UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

16th Annual Renewable Energy Law Institute
January 25-26, 2021
Live Webcast

PURPA: Tales of My Death Have Been (Somewhat) Exaggerated

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"The Commission is administratively gutting PURPA." That is what Federal Energy Regulatory Commissioner Glick said on July 16, 2020 when FERC adopted Order No. 872[1] over his dissent. Through Order No. 872, FERC overhauled its regulations that relate to the must-purchase obligation under the Public Utilities Regulatory Policies Act of 1978 ("PURPA").[2] Things have changed a bit since Commissioner Glick issued his dissent: Commissioner Glick eventually may become Chairman Glick, and in any case, FERC will have a Democratic majority probably no later than half-way through 2021. That said, the fast-approaching change in the makeup of FERC has little impact on my thesis regarding Order No. 872's impact. Order No. 872 was never the gutting that Commissioner Glick described for two reasons. First, the changes adopted were not particularly significant. Indeed, for those here in Texas, Order No. 872 actually mooted perhaps the two most anti-PURPA appellate decisions ever issued. Second, PURPA's relevance already was on life support; one cannot greatly exaggerate the death of a law that now plays only a small role in a very large industry.

The impact of Order No. 872, assuming it survives appeal intact, on the renewable industry *generally* will be negligible. But, its impacts even on that much smaller segment of the renewable industry that does rely on the PURPA must-purchase obligation also will not be significant. The revised PURPA Regulations still provide the states tremendous authority and FERC considerable discretion such that the PURPA purchase mandate will remain alive and well in the states that have always supported it. Indeed, the overall impact of Order No.

[1] *Qualifying Facility Rates & Requirements Implementation Issues Under the Pub. Util. Regul. Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041, *order on reh'g and clarification*, Order No. 872-A, 173 FERC ¶ 61,158 (2020), *appeal pending sub nom. Solar Energy Indus. Ass'n v. FERC*, Case No. 20-72788 (9th Cir.) ("Order No. 872" or "Final Rule"). General references to "Order No. 872" include Order No. 872-A.

[2] 16 U.S.C. § 796(17)-(18), 824a-3. PURPA is a broad statute that introduced many other concepts that continue to have profound impacts on the electric utility industry, but this article focuses on the subject of Order No. 872, PURPA's must-purchase mandate and more particularly on the must-purchase mandate as applied to small power production ("SPP") qualifying facilities ("SPP QFs"). The relevant regulations (hereinafter "PURPA Regulations") are found at 18 C.F.R. § 292.101 *et seq*.

872 on the PURPA must-purchase mandate and SPP QFs[3] generally has been overstated.

Note that the discussion below focuses on the impacts of Order No. 872 on those SPP QFs selling to purchasing utilities that are investor owned utilities regulated by state utility commissions, under the oversight of state legislatures that also may be involved in setting state PURPA laws and policies. Although there are many thousands of cooperative and government-owned utilities (i.e., utilities owned by federal, state, or local governments or by other political subdivision), SPP QFs have not particularly targeted them over the past four decades for mandatory purchases for a range of reasons.[4]

[3] The author notes that the term "SPP QFs" include several million residential and commercial retail customers that own SPP QFs that today are subject to net metering laws and programs that compensate them for their output through credits that are more lucrative than the avoided-cost compensation that PURPA offers. The impact of the Final Rule on existing and future retail customers with such on-site SPP QFs largely depends on the future of net metering in the state in which they are located. As net metering penetrates a state, reform of net metering laws and policies becomes inevitable; and, the PURPA must-purchase obligation can become far more important to these SPP QFs. Currently, however, PURPA has relatively little impact on such SPP QFs.

[4] For example, some government-owned utilities obtain very low-cost hydro power and thus their avoided costs are simply too low for an SPP QF to survive on an avoided-cost rate. Distribution cooperatives often assign their PURPA purchase mandate to a G&T cooperative that has sufficient owned and purchased resources that its capacity needs are non-existent at least for several years and thus the G&T's avoided cost of capacity is essentially zero. Most utilities in this category self regulate, i.e., setting their own PURPA policies in a manner that makes obtaining a PURPA contract quite difficult. A cooperative or municipal utility may choose to not permit net metering, requiring a buy-all, sell-all arrangement, which, for an SPP QF serving on-site load, may be uneconomical.

Indeed, perhaps one of PURPA's most "entertaining" legal sideshows has been a decades-long legal fight between the owners of a motel with an adjoining QF, a couple named the Sweckers, and an Iowa cooperative. Their PURPA war has resulted in myriad FERC, state court, and federal court decisions, virtually all of which favored the cooperative. The lack of legal merit to the Sweckers' positions reflects that self-regulated utilities have long had legitimate legal authority to adopt policies that do not encourage QF development.

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First appeared as part of the conference materials for the
16th Annual Renewable Energy Law Institute session
"PURPA: Tales of My Death Have Been (Somewhat) Exaggerated"