



THOMPSON
COBURN LLP

PURPA: The Latest Developments for Electric Utilities

American Public Power
Association
Legal & Regulatory
Conference

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Part I – Background and Context



Statutes, Regulations, and Orders



- Public Utility Regulatory Policies Act of 1978 “PURPA”
 - Title II, Section 210, entitled “Cogeneration and Small Power Production”
 - Codified at 16 U.S.C. § 824a-3
 - Definitions at 16 U.S.C. § 2602
- FERC Regulations at 18 C.F.R. Part 292
- FERC Order Nos. 69, 70 series, 671, 671-A, 688, 688-A, and 732

Background – 1970s Energy Crisis



- Late 1960s, early 1970s – demand for electricity increasing
- 1973 – Petroleum embargo
 - Oil prices quadrupled
 - Gas pump lines, conservation measures
 - Prices stayed high even after embargo ended
 - Petroleum products = source of fuel for electricity generation
 - ~16% by 1978
 - National security concerns
- Concerns about natural gas supply
 - 14% of fuel used to generate electricity by 1978

Background – 1970s Energy Crisis



“The oil and natural gas that we rely on for 75 percent of our energy are simply running out. In spite of increased effort, domestic production has been dropping steadily at about 6 percent a year. Imports have doubled in the last 5 years. Our Nation's economic and political independence is becoming increasingly vulnerable. Unless profound changes are made to lower oil consumption, we now believe that early in the 1980's the world will be demanding more oil than it can produce.”

- President Carter, Address to the Nation on Energy (Apr. 18, 1977)

National Energy Act of 1978



- PURPA was one Act within this five-Act legislation:

“The Congress finds that *protection of the public health, safety, and welfare*, the preservation of *national security*, and the proper exercise of congressional authority under the Constitution to regulate *interstate commerce* require –

(1) a program providing for *increased conservation* of electric energy, *increased efficiency* in the use of facilities and resources by electric utilities, and *equitable retail rates* for electric consumers,

(2) a program to *improve the wholesale distribution* of electric energy, the *reliability* of electric service, the procedures concerning consideration of wholesale rate applications before the Federal Energy Regulatory Commission, the participation of the public in matters before the Commission, and to *provide other measures with respect to the regulation of the wholesale sale of electric energy . . .*”

- PURPA at Section 2.

PURPA – Section 210



- Requires FERC to implement rules encouraging the development of “cogeneration” and “small power production” facilities
 - Including rules that require *electric utilities* to offer to
 - (1) sell electric energy to qualifying cogeneration and qualifying small power production facilities and
 - (2) purchase electric energy from such facilities at “the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.” Section 210(b).
 - Generally referred to as “avoided cost”

PURPA – Section 210



- Applies to “electric utilities”
 - Any person or State agency that sells electric energy
 - No exclusions for non-public utilities under the Federal Power Act
 - This means that municipals and cooperative utilities that are normally exempted from most areas of FERC jurisdiction are subject to the requirements of PURPA Section 210 (*i.e.*, the “must buy” and “must sell” provisions)

Qualifying Facilities or “QFs”



- Small Power Production facilities (18 C.F.R. § 292.204):
 - Primary fuel source must be biomass, waste, renewable resources, geothermal, or combination
 - May not exceed 80 MW – same fuel/same owner/same site
 - 1 mile rule
- Cogeneration facilities (18 C.F.R. § 292.205):
 - Produce electric energy, steam or forms of useful energy
 - No maximum size
 - Thermal energy output must be used in productive and beneficial manner
 - Facility’s fundamental purpose cannot be making electricity sales for resale
- Must be certified unless 1 MW or smaller (18 C.F.R. § 292.207):
 - Either self-certification on Form 556 or Commission certification
 - Must be served on transacting electric utilities
 - Failure to certify can result in payment of time-value of revenues received during non-compliance period, depending on facts of non-compliance. See *OREG 1, Inc.*, 135 FERC ¶ 61,150 (2011), *order on reh’g*, 138 FERC ¶ 61,110 (2012).
 - Remedy derives from Section 205 of the Federal Power Act

