroit Edison Company (Detroit Edison) direction on information to include in the company's RFPs to ensure transparency in the bidding process), U-15806 (providing further guidance to Detroit Edison on a competitive bidding process), U-18419 (expressing the need for a fair competitive solicitation process), U-18232 (addressing issues in DTE Electric's RFP and advising the company to develop a more independent and defined solicitation with input from the competitive procurement workgroup), and U-20165 (approving a settlement agreement in Consumers' IRP case which included a competitive procurement process utilizing an independent administrator). August 20 order, pp. 2-4.

As recommended in some comments, the Commission seeks to continue its work to develop a workable competitive solicitation model and finds that the MI Power Grid competitive procurement workgroup, with the input of the Staff, stakeholders, and utilities, is the appropriate venue to do so. As explained in detail in the August 20 order, the Commission intends to develop defined parameters of a competitive solicitation process that complies with the minimum requirements set out in Order 872, including defining the role of an independent administrator. The Commission therefore adopts the competitive procurement requirements and standards set out in Order 872 as well as the clarification in Order 872-A that a competitive solicitation should be administered and scored by an independent entity. Order 872, ¶¶ 411-441; Order 872-A, ¶ 223. These standards should be incorporated into the competitive procurement workgroup led by the Staff.

The Commission notes that while Order 872 provides for competitive procurement as one option for setting avoided costs, it does not prescribe competitive bidding as the only option. Therefore, the Commission envisions that the competitive bidding framework developed in the workgroup would serve as a guide to then be implemented in an avoided cost review proceeding for a utility that chooses to adopt a competitive bidding model as a means to set its avoided cost. While the Commission leaves it to each utility to make its procurement decisions, the Commission advises utilities of the potential benefits of adopting a competitive solicitation model that include, but are not limited to, an avoided capacity cost set at zero; a streamlined avoided cost methodology; a presumption that the competitive solicitation and costs incurred are reasonable; a fair, transparent, and trustworthy competitive process; and potentially less frequent avoided cost and capacity reviews by the Commission.

4. Legally Enforceable Obligation

Order 872 requires that a QF demonstrate commercial viability and financial commitment pursuant to objective, reasonable criteria determined by a state commission and sets out 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 filing fees, to obtain all necessary local permitting and zoning approvals. The Commission agrees that these are reasonable factors that the Commission will consider in determining whether an LEO has formed in an individual case. The Commission also agrees with FERC's requirement that any factor must be in the QF's control and therefore, the Commission will not require that a QF actually obtain financing, receive local permits or zoning approvals, or obtain an executed PPA to be eligible for an LEO. Order 872, ¶¶ 684-688.

The Commission finds adoption of the requirements set out in Order 872 to be consistent with the Commission precedent set in the September 26, 2019 order in Case No. U-20156 (September 26 order), which was affirmed by the Michigan Court of Appeals in *Greenwood Solar, LLC v DTE Electric Co*, unpublished per curium opinion of the Court of Appeals issued December 17, 2020 (Docket No. 351223). In *Greenwood*, the Court of Appeals affirmed the Commission's decision to decline to find that Greenwood Solar, LLC (Greenwood) had established an LEO with DTE Electric. The Commission determined that an LEO had not been formed because Greenwood had not demonstrated an unequivocal commitment to sell energy and capacity. Specifically, the Commission reasoned:

> [I]nherent in the formation of an LEO is a binding commitment by both sides to the agreement or obligation—the obligation by the utility to purchase the power and the obligation by the QF to provide energy and capacity upon which the utility and its customers can rely. The Commission finds that merely sending a letter of intent or proposing a PPA to sell energy and/or capacity is akin to holding a position in the interconnection queue and does not, on its own, establish an unequivocal commitment from the QF that strikes the balance between QFs and utilities. While . . . the establishment of an LEO turns on the QF's commitment, and not the utility's actions, there are some additional steps necessary for a QF to fully understand *and commit to* its obligations. This is necessary to strike the right balance between access for QFs on the one hand and system reliability and certainty in utility planning and procurement to protect ratepayers on the other hand. Therefore, the Commission does not find that an LEO has been established in this case.
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> * * *
>
> The Commission in the present case is not denying the existence of an LEO simply based on the lack of a signed document between Greenwood and DTE Electric, but on the present lack of a distribution study, and lack of commitment to pay costs for any distribution upgrades found by the study to be required. In other

> words, an LEO cannot yet be found to exist in this case because it remains unclear the extent of the obligations to which Greenwood would be agreeing.

