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Has the Public Utilities Regulatory Policy Act ("PURPA") Outlived Its Purpose?

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That is the question receiving increasing attention by regulatory commissions at the state and federal level. When Congress enacted PURPA in 1978, the nation was in the midst of an energy crisis, with oil predicted to rise to over $100 per barrel. PURPA was passed to help lessen the dependence on fossil fuels and promote the development of power generation from non-utility power producers. At that time, most utilities were vertically integrated (generating, transmitting, and distributing energy to their customers), and PURPA compelled utilities to purchase energy from non-utility power producers whose generation facilities met the requirements of a Qualifying Facility ("QF") at a price that was at or below the utility's cost of generation. This was known as the utility "avoided cost." PURPA allowed QFs to choose between providing power at an avoided cost rate at the time of delivery or at the time the obligation was incurred.

Much has changed in the energy landscape since PURPA was established over forty years ago. The generation of electricity is now open to competition in many regions across the country, and wholesale markets provide a vehicle for many of these non-utility power producers to sell their power. Meanwhile, technological advances and renewable policy mandates have driven wholesale power prices to all-time lows. The prices that many QFs are receiving for their energy contracts signed in the past 20 years are well above current market prices. As QFs continue to seek long-term contracts for their energy, many utilities have pushed back on the purchase obligation established by PURPA. The utilities argue that PURPA is no longer compatible with the current competitive energy landscape, especially in light of excess capacity positions in several markets, and that non-utility power producers are advantaging themselves under existing PURPA rules to the detriment of utility customers. Alternatively, non-utility power producers contend that the "PURPA put" on utilities provides the only reasonable means of contracting with a distributor for their energy and that PURPA contracts allow QFs to operate efficiently and cost-effectively to the benefit of the utility's customers.

Although no timeline has been announced, the Federal Energy Regulatory Commission ("FERC") has pledged to "reenergize" its review of PURPA.[1] In the meantime, state regulators are attempting to address these issues in the absence of more guidance at the federal level, resulting in a patchwork of different regulations across the country. Under PURPA, state regulatory commissions were directed to implement the FERC rules, including the calculation of avoided costs and the establishment of implementation regulations. As purchase obligations under PURPA have become more contentious, developers of QF facilities have increasingly filed complaints against utilities and regulatory commissions alleging that they are violating the letter and intent of PURPA. These complaints include, among other things, the violation of PURPA size requirements in the calculation of the appropriate avoided cost rate. In at least two important cases, the FERC ruled that requiring

1 FERC May 2018 Open Meeting.

QFs to participate in and win a competitive solicitation to obtain a long-term contract imposes an "unreasonable obstacle" to obtaining a legally enforceable obligation to purchase energy from the QF.[2] Several states have responded to these developments by establishing proceedings to clarify PURPA-related issues. In states like Washington, Michigan, and Colorado, the issues being debated involve what constitutes a "legally enforceable obligation," what role a competitive procurement process should play in establishing a purchase agreement with the utility, and how avoided costs should be determined.

As the energy landscape continues its transformation and states progress toward meeting aggressive renewable mandates, clarity around the evolution of PURPA is critical. A wholesale review of the original objectives of PURPA and their application in today's modern energy sector is vital and time is of the essence. With the potential for massive regulatory change, regulators, non-utility power producers, and utilities would be wise to keep a close watch on this process. To learn more about PURPA and Concentric's expertise in the wholesale and retail energy markets, please contact Danielle Powers.

[2] Hydrodynamics, Inc., 146 FERC ¶ 61,193 (2014); Windham Solar LLC and Allco Finance Ltd., 156 FERC ¶61,042 (2016).