

The Uncertain Future Of PURPA, A Key To Renewable Energy

Law360, New York (February 23, 2017, 12:37 PM EST) -- In recent orders, the Federal Energy Regulatory Commission (FERC) addressed claims that some states and local utilities have not been complying with the Public Utility Regulatory Policies Act of 1978 (PURPA), and generally reinforced FERC's long-standing support of PURPA-driven generation development.

But PURPA's opponents have persistently made their case before FERC and Congress that PURPA must be repealed or at least amended. They argue that PURPA is obsolete, a vestige of the pre-competitive era, and that it saddles ratepayers with the costs of unneeded, overpriced power.

And with PURPA's supporters having been relatively quiet as the anti-PURPA coalition has made its case over the past few years, it is reasonable to assume that the calls for reform very likely will gain traction with the new Congress and the Trump administration, as well as in various states that already have sought to roll back certain of PURPA's features.

FERC's next steps will depend on the three to four new commissioners to be appointed by the Trump administration, and PURPA repeal or reform is likely to be a hot topic in their confirmation hearings.

PURPA was enacted to encourage alternative energy resources such as renewable power and cogeneration (now oftentimes called "combined heat and power"), or Qualifying Facilities (QFs) by, among other things, requiring otherwise reluctant utilities to purchase QF power at the utility's incremental, or "avoided cost."

FERC policy gives QFs the right to sell at a fixed rate to utilities under a contract or other legally enforceable obligation (LEO), and limits the circumstances under which utilities can curtail QF output. These and other PURPA benefits helped foster the development of non-utility generation by giving QFs a modicum of leverage in negotiations with their often unenthusiastic counterparties.

Indeed, regardless of one's perspective, no one seriously should doubt PURPA's success in fostering independent generation development and the role it has played in allowing many states to achieve their renewable portfolio objectives.



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As noted, utilities have long complained that PURPA's mandate forces them to purchase QF power they do not need or want at uneconomic prices that ultimately will be borne by ratepayers. As the electric industry shifted to a competitive market approach, utilities steadily and successfully argued for PURPA reform; and in 2005, Congress effectively eliminated the "mandatory purchase" requirement as to any utility able to show FERC that QFs in its service territory had nondiscriminatory access to a sufficiently competitive market.

Since then, FERC has granted a number of requests from utilities within the organized electric markets (i.e., those operated by regional transmission organizations or independent system operators) for relief from the "mandatory purchase" obligation, at least as to QFs larger than 20 MW.

As to small QFs (i.e., those 20 MW or less), FERC created a rebuttable presumption that these QFs continued to lack nondiscriminatory market access and therefore preserved PURPA's mandatory purchase requirement as to such QFs until such time as its presumption could be overcome.

At present, then, since the organized markets cover large regions of the country, PURPA's "mandatory purchase" requirement as to large QFs now applies mainly in the southeastern and western states — and, not surprisingly, this is where the opposition to PURPA now is the most fierce and where many developers still rely on PURPA's "mandatory purchase" requirement to develop QF projects, most of which would not have gone forward but for PURPA.

Last June, in the wake of utility testimony last Congress before the Senate Energy and Natural Resources Committee and the House Energy and Commerce Committee attacking PURPA's "mandatory purchase" requirement, FERC held a PURPA technical conference. For the most part, the speakers focused on the "mandatory purchase" obligation and avoided cost determinations as the areas most in need of administrative or legislative reforms or continued support, depending upon one's point of view.

Utilities testified that PURPA's "mandatory purchase" requirement is outdated and, in today's environment, should not be mandatory at all; that some utilities are now overwhelmed with QF power to the point of potentially jeopardizing reliability; and that any purchase obligation — which they argued should be eliminated within the organized electric markets even for small QFs — must be aligned with the utility's need for QF power.

Moreover, rather than forcing potentially overpriced QF power on ratepayers over the long term, the utilities argued that QF contracts should be subject to regular price adjustments, and not be required to specify only long-term, locked-in rates.

PURPA supporters, for their part, sparred with utilities on some of these points, arguing that the changes proposed by the utilities not only should be rejected, but that FERC should modify its policies to address ongoing challenges faced by QF developers in many states.

They stressed the importance of a long-term, locked-in rate to QF financing (a consideration also addressed in FERC's original PURPA rulemaking), explaining that without a contract setting a long-term locked-in rate, a QF would not be able to secure the predictable revenue stream needed to finance its project, and, therefore, FERC should require a minimum QF contract period.

Some PURPA supporters also made the point, and utilities generally agreed, that cogeneration QFs are different than small power renewable QFs and, therefore, the more significant changes in PURPA could potentially be limited to renewables. FERC subsequently received written comments focused on QF qualification criteria and QF contract policies.

While FERC goes about developing a record to permit its re-evaluation of PURPA policies, it has continued

to implement its long-standing precedent in a series of orders on individual QF petitions involving state rules making it more difficult for QFs to establish a LEO under state law.

For instance, Montana had conditioned recognition of a LEO on the QF already having an executed interconnection agreement, and Connecticut had conditioned recognition of a LEO on the QF having participated in a request for proposals initiated by the utility. In both cases FERC held that these state limitations were impermissible.

FERC said that, just as its regulations are intended to prevent the utility from circumventing its PURPA requirements simply by delaying or refusing to sign a power purchase contract, they also prohibit requiring an executed interconnection agreement as a precondition to establishing a LEO. Moreover, QFs have a right to sell their output pursuant to a LEO, regardless of whether they participated in a request for proposals.

In another Connecticut case, FERC addressed that state's effort to base payments for a QF's energy to only the actual market price at the time of delivery, despite the existence of a LEO, which effectively prevented a QF from locking-in a rate at the time the LEO is incurred and potentially making it impossible for the QF to be financed.

FERC found this, too, was an impermissible limitation because QFs have a right to lock-in a rate at the time a LEO is established, and the LEO had to last long enough to allow QFs reasonable opportunities to attract capital from potential investors.

Thus, up to now FERC has not shied away from reinforcing its long-standing PURPA requirements and has remained sensitive to at least some of the challenges facing QF developers. But much of that could change in the months ahead. The PURPA reform debate that began last Congress and continued at FERC last year will likely resume in the new administration.

FERC's next steps will depend on the three to four new commissioners to be appointed by the Trump administration, and PURPA repeal or reform likely will be a hot topic in their confirmation hearings. PURPA reform could also be addressed in energy legislation in the new Congress.

Presumably PURPA's opponents will continue to press reform measures before both FERC and Congress and, absent equally strong and organized support by PURPA's defenders, the political dynamics suggest that this effort might well succeed.

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