

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DRM 17-153

FREEDOM LOGISTICS, LLC, d/b/a FREEDOM ENERGY LOGISTICS

**Request for Rulemaking with Respect to Purchases of
Electric Energy and Capacity Produced from Qualifying Facilities**

Order Denying Request

ORDER NO. 26,071

November 3, 2017

In this Order, the Commission denies the Request for Rulemaking with Respect to Purchases of Electric Energy and Capacity Produced from Qualified Facilities (Request) filed on October 6, 2017, by Freedom Logistics, LLC, d/b/a Freedom Energy Logistics (Freedom Energy), under N.H. Code Admin. Rules Puc 205.03 and RSA 541-A:4. We do not believe that rulemaking is the appropriate vehicle for addressing the relevant issues; nor are we persuaded that the request for a new proceeding is timely. We also do not believe that there is a sufficient level of general interest in those issues.

I. FREEDOM ENERGY AND EVERSOURCE

A. Freedom Energy

Freedom Energy's Request asks the Commission to adopt rules authorizing a qualifying facility (QF) to sell its output to utilities and receive payments pursuant to a legally enforceable obligation at a long-run forecasted avoided cost rate, under the Public Utility Regulatory Policies Act of 1978, as amended (PURPA).¹ Request at 3. Freedom Energy represented that it is a member of Granite State Hydropower Association "and has been actively involved in developing Group Net Metering agreements." *Id.* at 1.

¹ 16 U.S.C. §824a

According to Freedom Energy, the current utility practice of paying QFs for their energy products at rates based primarily on the real-time locational marginal price (LMP) at the node in which the facility is located is inconsistent with the QF's option under PURPA. According to Freedom Energy, QF's are obligated under PURPA to provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, at rates that are, at the QF's option, to be based on the utility's avoided costs calculated either (i) at the time of delivery, or (ii) at the time the obligation is incurred. *Id.* at 2-3 (citing 18 C.F.R § 292.304(d)(2) (Federal Energy Regulatory Commission (FERC) regulations under PURPA)). Freedom Energy asserted that the QF has the "unconditional right to choose whether to sell its power 'as available' or pursuant to a legally enforceable obligation at a forecasted avoided cost rate." *Id.* (citing *Allco Renewable Energy Limited v. Massachusetts Electric Company d/b/a National Grid*, 208 F. Supp. 3d 390 (D. Mass. 2016) (*Allco*)).

Freedom Energy argued that the *Allco* decision "appears to be adverse to the Commission's recent ruling in Docket No. DE 14-238² as well as the currently relevant PSNH d/b/a Eversource tariff provision. (*Section 33 Rates for Purchases from Qualifying Facilities*)." *Id.* at 3. Freedom Energy submitted with its Request "the approximate text of a draft proposed rule establishing the requirements for the jurisdictional utilities in New Hampshire to purchase the output generated from in-state [QFs]." *Id.* at 1. The draft proposed rule text did not describe the methodology for determining a long-run forecasted avoided cost rate under PURPA. *Id.*

Freedom Energy noted that the Commission in 2015 had denied the request for rulemaking filed by Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) for the purpose of establishing the requirements for New Hampshire utilities to

² We assume this is a reference to the Commission's Order No. 25,920 at 82-90 (July 1, 2016), which addresses the current methodology for determining avoided cost payments to QFs for power purchases from their small power production facilities based on ISO-NE real-time energy market prices.

purchase the output generated from QFs at a purchase price for energy products based largely on the real-time LMP at the node where the generator is located. *Id.* at 1-2. *See* Order No. 25,814 at 3-5 (September 18, 2015). Freedom Energy quoted the Commission’s recognition in that order that “the determination of purchase obligations and avoided cost rates are important issues that may need to be revisited.” *Id.* at 2; *see* Order No. 25,814 at 4.

B. Eversource

On October 19, 2017, Eversource filed a response to Freedom Energy’s Request in which it maintained that the Commission had described in Order No. 25,814 the type of proceeding it would conduct “if there remain[ed] an interest in revisiting PURPA obligations following the completion of the Asset Proceeding.” Eversource Response at 1.³ Eversource characterized the proceeding described by the Commission in 2015 as a “generic, litigated proceeding” rather than a rulemaking initiative. *Id.* at 2. According to Eversource, the proposed rules filed by Freedom Energy with its Request seek only to confirm an existing obligation under federal law, and therefore “initiating a proceeding based upon [the Request] to examine the proposed rules is unnecessary.” *Id.* Eversource went on to provide an initial set of substantive comments on the relevant PURPA obligations for the Commission’s consideration, should it undertake a rulemaking based on the Freedom Energy Request. *Id.* at 2-6. Given that the only issue before us is whether to initiate a rulemaking proceeding to address those obligations, we will not describe Eversource’s initial substantive comments in this Order.