September 26 order, pp. 53-54. In the September 26 order, the Commission found that the circumstances of the Greenwood project necessitated a distribution study that would enable Greenwood to know the full extent of its technical and cost obligations to interconnect the project to DTE Electric's distribution system. Without this information, the Commission found it was not possible for Greenwood to establish its financial commitment to the project, and thus establish an LEO. The Commission believes its rationale aligns with the rationale in Order 872, which is to strike a balance between QF and utility interests to ensure that speculative and unviable projects do not burden a utility's resource and distribution planning but also to ensure that unreasonable barriers are not placed in front of QF development.

In justifying its requirement in Order 872 that a demonstration of commercial viability and financial commitment was necessary to establish an LEO, FERC explained that such a requirement:

> will ensure that no electric utility obligation is triggered for those QF projects that are not sufficiently advanced in their development, and therefore, for which it would be unreasonable for a utility to include in its resource planning. At the same time, the criteria ensure that the purchasing utility does not unilaterally and unreasonably decide when its obligation arises.

Order 872, ¶ 684. Indeed, FERC repeatedly stressed that such criteria should be objective and reasonable, and that "the factors the state requires must be factors that are within the control of the QF." *Id.*, ¶ 685.

Consistent with this rationale, the Commission finds value in providing greater certainty around if and when an LEO has formed that includes clearly articulated objective and reasonable criteria, consistent with the requirements of Order 872, Order 872-A, and past Commission orders, and is based on factors within the control of the QF. Additional clarity around whether an LEO has been formed will provide greater certainty to utilities and project developers alike, consistent with PURPA's statutory goal "to encourage cogeneration and small power production" within certain statutory limits. 16 USC 824a-3(a). As such, the Commission directs each 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, again consistent with FERC and Commission precedent. 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. Interested parties will also have the opportunity to provide evidence around these criteria as part of the contested case process.

The Commission also finds that the current complaint process for challenging a utility's determination of whether an LEO exists has significant shortcomings, including adding often significant transactional costs that unnecessarily burden QFs and frustrate Congress's intent in enacting PURPA to encourage the development of such projects. While the Commission expects that clear articulation of objective and reasonable criteria to determine whether a QF has demonstrated the necessary commercial viability and financial commitment will help in this regard, the Commission also finds potential value in an expedited review process to determine the relatively narrow question of whether an LEO has been established in a particular case, while noting that such an expedited LEO review process would not foreclose the availability of the Commission's formal complaint process for allegations involving potential violations of Commission rules or other requirements. As such, the Commission seeks additional comment on the following questions:

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?

Any person may submit written or electronic responsive comments to this order. Comments must be filed with the Commission and must be received no later than 5:00 p.m. (Eastern time (ET)) on February 11, 2021. Reply comments must be filed no later than 5:00 p.m. (ET) on February 25, 2021. Written comments should be sent to: Executive Secretary, Michigan Public Service Commission, P.O. Box 30221, Lansing, MI 48909. Electronic comments may be emailed to mpscedockets@michigan.gov. All comments should reference Case No. U-20905. All information submitted to the Commission in this matter will become public information available on the Commission's website and subject to disclosure.

THEREFORE, IT IS ORDERED that:

A. The MI Power Grid competitive procurement workgroup shall continue its efforts to develop a framework for competitive solicitations in compliance with the standards set out in *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 172 FERC ¶ 61,041 (2020) and *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 173 FERC ¶ 61,158 (2020).

B. The Commission directs utilities, as part of their next biennial review of avoided costs and associated issues, to provide clear guidance on the criteria it will use to evaluate a qualifying facility's commercial viability and financial commitment in determining whether a legally enforceable obligation has been formed, consistent with the framework set out in *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 172 FERC ¶ 61,041 (2020) and *Qualifying Facility Rates and*

*Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* 173 FERC ¶ 61,158 (2020), and Commission precedent.

C. The Commission invites comments and reply comments from interested stakeholders on the questions relating to an expedited review process to determine whether a legally enforceable obligation has been created, as described in this order. Comments must be received no later than 5:00 p.m (Eastern time) on February 11, 2021, and reply comments must be filed no later than 5:00 p.m. (Eastern time) on February 25, 2021.

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 Peretick, Commissioner

By its action of January 21,2021.

Lisa Felice

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 January 21, 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 J. Brown

Brianna Brown

Subscribed and sworn to before me
this 21st day of January 2021.

Angela P. Sanderson

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

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