



2018  
MID-YEAR  
ENERGY FORUM

Monday, Oct. 29 – Tuesday, Oct. 30

Renaissance Downtown Hotel  
999 Ninth Street, NW Washington, DC

## PURPA Revisions

*October 29, 2018, 4:15 – 5:30 pm*

**SESSION OVERVIEW:** Proposals to revisit the Public Utility Regulatory Policies Act (PURPA) frequently assume that new approaches will require Congressional action. But FERC exercised considerable discretion when it issued its regulations implementing PURPA. Even as FERC considers this question in Docket No. AD16-16-000, our panelists will offer their own distinct views and explore what changes, if any, they would make to modernize FERC's current PURPA regulations.

Moderator: Kenneth (Ken) Driver, Partner, Jones Day

Speakers:

Adam Benshoff, Executive Director, Regulatory Affairs, Edison Electric Institute

John P. Hughes, President & CEO, Electricity Consumers Resource Council

Kristine Raper, Commissioner, Idaho Public Utilities Commission



## Fact Sheet on PURPA, CHP & U.S. Manufacturers

Cogeneration or Combined Heat and Power (CHP) is the process of using one fuel source to produce two forms of energy. In manufacturing, cogeneration is utilized to produce steam for the industrial process and electricity for use on-site or to be sold in wholesale markets. It supports the economic viability and international competitiveness of such steam-driven industrial sectors as agricultural products, building materials, chemicals, food processing, glass, mining, oil & natural gas, paper & forest products, pharmaceuticals, rubber, steel, and textiles.

The US currently has about 82 GW of CHP capacity at over 4,400 industrial and commercial facilities. That represents over 12% of total US energy generation. About 78 percent of that is from industrial facilities. Industrial cogeneration is a technology that is embedded in an industrial process—it is part of the load. Somewhat ironically, CHP is measured by power capacity (megawatts) – the byproduct of the process – and not BTUs of steam or thermal energy, which is the main product.

The passage in 1978 of the Public Utility Regulatory Policies Act (PURPA) marked the first Congressional step toward electricity competition. It created a mechanism to address utilities' reluctance to purchase or sell power to non-utility generators.<sup>1</sup> Specifically, PURPA Title II enabled the ability of cogenerators to sell power on to the grid at a utility's "avoided cost," or what it would have cost the utility to contract or self-supply that energy and capacity. It also requires utilities to purchase power from all Qualifying Facilities (QFs) and to provide non-discriminatory back-up power to these facilities. Amendments to PURPA passed in 2005 established a process allowing relief from the purchase power requirement where competitive markets exist and a framework for QFs and utilities to negotiate future contracts.

Since the law's enactment PURPA has faced unrelenting opposition from utilities. Two Supreme Court challenges reaffirmed QF rights under PURPA: *FERC v. Mississippi*,<sup>2</sup> and *API v. AEP*.<sup>3</sup> A DC Circuit challenge also had to affirm the definition of "qualifying facility" in *Gulf States v. FERC*.<sup>4</sup>

All along there have been on-going attempts by utilities and some regulators to promulgate the following "reforms" to PURPA implementation:

- A variety of utility policies are directed at discouraging manufacturers from developing CHP or renewable energy resources as part of their portfolio of energy management tools and with an eye on compliance with any new climate change regulations.
- Utilities continue to suppress the development of new CHP facilities that are essential for the economic operation of steam-driven industrial processes. This reflects longstanding utility bias against the best interests

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<sup>1</sup> See Morgan Lewis: [https://www.morganlewis.com/events/~/\\_/media/19a042e2f6124102b7dc06db284fe790.ashx](https://www.morganlewis.com/events/~/_/media/19a042e2f6124102b7dc06db284fe790.ashx)

<sup>2</sup> 456 U.S. 742, 1982 (on constitutionality of section 210)

<sup>3</sup> 461 U.S. 402, 1983 (FERC acted reasonably in setting purchase rates at full avoided costs)

<sup>4</sup> 922 F.2d 873, 1991

of its customers—the utility’s core business is capital accumulation to maximize its regulated returns, and CHP dampens the utility’s ability to justify “gold plating” their assets (rate base).