³ “Asset Proceeding” is defined in Order No. 25,814 as Docket DE 14-238, in which the Commission reviewed and approved the 2015 Settlement Agreement providing for Eversource’s divestiture of its generation assets through a managed auction process. *See* Order No. 25,814 at 1-2. That divestiture auction process has not yet been completed. *See* Dockets DE 16-817, DM 17-029, and DE 17-124.

C. Freedom Response to Eversource

Freedom Energy filed a reply on October 20, 2017, alleging that Eversource's Response is "misleading and incomplete," because it fails to acknowledge the ongoing PURPA-related proceedings in which its affiliates are participating in Massachusetts and Connecticut. Freedom Energy Reply at 1. Freedom Energy again cited the *Allco* decision, in which the federal district court found that the relevant Massachusetts Department of Public Utilities (DPU) regulations are inconsistent with FERC's PURPA regulations and that the DPU's implementation of PURPA therefore must be revisited, "either through a new rulemaking, a case-by-case adjudication, or other reasonable method." *Id.* Freedom Energy noted that the Massachusetts DPU has initiated a rulemaking proceeding (D.P.U. 17-54) to review and revise its PURPA implementation regulations, consistent with the *Allco* ruling. *Id.* at 1-2. Freedom Energy conceded that its Request "does seek to confirm an existing obligation" that is "already found in federal regulations." *Id.* at 2. It nonetheless asserted that the Commission must "pin PSNH/Eversource on this important point of law by adopting a similar state regulation," because QFs otherwise would either individually or collectively be "left with the looming prospect of having to [seek] relief from FERC on this matter." *Id.*

II. COMISSION ANALYSIS

Pursuant to RSA 541-A:4 and Puc 205.03, the Commission must, within 30 days of receipt of a request for rulemaking, either grant the request and initiate a rulemaking, or deny the request and state its reasons for denial. We deny Freedom Energy's request for a rulemaking because we do not believe a rulemaking is the appropriate vehicle for addressing legally enforceable long-term obligations or avoided cost determinations under PURPA. The Commission has never had rules implementing the obligations of electric utilities and the rights

of QFs under PURPA, instead relying on rate orders, related issuances, and utility tariff filings. We see no reason to depart from that precedent and adopt any such PURPA implementation rules at this time.

We acknowledge that, in 2015, the Commission described in general terms the type of process it believed would be appropriate to address PURPA implementation issues if and when those issues required resolution:

We recognize that the determination of PURPA purchase obligations and avoided cost rates are important issues that may need to be revisited. We also recognize that there are more parties interested in these issues than those participating in the Asset Proceeding. Therefore, *if there remains an interest in revisiting PURPA obligations following the completion of the Asset Proceeding, we will open a generic avoided cost docket.* In that docket, interested parties will be permitted to litigate generally applicable requirements and the avoided cost rate methodology or methodologies for utility purchases of QF power pursuant to PURPA.

Order No. 25,814 (September 18, 2015) at 4 (emphasis added).

We believe that now is not the time to open a generic avoided cost docket, because Eversource has not yet concluded the generation asset divestiture process and transitioned to a restructured wires-only electric utility. It is premature to find that the “Asset Proceeding” has been completed. Furthermore, we are not persuaded by Freedom Energy’s assertion that there currently exists a sufficient level of interest in revisiting the implementation of PURPA in New Hampshire through Commission precedent and utility tariffs. Freedom Energy is neither an owner nor a developer of QF projects; rather, it is a registered electric load aggregator that does not take ownership of electricity. We are not aware of any QF project owner or developer who has recently expressed interest in obtaining a legally enforceable long-term obligation from a New Hampshire electric utility to purchase the electric output of its project.

We remain open to initiating a new proceeding that would reexamine PURPA implementation issues on a generic basis, once the Eversource generation divestiture process has

been completed and a sufficient level of relevant interest has been demonstrated. Until then, each of the utilities has a tariffed methodology on file for determining PURPA avoided cost rates, and the Commission retains the authority to address other related issues on a case-by-case basis, if necessary.

Based upon the foregoing, it is hereby

ORDERED, that Freedom Energy's Request for Rulemaking with Respect to Purchases of Electric Energy and Capacity Produced from Qualified Facilities is DENIED.

By order of the Public Utilities Commission of New Hampshire this third day of November, 2017.



Martin P. Honigberg
Chairman



Kathryn M. Bailey
Commissioner



Michael S. Giaimo
Commissioner

Attested by:



Debra A. Howland
Executive Director