Must Purchase Obligation



- Each electric utility shall purchase energy and capacity made available to the electric utility from a QF
 - Directly interconnected or wheeled from elsewhere
 - 18 C.F.R. §§ 292.303(a) and 292.304
- Rates must be just and reasonable to the electric consumer of the electric utility, in the public interest, and non-discriminatory
- Purchase can be made “as available” or pursuant to “legally enforceable obligation” – the QF decides
 - If “as available,” avoided cost rate is calculated at time of delivery
 - If pursuant to a legally enforceable obligation, the avoided cost rate may be calculated at time of delivery or when the legally enforceable obligation arose
 - Legally enforceable obligations may arise before contracts are signed
 - Discussed in various FERC orders – see, e.g., Order No. 688

Must Sell Obligation



- Each electric utility shall sell energy and capacity to any QF
 - Rates shall be just and reasonable, in the public interest, and not discriminatory relative to similarly-situated customers
 - Use accurate data and consistent systemwide costing principles
 - Provide supplementary, back-up, maintenance, and interruptible power
 - Special rules applicable to rates for sales of back-up and maintenance power
 - 18 C.F.R. §§ 292.303(b) and 292.305
- Waivable – Joint PURPA Implementation Plans (coops and municipal JEAs)
- Terminable if alternate suppliers are available and if no state obligation to serve

Must Interconnect Obligation



- Electric utilities are required to interconnect QFs to their system
 - 18 C.F.R. § 292.303(c) – “as may be necessary to accomplish purchases or sales”
 - Electric utilities are not required to interconnect if they would become a FERC-jurisdictional public utility
- QFs may be required to pay interconnection costs
 - 18 C.F.R. § 202.306
 - Assessed on a non-discriminatory basis
 - For example, metering, transmission/distribution system upgrades, administrative costs, etc.

Other Electric Utility Obligations



- To transmit to other electric utilities if the QF agrees
 - The electric utility to which the output is transmitted has the same must-purchase obligation as if the QF were supplying the output to that utility directly.
 - Rates may be adjusted for line losses; rate shall not include transmission charges (QF responsible for charges, *Swecker v. Midland Power Coop.*, 114 FERC ¶ 61,205 (2006))
 - 18 C.F.R. § 292.303(d)
- To offer to operate in parallel, provided reliability requirements are fulfilled
 - 18 C.F.R. §§ 292.303(e) and 292.308

Part II – Current Issues



FERC Technical Conference



- June 2016 FERC technical conference (Docket No. AD16-16)
 - Focused on mandatory purchase obligation, the one-mile rule, and methodologies for calculating avoided costs
 - No action by FERC so far

New FERC Commissioners on PURPA



■ New FERC Commissioners

- Robert Powelson:

“PURPA is a 1978 vintage document, it was addressing a scarcity issue and here we are today ... leaning toward energy independence, and the generation mix has changed dramatically . . . I say this respectfully: a congressional review of PURPA, a PURPA 2.0 doctrine, may be part of a potential energy bill.”

- Neil Chatterjee:

“any major changes need to come from [Congress] and not from FERC.”

FERC Nominees on PURPA



- FERC Nominees

- Kevin McIntyre

- *“I agree that both FERC and the states have a role to play under PURPA. Although any major changes to PURPA must come from Congress, I note that FERC convened a technical conference last year to discuss issues related to the statute’s implementation. If confirmed I will give these important PURPA issues the careful attention they deserve and will work to determine whether there are opportunities for improvements to FERC policy in this area.”*

Congressional Perspective: Need for Reform?



- November 6, 2015 letter to FERC:

“Electricity markets, generation technologies, and investments in the electric grid have changed substantially since PURPA was enacted nearly 40 years ago as part of President Carter’s energy plan. Since then, competitive electricity markets and open access policies have emerged and matured, expanding the markets for new generation resources, particularly renewable energy resources.”

