FERC in the crossfire as PURPA debate heats up

Gary J. Newell, Attorney, Jennings, Strouss & Salmon PLC; and Melissa Alfano, Attorney, Jennings, Strouss & Salmon PLC

Editor's note: *"From a Legal Perspective" appears regularly in* District Energy *magazine to address legal issues of current importance to the district energy industry. It is intended for educational purposes only and does not constitute legal advice.*

The Public Utility Regulatory Policies Act – PURPA - was enacted by the U.S. Congress to promote the expanded use of renewable energy resources. PURPA does so by imposing obligations on utilities to purchase the output of renewable-based and certain other types of generating units and by directing states to adopt rules that offer favorable pricing for the electric energy those units produce. Today, almost 40 years after PURPA became law, a minor drama is unfolding that pits against one another forces that seek to roll PURPA back and those that hope to expand it. And the Federal Energy Regulatory Commission finds itself caught squarely in the middle.

A (VERY) BRIEF HISTORY OF PURPA

Congress enacted PURPA in 1978 as part of a broader legislative package that responded to the Middle East oil embargo of the mid-1970s. PURPA was designed to reduce U.S. dependence on foreign oil by diversifying sources of supply in the electric power industry to include more wind, solar and cogeneration facilities. Generators that satisfied certain fuel use or thermal efficiency criteria (so-called "qualifying facilities," or QFs) enjoyed the benefits of (1) a guaranteed market, through a requirement that the "host" utility buy the output of a QF, regardless of need; (2) a favorable price, set at the purchasing utility's "avoided cost," which typically was higher than the prevailing market price; and (3) the availability of backup and maintenance power that a QF might need, through a requirement that the host utility sell these services at reasonable rates.

Since its enactment, PURPA has been amended only once – by the Energy Policy Act of 2005 – primarily to recognize the emergence of open-access transmission service and centrally operated wholesale electricity markets. For example, Congress relaxed the mandatory purchase and sale obligations by allowing a utility to obtain a waiver from FERC if it could demonstrate that a QF with which the utility otherwise might be required to transact has access to nondiscriminatory transmission services and independently operated energy markets where the QF could sell its output and buy backup and maintenance power when needed. The essential components of the 1978 statute, however, were kept intact.

PRESSURE MOUNTS FOR MAJOR CHANGES

The energy industry in general and the electric power markets in particular have undergone sweeping changes since PURPA was enacted and even since it was amended in 2005. Many of these changes have given rise to increasing pressure for significant modifications of PURPA. For example, as the cost to build wind- and solar-powered electric generation has fallen, and the number of these units has increased, utilities have chafed at the obligation to purchase the units' output, regardless of need. At the same time, the steep fall in natural gas prices has caused a drop in the avoided-cost rates QFs are entitled to receive, rendering the economic prospects for QF development more challenging. Yet, the demise of coal-fired generation makes the need for increased use of renewable resources even more acute, leading some to suggest that PURPA avoided-cost rates – which are meant to reflect the incremental generation costs a utility avoids by purchasing from a QF instead – may not be high enough.

Not surprisingly, the pressure to change PURPA has been expressed most openly in Congress, where legislative proposals with directly competing goals recently have been introduced. Specifically, in April 2015, Republican Sen. James Risch of Idaho – a state where QF developers and utilities have battled fiercely for years – introduced a bill (S.1037) that would amend PURPA to declare that no electric utility shall be required to enter into a new contract to purchase energy from a QF if the state agency having rate-making authority over the utility determines the company can meet its service obligations without purchasing additional generation. On the flip side, Democratic Sen. Ron Wyden of Oregon – a much more renewables-friendly state – introduced in May of last year a measure that came to be known as the PURPA Plus Act.

PURPA Plus would permit state regulatory authorities to set QF avoided-cost rates at a level higher than the incremental cost of alternative energy for purchases from any QF of up to 2 MW in capacity. (Under current law, the incremental cost of alternative energy is the highest an avoided-cost rate can be fixed by a state.) Both measures were referred to the Senate Committee on Energy and Natural Resources, which held hearings in May 2015 that touched on the proposed legislation but mainly served as a platform for PURPA opponents (most notably Berkshire Hathaway Corp., the owner of numerous coal-fired generating units) to argue their case for significant limitations on PURPA. Neither bill, however, could garner the votes to be moved out of committee, so that is where they remain.

THE PRESSURE TO CHANGE PURPA HAS BEEN EXPRESSED MOST OPENLY IN CONGRESS, WHERE LEGISLATIVE PROPOSALS WITH DIRECTLY COMPETING GOALS HAVE BEEN INTRODUCED.

FERC CAUGHT IN THE CROSSFIRE

Perhaps recognizing that any bill that significantly limits PURPA would stall in committee, the chair of the Senate Committee on Energy and Natural Resources, Lisa Murkowski (R-Alaska), and two like-minded House energy committee leaders, Reps. Ed Whitfield (R-Ky.) and Fred Upton (R-Mich.), took a different tack. On Nov. 6 of last year, they wrote to FERC, through its chairman Norman Bay, asking that FERC convene a technical conference "to examine the Commission's implementation of [PURPA] in light of the significant developments in electricity markets that have occurred since the enactment and subsequent amendment of the Act."

