

Public Utility Regulatory Policies Act/Order No. 872: Solar Energy Industries Association Judicial Challenge



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The Solar Energy Industries Association (“SEIA”) filed its Opening Brief in its challenge of Federal Energy Regulatory Commission (“FERC”) Order No. 872 before the 9th Circuit Court of Appeals (“9th Circuit”).

Order No. 872 revised in 2020 the FERC regulations implementing the Public Utility Regulatory Policies Act of 1978 (“PURPA”).

PURPA was enacted by Congress in 1978 during a period of energy crisis. Goals of the federal statute included:

- Conservation of electric energy
- Increased efficiency in the use of facilities and resources by electric utilities
- Equitable retail rates for electric consumers
- Expedient development of hydroelectric potential of existing small dams
- Conservation of natural gas while ensuring that rates to natural gas consumers are equitable

The federal statute established in 1978 a new class of generating facilities that were provided special rate and regulatory treatment. Such generating facilities are classified as qualifying facilities and are encompassed by one of two categories:

- Qualifying Small Power Production Facilities
- Qualifying Co-Generation Facilities

The regulations originally established to implement PURPA were promulgated in 1980. Some changes have been enacted since the original promulgation. However, the FERC rule revisions promulgated in Order No. 872 have been described as the first comprehensive revisions since 1980.

The FERC contended in promulgating Order No. 872 that its purpose was to:

... better align those regulations with the modern energy landscape, while continuing to encourage development of qualifying facilities.

A link to a post describing Order No. 872 can be found [here](#).

The SEIA filed a September 18th Petition before the 9th Circuit challenging Order No. 872.

SEIA challenges what it describes as “four unlawful aspects of FERC’s rulemaking “ that are stated to exceed the agency’s authority and conflict with Congress’s goals. They are alleged to include:

1. Failure to undertake the required environmental impact analysis that would have confirmed that undermining renewable energy development by rolling back important aspects of FERC's existing PURPA rules has significant environmental impacts
2. FERC exceeded its narrow scope of authority to determine whether generating facilities are "at the same site" to invent new caps on an entity's total generating capacity across a wide region (based on FERC's policy preferences that conflict with Congress's)
3. Reversed a longstanding interpretation of PURPA's price cap in favor of a new interpretation that conflicts with Congress's express goals to encourage renewable generation and avoid discrimination
4. Shifted the burden of persuasion to determine a utility's alternative power costs despite admitting it was unlawful to do so

SEIA requests that the 9th Circuit vacate Order No. 872.

A copy of the SEIA Opening Brief can be downloaded [here](#).