- There are continued attempts to depart from cost of service for regulated services that are needed by manufacturers. Most of these services may not be under the purview of FERC, but nondiscriminatory buyback rates and rates for supplementary, backup and maintenance power are FERC’s responsibility under the law.
- Outside of ISOs and RTOs there are growing attempts to not account for full avoided costs. For example, utilities with known capacity deficits are attempting to eliminate capacity costs from avoided cost calculations.
- There are inconsistencies between a utility’s “need” for QF capacity and its own long-term needs as documented in its IRP. Part of the problem is “rate base or buy problem” that is endemic to regulation. Before legitimate QF developers are singled out for blame, state commissioners need to better scrutinize the motives and planning behavior of their jurisdictional utilities to ensure that outright hostility to PURPA did not foreclose a more reliable and least-cost resource mix.
- There are attempts to shorten the contract terms for certain new or renewing QFs to two or three years from 15 to 20 years. Projects cannot get financed without some degree of long-term PPA pricing certainty. Utilities already receive cost recovery for assets over their lifetimes, often spanning 20 to 40 years. QFs should receive comparable treatment.
- There are attempts to broaden the scope of 2005 amendments beyond the intent of the law. For example, there are efforts to eliminate the presumption that QFs under 20 MWs do not have nondiscriminatory access to markets.

## **ELCON Position & Recommendations**

PURPA works and FERC and Congress should resist changes that amount to the wholesale repeal of the act. ELCON’s concern is that attempts to correct rent-seeking behavior associated with avoided costs may result in other “reforms” imposing collateral damage to the huge existing fleet of industrial QFs with a proven track-record as highly efficient, reliable and clean energy resources. The Mandatory Purchase Obligation, where applicable, and Supplementary, Backup and Maintenance Power Services at just and reasonable rates are even more important today than when PURPA was enacted in 1978. Industrial QFs are impossible without these essential services.

If the claims that QFs are locking in buyback rates that exceed avoided costs and that the capacity from these resources are not otherwise needed are true, then it reflects a failure of state regulators to properly implement PURPA, not a failure of PURPA. As FERC has explained, “in order to maximize the incentives for QFs, the Commission sets the price for purchases from QFs, absent negotiations, at the statutory ceiling. Thus, the avoided cost rate is neither more nor less than the price the utility would have paid for comparable power from other sources, including other wholesale sources.” The starting point for evaluating the ongoing complaints of utilities about avoided costs under PURPA is the Supreme Court’s determinations on the subject. In upholding FERC’s full avoided cost rule, the Supreme Court observed that

“...although FERC recognized that the rule would not directly provide any rate savings to consumers, it reasonably deemed it more important at this time that the rule would provide a significant incentive for the development of cogeneration and small power production, and that ratepayers and the Nation as a whole will benefit from the decreased reliance on scarce fossil fuels and the more efficient use of energy.”<sup>5</sup>

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<sup>5</sup> 461 U.S. at 403, 415-18. In the 2005 Amendments to PURPA, Congress expressly declined to change the terms of the Commission’s avoided cost rule.

We recommend that if FERC chooses to act that it provide states with better guidance on avoided cost calculations. Some states need to do a better job. Estimating avoided costs is no more challenging than setting customer rates on a forward looking basis. PURPA and the FERC regulations already prohibit states from using avoided costs as a policy tool to discourage economically viable resources (with rates that are below avoided costs) or to encourage uneconomic resources (with rates that exceed avoided costs). It is time to enforce, not change, PURPA and the FERC regulations. The Commission should limit any PURPA inquiry to narrow, targeted fixes that may warrant review, such as reassessment of the one-mile rule and correction of the over-saturation of renewable qualifying facilities in certain states.<sup>6</sup>

ELCON members are increasingly diversifying their deployment of Distributed Energy Resources that are Qualifying Small Power Producers at capacity ratings below 20 MWs. These resources typically use biomass, waste and/or renewable energy and should qualify for Order 688's rebuttable presumption that it does not have nondiscriminatory access to wholesale markets and is eligible to require the electric utility to purchase its electric energy.

Finally, it should be acknowledged that the enactment of PURPA created an element of competition in an industry not noted for market efficiency or innovation. PURPA inspired the electric industry restructuring era that has brought billions of dollars in cost savings to consumers of all sizes. ✎

For more information about ELCON and this issue, visit:

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<sup>6</sup> FERC's one-mile rule provides that, for purposes of determining whether small power-production facilities seeking QF status are considered to be located "at the same site," FERC will aggregate the capacity of generating facilities that: (1) are located within 1 mile of each other, (2) use the same energy resource (e.g., solar, wind or biomass) and (3) are owned by the same entities.. FERC's regulations require the distance between generating facilities for the one-mile rule to be measured "from the electrical generating equipment of each facility."