PURPA: Non-Discriminatory Rates for Independent Power Producers

The Public Utility Regulatory Policies Act (PURPA) was passed by Congress in 1978, in response to the energy crisis that America experienced in the 1970s.[1] The purpose of the Act was to reduce dependence on foreign energy sources, promote alternative energy and diversify the country's power system.[2]

One way that PURPA sought to accomplish those goals was by creating a market for non-utilities to sell power. For the first time, ***the Act required utilities to buy power from independent companies*** if they could meet certain conditions.

1. First, these independent power producers, which the Act calls "qualifying facilities," must be either cogeneration facilities or ***small power facilities run by*** biomass, waste, ***renewable*** or geothermal ***power***, and must not be greater than 80 megawatts in size.[3]

2. Second, ***utilities are <u>required</u> to purchase energy*** from only those facilities that can produce it for the same price it would have cost for the utility to generate that power itself (known as the utility's "avoided cost").[4]

The Act delegates to state commissions the responsibility to set these "avoided cost" rates for purchase from qualifying facilities by the electric utilities that they regulate.[5] However, FERC retains authority to step in and enforce against improper implementation of PURPA with respect to both state commissions and non-regulated utilities.[6]

Above all, rates for both *the purchase of* energy from qualifying facilities and *the sale of* energy to qualifying facilities must be:

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[1] 16 U.S.C. § 2601 *et seq.*
[2] The United States Supreme Court, in discussing the intent of PURPA, noted that "Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels," and recognized that electric utilities had traditionally been "reluctant to purchase power from, and sell power to, the nontraditional facilities." *FERC v. Mississippi*, 456 U.S. 742, 750 (1982).
[3] 18 C.F.R. §§ 292.203; 292.205.
[4] 16 U.S.C. § 824a-3; 18 C.F.R. §§ 292.304(a)(2), 292.101(b)(6).
[5] 16 U.S.C. § 824a-3(f); *see also Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA* (Order No. 69), 45 Fed. Reg. 12214, 12215 (Feb. 25, 1980). PURPA regulations lay out several factors that "shall, to the extent practicable, be taken into account" when state commissions are determining avoided cost rates. These include: utilities' energy and capacity costs; availability of capacity or energy from qualifying facilities during system daily and seasonal peak periods; dispatchability and reliability; duration and terms of contract; individual and aggregate values of energy and capacity; smaller capacity increments and shorter lead times; line losses; etc. 18 C.F.R. § 292.304(e)(1)-(4).
[6] FERC may enforce the state implementation requirements of Section 210(f) against any state regulatory authority or non-regulated electric utility. 16 U.S.C. § 824a–3(h)(2).

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1) just and reasonable to the consumers of the electric utility and in the public interest, and

2) ***must not discriminate*** ***against qualifying facilities***.[7]

Specifically, PURPA ***requires*** electric utilities to "furnish electric energy to qualifying facilities on a nondiscriminatory basis, and at a rate that is just and reasonable and in the public interest; ***and that they must provide certain types of service which may be requested by qualifying facilities to supplement or back up those facilities' own generation***."[8]

PURPA's purchase and sale obligations apply to all public utilities, including regulated utilities (such as Alabama Power) and non-regulated utilities (such as TVA, electric cooperatives and municipal utilities), unless a utility obtains a waiver or an exemption. In 2005, PURPA was amended by the Energy Policy Act, which exempts utilities from this purchase obligation in places where organized markets such as Regional Transmission Organizations (RTOs) provide nondiscriminatory access to independent power producers.[9]

However, FERC established a presumption that even in such organized markets, qualifying facilities 20 megawatts and smaller do not have non-discriminatory access.[10] For this reason, ***the obligation to purchase and sell power generally remains in place for utilities with respect to systems 20 megawatts and smaller.***

PURPA is a cornerstone of federal energy law that continues to drive competition today, especially in areas of the country without structured energy markets.

Due to the new opportunities for competition afforded by PURPA, qualifying facilities now produce seven percent of our country's power.[11]

[7] 16 U.S.C. § 824a-3(b). (c); 18 C.F.R. § 292.304(a)(1).
[8] Order 69, 45 Fed. Reg. 12,214, 12,215 (Feb. 25, 1980); *see also* 18 C.F.R. § 292.305.
[9] *See* 18 C.F.R. § 292.309 (FERC specifications for markets to qualify as providing "non-discriminatory access").
[10] *Id.* at § 292.309(d).
[11] *See* http://www.ucsusa.org/clean_energy/smart-energy-solutions/strengthen-policy/public-utility-regulatory.html#.VvRJeuIrKUk.