FERC Sows Confusion Over Small Power Producer Regulation

By **Jennifer Key**

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One would think the issue of jurisdiction over interconnections to distribution facilities for resources selling wholesale power could not get more complex. The Federal Energy Regulatory Commission's Order No. 2222 proves that it could.

Specifically, interconnections of qualifying facilities, or QFs, to distribution — an area where jurisdiction previously had been relatively clear — has been muddled a bit.

For decades, FERC has claimed that it has jurisdiction over the interconnection of QFs connected to the distribution systems of FERC-jurisdictional utilities, unless the QF was only selling, or could only sell, to the utility to which it was connected, and the sales were regulated under the Public Utility Regulatory Policies Act, or PURPA.

Order No. 2222 perhaps continues this policy — or perhaps not. According to FERC:
This final rule also does not revise the Commission's jurisdictional approach to the interconnections of QFs that participate in distributed energy resource aggregations.

In support of this statement, FERC cited its Order No. 2003,[1], Order No. 2006[2] and Order No. 845.[3] The problem is that these citations do not really cover an approach for QFs "that participate in distributed energy resource aggregations." The citations are instead to an approach that applies to QFs participating directly in wholesale markets. That said, the case for FERC jurisdiction appears more compelling than the case against FERC jurisdiction, absent further clarification.

To interpret Order No. 2222, a review of the law is necessary. The issue of jurisdiction over QF interconnections where the QF is not selling 100% of its output to its host utility under PURPA begins with Western Massachusetts Electric Co. in 1999.

In the underlying FERC case, FERC asserted jurisdiction over QF interconnections involving any sales to third parties based on Section 205 of the Federal Power Act — allowing FERC to regulate contracts which in any manner affect or relate to transmission rates, charges, classifications and services. QF interconnection agreements were found to relate to FERC-jurisdictional transmission, because the purpose of the interconnection was to facilitate transmission of QF-generated power to a third party.

FERC also held that its QF regulation assigning jurisdiction over QF interconnections to state authorities did not apply where the interconnecting utility had no obligation to interconnect under FERC's PURPA regulation. The court upheld these rulings — and the era of FERC jurisdiction over interconnections by market participant QFs began.

Eventually, the issue arose as to whether the same clear rule set forth in Western Massachusetts Electric Co. applied to market participant QFs connected to distribution

facilities. The issue of distribution interconnections was not explicitly addressed in paragraphs 813-815 of Order No. 2003.

But it was addressed implicitly when FERC stated "states will continue to exercise authority over QF interconnections when the owner of the QF sells the output of the QF only to an interconnected utility or to on-site customers." Thus, state jurisdiction was quite limited.

In Order No. 2006, in paragraphs 516-518, FERC confirmed that:
[W]hen an electric utility interconnecting with a QF does not purchase all of the QF's output and instead transmits the QF's power in interstate commerce, the Commission exercises jurisdiction over the rates, terms, and conditions affecting or related to such service, such as interconnections.

But distribution was not directly mentioned.

A few years after these rules were issued, FERC addressed the issue head on in its 2007 PJM Interconnection LLC case,[4] stating that where a QF "seeks interconnection to a non-OATT 'distribution' facility to make jurisdictional wholesale sales ... [FERC] has jurisdiction over this interconnection, even though Order No. 2003 does not apply." Order No. 2222 also cites to Order No. 845, which found QF interconnection issues outside its scope.

Thus, the case law is rather clear that market participant QFs — whether selling directly to organized markets or bilaterally to third parties — are subject to FERC jurisdiction over their interconnections. But FERC cited this case law as if it addressed QFs in distributed energy resource, or DER, aggregations, when neither the orders cited nor PJM mention aggregation.

The issue of interconnection jurisdiction did arise in an order on the DER aggregation program of the California Independent System Operator, or CAISO, but not in the context of QFs. All DERs participating in CAISO markets that sell energy connect under FERC jurisdiction — and the utilities said in the CAISO case that this rule would apply to DERs in aggregations.

FERC found that some DERs, such as demand response-only DERs, would not interconnect under its jurisdiction. But the commission did not challenge the argument that other DERs — i.e., QF or non-QF — in aggregations would interconnect under a FERC-jurisdictional distribution tariff.

The New York Independent System Operator's recent aggregation program also addresses interconnection. The FERC order on the same says nothing about jurisdiction, and merely addresses the interconnections that the NYISO has deemed are subject to its tariff. Much as with the order on the CAISO program, QF interconnection issues are not addressed at all.

In sum, the existing case law clearly holds that QFs intending to transmit power to third parties in interstate commerce should be interconnected under FERC jurisdiction — and it provides that states should only have jurisdiction over QF interconnections if the QF is selling its full output to the host utility under PURPA.

In declining to assert any jurisdiction over non-QF DERs' interconnections — even those that historically would interconnect under FERC jurisdiction under the first use test — FERC based its decision to decline jurisdiction on practical reasons:

[W]e agree with commenters that state and local authorities, which have traditionally regulated distributed energy resource interconnections, have the requisite experience, interest, and capacity to oversee these distribution-level interconnections.

FERC did limit its ruling to DERs selling exclusively through a distributed energy resource aggregation. Given that non-QF DERs participating in markets exclusively through aggregations eventually have their power transmitted in interstate commerce, one of the two reasons for FERC asserting jurisdiction over aggregated QF DERs arguably has been eliminated.

But QFs remain different from other DERs. Per FERC precedent, the only reason any QF interconnection is ever state-jurisdictional is FERC's QF interconnection regulation.[5] If an entity is a QF, its interconnection appears to always be FERC-jurisdictional, unless it can meet the very narrow exception of selling its full output to its host under PURPA.

That said, more clarity would help, particularly in regions of the country where net energy metering does not exist, or where compensation is not particularly robust — i.e., regions where DERs are most likely to participate in aggregations.

Clarity on this issue is important, because most all solar rooftop DERs are QFs by operation of law under FERC's PURPA regulations, due to their small size (less than one megawatt). DER aggregation may appeal to such customers, if they are located in a region without net metering, or where net metering credits are now quite reduced.

If a new all-solar roofed community is built with DER aggregation planned as part of the community, and all such homeowners' resources are QFs as a matter of law due to their size, it is rather important for a distribution owner to know if FERC does indeed have jurisdiction over the interconnection of these DERs, given their QF status.

Clarity on this issue is also vital as to existing QFs selling to their host under PURPA that decide to terminate PURPA sales and join a DER aggregation. In Order No. 2222, FERC states:
[T]o minimize disruption to existing interconnection agreements for distributed energy resources, we are not requiring distributed energy resources that already interconnected under Commission-jurisdictional procedures to convert to state or local interconnection agreements.

Notably, FERC never says the reverse — i.e., that a QF DER interconnected under state jurisdiction today does not need a FERC-jurisdictional interconnection if it joins a DER aggregation.

Today, a QF does need a FERC-jurisdictional interconnection if it ceases selling power to its host and converts to third-party sales. Indeed, Order No. 2003 addressed such conversions for QFs, allowing them to skip the queue if their characteristics had not changed.

In sum, FERC's brief discussion of the interconnection of QF DERs is insufficient to provide the clarity needed by distribution owners.

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[1] FERC Order No. 2003, 104 FERC ¶ 61,103 at PP 813-815.

[2] FERC Order No. 2006, 111 FERC ¶ 61,220 at PP 516-518.

[3] FERC Order No. 845, 163 FERC ¶ 61,043.

[4] PJM Interconnection LLC, 123 FERC ¶ 61,087 (2007).

[5] 18 C.F.R. § 292.306.