

ISSUE BRIEF January 2020

The Public Utility Regulatory Policies Act of 1978

Summary

The Public Utility Regulatory Policies Act of 1978 (PURPA) was enacted following the energy crisis of the 1970s to encourage cogeneration and renewable resources and promote competition for electric generation. It also sought to encourage electricity conservation. Implemented by the Federal Energy Regulatory Commission (FERC or Commission) and the states, the statute imposes mandatory purchase obligations on electric utilities for power generated by cogeneration facilities and small power production facilities of 80 megawatts (MW) or less. Much has changed since enactment of the act 42 years ago, including the development of organized wholesale electricity markets, federal and state programs encouraging renewable resources, and the adoption of policies at FERC to promote open access transmission policies. Utilities and state regulators have raised concerns with the Commission and Congress about PURPA's implementation and needed reforms to its mandatory purchase obligation provisions. In response to the concerns, FERC is currently considering changes to its regulations implementing PURPA, and legislation was introduced in the House of Representatives in the 115th and 116th Congresses to modernize the statute. The American Public Power Association (APPA or Association) supports FERC's proposed rule changes and believes PURPA needs to be updated to reflect today's energy marketplace.

Background

PURPA was enacted following the energy crisis of the 1970s to encourage cogeneration and renewable resources and promote competition for electric generation. It also sought to encourage electricity conservation. The act requires electric utilities to purchase electric energy from cogeneration facilities and small power production facilities of 80 MW or less in size at a rate that does not exceed the incremental cost to the electric utility of alternative electric energy (referred to as "avoided cost"). FERC and the states were directed to implement PURPA, with FERC determining what constitutes a qualifying facility (QF) and providing guidance on avoided costs. State public utility

commissions (PUCs) have responsibility for determining the avoided costs for the utilities they regulate and to establish the rates, terms, and conditions of power purchase contracts and interconnection.

Section 210 of the act governs the purchase of energy from QFs by electric utilities. QFs are divided into two categories—small power production facility and cogeneration facility. A small power production facility has a capacity of 80 MW or less and its primary energy source must come from a renewable, biomass, waste, or geothermal source. A cogeneration facility is a generator that produces electricity and a second form of thermal energy (such as heat or steam) in a manner that is more efficient than producing both forms of energy separately. PURPA provides that all small power production facilities located at the same site count toward the 80 MW size limit. Under FERC's "one-mile rule," the agency deems small power production facilities located more than one mile apart to be located at different sites. Some renewable developers have spread out power production facilities that are more than 80 MW over a larger area to divide the overall project into smaller ones that meet PURPA's QF requirements.

PURPA also requires electric utilities to sell power to QFs at non-discriminatory rates that are just and reasonable and in the public interest. In one recent case, a public power utility's retail rates were challenged at FERC by retail customers and a solar energy advocacy group, who argued that rates applicable to customers with rooftop solar facilities discriminated against QFs in violation of PURPA. Although FERC declined to initiate an enforcement action in response to the petition, the challengers have brought suit in federal district court, and it is possible that other utilities could face similar challenges to their retail rates.

The Energy Policy Act of 2005 made changes to PURPA, including adding a new provision—section 210(m)—that allows an electric utility to terminate the requirement to enter into new QF purchase contracts or obligations if FERC finds the QFs have non-discriminatory access to certain categories of wholesale electric markets. Under its current regulations implementing section 210(m), FERC presumes that QFs that are 20 MW or

smaller do not have non-discriminatory access to the market, although FERC is currently proposing to lower this threshold to 1 MW for small power production QFs.

Regulatory and Congressional Action

Much has changed in the 42 years since the enactment of the act, including the development of organized wholesale electricity markets and the adoption of policies at FERC to promote open access transmission policies. Further, state and federal incentives have been adopted to promote generation from wind and solar resources, such as state renewable portfolio standards and the federal Investment Tax Credit and Production Tax Credit. Today, 8.1 percent of electric generation is from these resources versus virtually none in 1978.

Responding to these industry changes, FERC issued a notice of proposed rulemaking (NOPR) in September 2019 proposing to broadly revise its PURPA regulations for the first time since 1980. The changes proposed in the rule include replacing the current strict one-mile rule with a tiered approach, clarifying the authority of states and nonregulated electric utilities to set avoided cost rates for certain QF sales based on competitive market factors, and lowering the threshold below which QFs are presumed not to have non-discriminatory access to the markets under PURPA section 210(m) from 20 MW to 1 MW. APPA has filed comments in support of FERC's NOPR.

Although FERC has wide latitude in revising its PURPA regulations under the current statutory scheme, the need for PURPA reform has also drawn the attention of Congress. During the 115th Congress, the House Energy & Commerce Committee's Subcommittee on Energy held a hearing to examine PURPA, which resulted in Representative Tim Walberg (R-MI) introducing H.R. 4476, the PURPA Modernization Act of 2017. The legislation would have amended PURPA section 210(m) so that small power production facilities of 2.5 MW or greater would be presumed to have non-discriminatory access to wholesale markets for purposes of allowing electric utilities to terminate the mandatory QF purchase obligation. The bill would also have empowered state PUCs and non-jurisdictional entities (i.e., public power utilities and electric cooperatives not regulated by PUCs) to waive the mandatory purchase obligation on a case-by-case basis for small power production facility QFs if additional power is not needed to meet consumers' electricity needs. In addition, the legislation would have directed FERC to relax its strict one-mile rule to prevent abuse of the rule. The Energy Subcommittee held a legislative hearing on the bill in January 2018; however, the subcommittee did not mark up the legislation prior to the end of the 115th Congress. As noted

above, FERC is proposing to reform, using its existing authority, some aspects of PURPA implementation that would have been specifically addressed by the PURPA Modernization Act of 2017.

Rep. Walberg reintroduced his legislation in March 2019 (now H.R. 1502). APPA supports the bill. In June 2019, Senator John Barrasso (R-WY) introduced S. 1760, the UPDATE PURPA Act, that similarly seeks to reform the law.

American Public Power Association Position

APPA has heard from its members that PURPA's mandatory purchase obligation has forced them to buy QF power they do not need, often at rates that are higher than what can be obtained from the market. It can also impact their long-term generation capacity planning when they are unexpectedly required to purchase power not accounted for in their integrated resource plan.

In enacting PURPA, the Association does not believe Congress ever intended for utilities to have to buy power they do not need, at rates typically higher than what is available on the market. APPA supports FERC's pending effort to reform its PURPA regulations to reflect the modern energy landscape. For the same reasons, APPA supports the PUPRA Modernization Act because it would direct FERC to relax its one-mile rule so that it is a rebuttable presumption instead of a firm rule. This would provide utilities and other stakeholders with potential redress when a renewable developer splits a larger project into smaller ones located just over a mile apart to meet PURPA's 80 MW QF capacity limit as implemented in FERC regulations. The Association also supports the inclusion of language in the bill to allow self-regulated public power utilities to be relieved of new mandatory purchases from small power production QFs when the public power utilities determine they do not need the additional energy.

American Public Power Association Contacts

Sarah Czufin, Government Relations Director, 202-467-2959 / sczufin@publicpower.org

John McCaffrey, Senior Regulatory Counsel, 202-467-2952 / jmccaffrey@publicpower.org

The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.