Moreover, they suggested a number of specific topics FERC should consider at the conference, including (1) whether imposing a mandatory purchase obligation under PURPA is appropriate where a state regulatory agency determines that an electric utility does not need to acquire capacity from a QF to meet its service obligations; (2) whether it is appropriate to impose a mandatory purchase obligation where a QF has had an opportunity to compete in a state-mandated integrated resource planning process that included competitive resource procurement; and (3) an examination of the methods used by states to establish avoided-cost rates for QF purchases. The letter concluded with an expression of the sponsors' hope "that a technical conference evaluating these issues can identify any potential administrative or legislative reforms that may be necessary to ensure the appropriate role for PURPA in today's electricity marketplace." Coincidentally (but more likely not), Chairman Bay and the other FERC commissioners were set to appear before Sen. Murkowski's committee three weeks later for the agency's regular oversight hearing.

Doubtless recognizing that an agency ignores a direct request from the chair of its oversight committee at its peril, FERC on Feb. 9 of this year issued notice of a technical conference, to be held June 29, focused on "implementation issues under [PURPA]." The notice indicated that topics and speakers would be identified at a later date, which opened the door for PURPA's supporters in Congress to act. On Feb. 11, Sen. Maria Cantwell (D.-Ind.), the ranking member on the Energy and Natural Resources Committee, and two ranking members of House bodies with energy jurisdiction (Reps. Bobby Rush, D-Ill., and Frank Pallone, D-N.J.) sent a letter of their own to FERC Chairman Bay. In it, they urged FERC to recognize that PURPA "remains a singular federal backstop to support renewable energy in parts of the country that may otherwise have significant barriers." Arguing that the objectives of PURPA "remain as relevant today in some jurisdictions as they were in 1978," they declared that "[u]ntil Congress chooses to act again, it would be improper for FERC to narrow the scope of [PURPA] any further."

And, not to be outdone by the other side of the aisle, the letter's authors provided their own list of suggested topics that, by their phrasing and focus, highlight the authors' pro PURPA orientation. The list includes (1) whether the methods used by states to calculate avoided costs "accurately reflect the full value of all avoided costs ... including avoided energy, capacity, ancillary service, transmission, and distribution costs"; (2) whether states have used the discretion they already have under PURPA to remedy any perceived oversupply of QF power, as by adjusting avoided-cost calculations, limiting the size of QFs or shortening the maximum length of QF contracts; and (3) whether state policies on matters such as integrated resource planning, competitive procurement, net metering and renewable portfolio standards "have generally been stable enough to provide a reliable investment climate for renewable generation."

Faced with a dizzying array of competing topics suggested by senior legislators, FERC acted with circumspection in developing an agenda for the June 29 technical conference. Rather than adopting one set of suggested topics or the other, and rather than lumping both together, FERC's supplemental notice instead identified two broad topics to be addressed: "Mandatory Purchase Obligations" and "Avoided Cost Calculations." The supplemental notice included a number of specific areas that each panelist will be free to address, but it scrupulously avoided any of the "spin" with which suggested topics were stated in the legislators' letters. In that way, the agenda reflects the same careful neutrality expressed by Chairman Bay in responding to a question at a February conference when he was asked whether there are parts of PURPA that seem outdated. "I don't want to prejudge what we might learn at the tech conference," he replied.

WHAT'S NEXT?

As the developments leading up to the PURPA technical conference make clear, FERC has been caught between competing factions in Congress: those who believe changes in the industry justify sharp restrictions on PURPA and those who believe the same industry changes call for giving states leeway to expand PURPA's prorenewables incentives. In theory, FERC could go either way, but there are two important factors to recognize. First, FERC is somewhat limited in its ability to change how PURPA is implemented. While FERC can influence the details of implementation by modify-

ing its regulations, any changes it makes still must be consistent with the PURPA statute. For that reason, any truly major shifts in PURPA implementation would require legislative action – the same sort of action that neither of the competing factions was able to achieve during Congress' 2015-2016 session. Second, FERC is under no obligation to take any particular action as a follow-on to the June technical conference. Indeed, it is entirely within FERC's discretion to conduct the technical conference, invite written comments, consider the detailed record and then do nothing at all. And given the deep divisions in Congress on PURPA's usefulness and future, that may in fact prove to be the best of all options for FERC.

In any case, FERC's technical conference on PURPA implementation should be of considerable interest to any IDEA members that rely on PURPA to make sales of excess power from their CHP systems. We will report back on any major developments that might affect IDEA members.

Gary J. Newell is a member of Jennings, Strouss & Salmon PLC and is based in Washington, D.C. His practice focuses on regulatory and contract issues affecting both suppliers and purchasers of wholesale electricity and bulk power transmission, natural gas and nuclear power. Newell regularly represents his clients before the Federal Energy Regulatory Commission. He can be reached at gnewell@jsslaw.com.

Melissa Alfano is an attorney with Jennings, Strouss & Salmon PLC who advises both natural gas and electric clients on matters relating to participation in wholesale markets and FERC compliance. She can be reached at malfano@jsslaw.com.