- Senator Lisa Murkowski, Congressman Fred Upton, and Congressman Ed Whitfield

Congressional Perspective: Driver of Renewable Growth?



- February 11, 2016 letter to FERC:

“State policies have also driven the growth in renewable generation. Today, over half of states have renewable portfolio standards that go beyond PURPA to directly require construction of renewable resources. Many states also have competitive procurement requirements . . . As a result of these policies, in many of the states not already substantially exempt by the Commission under section 210(m) from PURPA’s mandatory purchase and sale requirements, PURPA is effectively dormant.

Yet in light of these many related areas of electricity policy, Title II remains a singular federal backstop to support renewables in parts of the country that may otherwise have significant barriers.”

- Senator Maria Cantwell, Congressman Frank Pallone, and Congressman Bobby Rush

Let's Hold a Hearing . . .



- September 6, 2017 Committee on Energy and Commerce Hearing - “Powering America: Reevaluating PURPA’s Objectives and its Effects on Today’s Consumers.”

“Since PURPA’s implementation, the nation’s power generation sector has experienced significant changes in the manner and mode by which electricity is supplied to consumers. The rapid deployment of less costly renewable resources in recent years, along with the growth of energy efficiency and demand response products, has changed the long-standing model by which consumers use, and generators supply, electricity. Moreover, little to no growth in demand for electricity nationwide has created an environment where a diverse fleet of generator resources now aggressively compete to supply electricity to a relatively static base of customers. These factors, along with others, have resulted in near-record low electricity prices around the country.

Due to these changes in the power generation sector, now is an appropriate time to revisit the objectives of PURPA, evaluate its current impacts on consumers, and consider whether any reforms are necessary to modernize this law.”

Current Issues – One-Mile Rule



- 80 MW size limit
- What does “at the same site” mean?
 - 18 C.F.R. § 292.204(a)(2):
 - “[F]acilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile”
 - “[T]he distance shall be measured from the electrical generating equipment of a facility.”
 - For purposes of wind resources, “turbine to turbine”
 - Location of other project facilities (substations, tie-lines, etc.) not determinative
 - Licensing characteristics not determinative
 - *Northern Laramie Range Alliance*, 138 FERC ¶ 61,171 (2012), *order on reh’g*, 139 FERC ¶ 61,190 (2012)

Current Issues – One-Mile Rule



- If the one-mile rule is not satisfied, the facility is not a QF
 - Bright-line rule, not a rebuttable presumption
- QF status is revocable:
 - 18 C.F.R § 292.207(d) – “The Commission may, on its own motion or on the motion of any person, revoke the qualifying status . . . if the facility fails to conform to any of the Commission’s qualifying criteria . . .”
- One mile rule can be waived
 - 18 C.F.R. § 292.204(a)(3)
 - *Windfarms, Ltd.*, 13 FERC ¶61,017 (1980) – FERC waived application of one-mile rule due to topography
- *Beaver Creek Wind* (Docket Nos. QF17-673 and QF17-674)
 - Applicants proposed a weighted geographic center methodology
 - FERC did not reach the alternative methodology in its order certifying the QFs
 - May see more alternative applications of rule in future proceedings
- One mile rule may not be binding in proceedings to terminate PURPA purchase obligation (see below)

Current Issues – I'm in an RTO/ISO



- Avoided cost and market pricing
 - No direct FERC precedent at this time, but . . .
 - States use market metrics to establish avoided costs
 - *Pub. Serv. Co. of New Hampshire, d/b/a Eversource Energy*, 2016 WL 3613349 (N.H.P.U.C. 2016).
 - *Re The Detroit Edison Co.*, No. U-16797, 2011 WL 2483594 (Mich. P.S.C. Jun. 16, 2011).
 - *Joint Applications of Wis. Elec. Power Co. and Wis. Gas LLC*, No. 5-UR-106, 2012 WL 6707032 (Wis. P.S.C. Jun. 16, 2011).
 - FERC has rejected use of market price at QF node as measure of avoided cost
 - Not because it was a market price, but because it did not reflect the price the electric utility would incur to serve load
 - *Exelon Wind I*, 140 FERC ¶ 61,152 (2012).
 - Inference that price at load node may be acceptable

