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FERC Power Deal Rule Redo Flouts Congress, 9th Circ. Hears

By **Juan Carlos Rodriguez**

Law360 (January 7, 2022, 6:03 PM EST) -- Environmental groups and renewable energy industry players on Thursday urged the Ninth Circuit to overturn the Federal Energy Regulatory Commission's overhaul of regulations implementing a federal law that requires utilities to purchase electricity from small-scale renewable energy producers.

The green groups, led by the Sierra Club, said FERC's late 2020 action "gutted" its regulations implementing Congress' policy of supporting independent renewable energy development. The commission's update to its long-standing policies under the Public Utility Regulatory Policies Act improperly gives states dramatically more leeway to administer PURPA as they see fit, according to **the groups**.

"Refusing to accept that an agency cannot rescind legislation, FERC set out to erode its impact by adopting rules that exceed FERC's authority, conflict with congressional purpose and trample rights of independent renewable energy producers. FERC's rulemaking order must be vacated," the groups said in a reply brief.

Under **FERC's final rule** that revised its 1980 regulations implementing PURPA, the agency allowed state utility regulators to set variable rates in contracts between utilities and small-scale power producers in order to reflect changing electricity market conditions.

PURPA requires utilities to purchase power made available by renewable and cogeneration projects smaller than 80 megawatts, known as qualifying facilities, or QFs.

For utilities in competitive markets run by regional grid operators, FERC also changed the exemption threshold for purchasing power from small-scale power producers, lowering it from 20 megawatts to 5 megawatts. This comes as a major change to how the agency implements PURPA power purchase requirements known as the "mandatory purchase obligation."

The Solar Energy Industry Association, which is also challenging the revisions, said Thursday in its own reply brief that the new regulations hurt qualified facilities by doing away with their right to enter into long-term, fixed-rate contracts and could ultimately choke off small-scale renewable development. The group attacked briefs filed by FERC and energy industry groups that support the rule, such as the Edison Electric Institute.

"The commission's brief, and that of respondent-intervenors, attempts to paper over a concerted, multiyear effort by monopoly electric utilities and their allies to gut the commission's implementation of the one federal law that provides a check on their exclusive control over electric generation," the SEIA said.

Another rule challenger, NewSun Energy LLC, which owns current and prospective solar and other energy generators for development, said FERC new regulations could result in qualifying facilities receiving a capacity rate of zero and "an energy rate that is tied to unpredictably volatile short-term markets, with no minimum contract term."

"[FERC and its supporters] make no attempt to explain how financing could be obtained for qualifying facilities facing such uncertain prospects, or how a rule that effectively cripples qualifying facility financing satisfies FERC's statutory obligation to adopt rules 'necessary to encourage' qualifying

facilities," NewSun said in a reply brief.

A representative for FERC declined to comment Friday. Representatives for the other groups did not immediately respond to requests for comment Friday.

The SEIA is represented by Heather Curlee, Todd G. Glass and John B. Kenney of Wilson Sonsini Goodrich & Rosati PC.

The Montana Environmental Information Center, Sierra Club, Center for Biological Diversity and Vote Solar are represented by David C. Bender Earthjustice. The Community Renewable Energy Association is represented by Gregory M. Adams Richardson Adams PLLC. Appalachian Voices, Energy Alabama, Georgia Interfaith Power & Light, North Carolina Sustainable Energy Association and Upstate Forever are represented by Lauren J. Bowen, Nicholas Jimenez and Jillian Kysor of the Southern Environmental Law Center.

NewSun Energy LLC is represented by its own Marie P. Barlow.

FERC is represented by the agency's own Matthew Christiansen, Robert H. Solomon, Susanna Y. Chu, Matthew W.S. Estes and Joshua A. Kirstein.

The Edison Electric Institute is represented by its own Emily S. Fisher and Adam Benschhoff as well as Jeremy C. Marwell, Margaret E. Peloso and James T. Dawson of Vinson & Elkins LLP. The National Rural Electric Cooperative Association is represented by Randolph Elliott of McCarter & English LLP. Large Public Power Council is represented by Jonathan D. Schneider of Stinson LLP. American Public Power Association is represented by its own John E. McCaffrey.

The case is Solar Energy Industries Association v. Federal Energy Regulatory Commission, case number 20-72788, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Morgan Conley and Keith Goldberg. Editing by Stephen Berg.

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