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# The PURPA Modernization Act of 2017: Proposed Reforms and Potential Implications

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By: Scott Daniel Johnson, Shawn Whites (paralegal)

## Background

Congress enacted PURPA in response to the U.S. energy crisis of the early 1970s, seeking to promote conservation and increased use of domestic renewable energy resources.[2] Among its means for doing so was opening the traditional, vertically integrated electric utility monopoly model by requiring utilities, under certain circumstances, to purchase power from certain generating facilities—called "qualifying facilities" or QFs—that receive special rate and regulatory treatment under PURPA.[3] PURPA divides QFs into two categories: (1) small power production facilities and (2) cogeneration facilities. Small power production QFs cannot be larger than 80 MW and must have a primary energy source that is renewable (e.g., water, wind, or solar), biomass, waste or geothermal. Cogeneration QFs, on the other hand, sequentially produce electricity and another form of useful thermal energy, such as heat or steam, more efficiently than producing both forms of energy separately. They can use other energy resources and are not subject to a size limit.[4]

In recent years, some legislators, regulators and electric power industry participants have called for updates to PURPA and the Federal Energy Regulatory Commission's (FERC) implementing regulations in light of (i) the maturation, rapid deployment and declining cost of renewable energy technologies; (ii) the expansion of open access to wholesale electricity markets; (iii) generally flat demand for electricity; and (iv) the abundance of low-cost natural gas.[5] These factors, taken together, have made it easier in some areas of the country for small power production QFs to connect to the grid and access competitive power markets while

making the price of the power that they produce less competitive with other resources in certain markets.

To address the issue of competitiveness, the Act would limit eligibility for QF status for certain small power production facilities, which can be critical to the economics of such projects. This is because, as noted here, PURPA generally requires utilities to purchase the output of QFs at the utility's "avoided cost." Because "avoided cost" can exceed the market rate, some proponents of PURPA reform argue that this requirement imposes unjustified additional costs on consumers. The Act also would restrict the general applicability of the mandatory purchase obligation for QF output in several ways, as discussed below.

### New Rebuttable Presumption for Application of FERC's "One-Mile Rule"

First, the Act would require FERC to amend its regulations to establish a rebuttable presumption—in place of the current bright-line rule—for determining whether facilities seeking to claim QF status as small power production facilities are "located at the same site."

Under FERC's current regulations, the net power production capacity of a small power production QF, "together with the power production capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site," may not exceed 80 MW.[6] For nonhydroelectric small power production facilities, FERC considers a facility to be "located at the same site" as another facility if any part of the "electrical generating equipment" of one facility (e.g., a wind turbine generator) is within one mile of any part of the "electrical generating equipment" of the other facility.[7] This is commonly known as the "one-mile rule," which FERC has repeatedly held to be a bright-line rule rather than a rebuttable presumption.[8]

The Act would require FERC to create a rebuttable presumption that "facilities located one mile or more away from each other are not located at the same site; and . . . facilities located within one mile of each other are located at the same site." Any person would be able to rebut the applicable presumption. The Act also sets forth the factors that FERC should consider in determining whether two facilities are "located at the same site," including:

1. "The extent to which the owners or operators of the facilities are affiliated or associated with each other, or are under the control of the same company or person;"
2. "The extent to which the owners or operators of the facilities have treated the facilities as a single project for purposes of other regulatory filings or applications;"

3. "Whether the facilities use the same energy resource;"

4. "Whether the facilities have a common generator lead line or connect at the same or nearby interconnection points or substations;"

5. "The extent to which the owners or operators of the facilities have a common land lease or land rights with respect to land on which the facilities are located;"

6. "The extent to which the owners or operators of the facilities have common financing with respect to the facilities;" and

7. "The extent to which the facilities are part of a common development plan or permitting effort, even if the interconnection of the facilities occurs at separate points."

Converting the "one-mile rule" into a rebuttable presumption would open small power production facilities seeking QF status to challenges by local utilities and others, even where no part of the electrical generating equipment of one facility is within a mile of any electrical generating equipment of another facility. In addition, because FERC uses the "one-mile rule" for making QF-size determinations besides the 80-MW maximum size determination,[9] the ability to challenge whether facilities are "located at the same site" could affect whether certain facilities require market-based rate authority from FERC or are exempt from regulation under the Public Utility Holding Company Act of 2005.[10] As we previously noted, changes to the "one-mile rule" could affect the way that renewable energy project developers—particularly those developing projects with multiple pieces of "electrical generating equipment"—perform due diligence on property selection and equipment siting when planning multiple projects, which could increase regulatory uncertainty and development costs, and could even make some projects economically unviable.