Current Issues – I'm in an RTO/ISO



- Must purchase obligations is terminable if a QF has market access for making energy and capacity sales (18 C.F.R. §§ 292.309 and 292.310)
 - Electric utilities in ISO/RTOs – applies on service territory-wide basis
 - Applicable to QFs greater than 20 MW
 - Small QFs presumed to lack access – rarely granted
 - Contemplated changes in ISO/RTO market rules could facilitate greater access by smaller resources
 - 1 mile rule is not binding with respect to 20 MW threshold
 - FERC has not addressed
 - Purchase obligation suspended while request is pending
 - FERC action is required in 90 days (although has been extended)
- Wide use of terminations may create pockets of PURPA development in non-RTO/ISO regions

Current Issues – No Need for Capacity/Energy



- What if an electric utility does not need capacity?
 - System cost data should demonstrate this
 - May need to update on more frequent basis
 - Avoided cost for capacity = \$0.00
 - *City of Ketchikan*, 94 FERC ¶ 61,293 (2001) – “[W]hile utilities may have an obligation under PURPA to purchase from a QF, that obligation does not require a utility to pay for capacity that it does not need.”
- Energy is presumed to be needed
 - Special circumstances could arise if existing resources would be shut off to facilitate energy purchases from QFs
 - 18 C.F.R. § 304(f) and *Entergy Services, Inc.*, 137 FERC ¶ 61,199 (2011)
 - Analogous to selling into market at loss?
 - Be aware of limits on curtailment under 18 C.F.R. § 304(f)
 - Generally not available if the QF is selling under a legally-enforceable obligation. *Idaho Wind Partners 1, LLC*, 140 FERC ¶ 61,219 (2012), *reh’g denied*, 143 FERC ¶ 61,248 (2013)

Current Issues – Contract Duration



- FERC has not established a minimum or maximum term
- State regulatory authorities have addressed contract duration:
 - Idaho PUC: Granted petition requesting that it reduce the length of prospective contracts for certain QFs from twenty years to two years. (*In the Matter of Idaho Power Company's Petition to Modify Terms and Conditions of PURPA Purchase Agreements*, 2015 WL 5002133 (Idaho P.U.C. Aug. 20, 2015)).
 - Wyoming PSC: Rejected request to reduce a utility's PURPA contract terms from twenty years to three years. (*In the Matter of Rocky Mountain Power for Modifications of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities*, 2016 WL 3483204 (Wyo. P.S.C. June 23, 2016)).
 - North Carolina: In 2017, adopted PURPA legislation reducing mandatory PURPA contract term from fifteen years to ten years.
- Competing objectives:
 - Developers' goal to finance projects under longer contract terms
 - Electric utilities' goal (may be) to mitigate price risk with shorter terms

Current Issues – Planning Challenges



- QF development can create planning challenges
 - Current planning environment is generally challenging for reasons unrelated to PURPA
 - Demand may be relatively flat
 - Large amounts of behind-the-customer-meter distributed generation
 - Retail choice policies
 - But PURPA adds another layer of unpredictability
 - In some cases, QF project size may be large relative to or exceed size of load
 - Electric utilities may not know where or when project development may occur

Looking Ahead



- Industry continues to take a hard look at PURPA
 - Energy landscape is very different 40 years later
 - FERC has an open PURPA docket
 - Docket No. AD16-16-000
 - A number of issues may be resolved at the FERC level
 - One mile rule
 - Market pricing as compliant with FERC policies
 - Curtailments
 - Other issues may require legislative action
 - Size threshold
 - If statute still needed to serve its original purpose
 - Limitations on must-purchase obligation
 - Expansion of terminations

Thank you



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