**Presumption of Nondiscriminatory Market Access for QFs of 2.5 MW and Larger**

Second, the Act would reduce the 20-MW threshold for the mandatory purchase obligation to 2.5 MW "to reflect increased competition in electricity markets since PURPA was enacted."[11]

In the Energy Policy Act of 2005, Congress amended PURPA to provide for the termination of a utility's mandatory purchase obligation where QFs have nondiscriminatory access to markets that meet certain criteria in FERC's regulations.[12] FERC subsequently created a rebuttable presumption that QFs larger than 20 MW have nondiscriminatory market access if they are

eligible for interconnection service under a FERC-approved open access transmission tariff and interconnection rules in markets with certain characteristics.[13] For QFs with a generating capacity at or below 20 MW, there is a rebuttable presumption that the QF **does not** have nondiscriminatory market access.[14] In such markets, utilities can terminate their obligation to purchase output from QFs larger than 20 MWs, but they have to continue purchasing output from smaller QFs, unless the utility can demonstrate that such QFs have nondiscriminatory access to transmission and a wholesale market.[15]

The Act would amend PURPA to provide that a small power production QF "with an installed generation capacity of 2.5 megawatts or greater is presumed to have nondiscriminatory access to transmission and interconnection services and wholesale markets." This presumption would not be rebuttable. Therefore, small power production QFs larger than 2.5 MW would not be subject to the mandatory purchase obligation in the competitive wholesale markets described in PURPA Section 210(m)(1).[16] Because many small power production QFs are between 2.5 MW and 20 MW, this change likely would reduce the overall number of small power production QFs able to take advantage of the mandatory purchase obligation.

### Recognition of State or Other Determinations of Need for QF Output

Third, the Act would empower state public utility commissions and certain other agencies to effectively "waive the mandatory purchase obligation on a case-by-case basis" for a small power production facility of any size, upon a determination that "additional power is not required to meet customers' electricity needs."[17]

Specifically, the Act proposes to exempt utilities from the mandatory purchase obligation, without regard to QF size or market access, "if [an] appropriate State regulatory agency or non-regulated electric utility finds, and submits to [FERC]," one of two written determinations. First, the utility "has no need to purchase electric energy from such qualifying small power production facility in the amounts to be offered within the timeframe proposed by the qualifying small power production facility, consistent with the needs for electric energy and the timeframe for those needs as specified in an electric utility's integrated resource plan, in order to meet its obligation to serve customers." Or, alternatively, the utility "employs integrated resource planning and conducts a competitive resource procurement process for long-term energy resources that provides an opportunity for qualifying small power production facilities to supply electric energy to the electric utility in accordance with the integrated resource plan of the electric utility."

The Act does not state whether either determination would be rebuttable; however, it seems likely that the first type of determination would be particularly likely to spark litigation. Either way, empowering utilities to determine whether they "need" the output of certain small power production QFs, or requiring such QFs to participate in competitive procurement processes administered by the utilities, likely would result in fewer small power production QFs being able to interconnect to the grid.

### Potential Implications

The reforms in the Act likely would (i) reduce the number of renewable energy projects eligible for small power production QF status, (ii) limit the number of projects deemed to have nondiscriminatory access to markets, (iii) restrict the availability of the mandatory purchase benefits set forth in PURPA, (iv) increase regulatory uncertainty and costs for project developers, and (v) slow the development of small renewable energy projects in many markets. In addition, because FERC uses the "one-mile rule" for more than just determining whether a facility exceeds the maximum small power production QF size limit, making the "located at the same site" determination subject to challenge could result in a sharp increase in litigation over a variety of other issues potentially not intended to be affected by the proposed legislation. In any event, renewable energy project developers would need to adjust their approach to developing and siting projects for which small power production QF status is important; but, even if they do so effectively, the threat of an adverse-need demonstration or difficult competitive procurement process could increase risk enough to preclude development of projects that are relatively low-risk today.

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[1] Press Release, Rep. Tim Walberg, Walberg Introduces Legislation to Modernize PURPA, Lower Costs for Electricity Consumers (Nov. 29, 2017), https://walberg.house.gov/media/press-releases/walberg-introduces-legislation-modernize-purpa-lower-costs-electricity ("Walberg Press Release").

[2] *See, e.g.*, FERC, What is a Qualifying Facility?, https://www.ferc.gov/industries/electric/gen-info/qual-fac/what-is.asp (last visited Dec. 7, 2017) ("FERC QF Website").

[3] *See, e.g.*, Memorandum from Comm. Majority and Minority Staff to Members of the H. Subcomm. on Energy 2 (Aug. 31, 2017),

http://docs.house.gov/meetings/IF/IF03/20170906/106362/HHRG-115-IF03-20170906-SD003.pdf ("PURPA Hearing Background Memo").

[4] *See, e.g.*, FERC QF Website.

[5] *See, e.g.*, Letter from Neil Chatterjee, Chairman, FERC, to Rep. Tim Walberg (Nov. 29, 2017), https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14769654.

[6] 18 C.F.R. § 292.204(a)(1) (2017).

[7] *Id.* § 292.204(a)(2).

[8] *See, e.g.*, *N. Laramie Range Alliance*, 139 FERC ¶ 61,190, at PP 22-25 (2012).

[9] *See SunE B9 Holdings, LLC*, 157 FERC ¶ 61,044, at P 16 (2016) ("[T]he one-mile rule . . . is a size determination which [FERC] has consistently applied generally to the regulations pursuant to PURPA, and which [also] applies . . . to determining the applicability of the less-than-1-MW exemption of [18 C.F.R. §] 292.203(d).").

[10] *See* 18 C.F.R. Part 292, Subpart F (providing exemptions for certain small power production facilities, based on size, from certain federal and state laws and regulations).

[11] Walberg Press Release.

[12] PURPA Hearing Background Memo at 3 (citing 18 C.F.R. § 292.309).

[13] 18 C.F.R. § 292.309(c).

[14] *Id.* § 292.309(d).

[15] PURPA Hearing Background Memo at 3.

[16] 16 U.S.C. § 824a-3(m)(1) (2012).

[17] Walberg Press Release.

## Categories

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