



## Next Generation Energy Law Newsletter

Published by Law Offices of Carolyn Elefant, PLLC

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## LOCE Six Months Update & A Personal Note



Capri, Italy June 2014

When the firm dispatched our annual [FERC Appeal Round Up](#) back in January 2015, we never expected to go six months without a newsletter. But it's been a busy half-year. The firm represented one of our clients in the regulatory approval proceedings for the

Exelon-Pepco merger in both [Maryland](#) and [Washington D.C.](#), participating in several weeks of hearings between January and

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### Meet!

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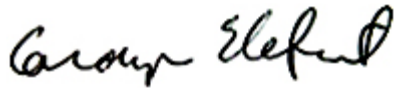
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April 2015. The firm prevailed on an appeal of a water quality certificate on behalf of a landowner and farm [involving a pipeline](#), has been litigating several eminent domain cases in federal court and representing clients in various PURPA matters at FERC, including one resulting in this favorable ruling [here](#) as well as in pipeline siting cases.

The firm continues to work with a [network](#) of independent practitioners to assist with our burgeoning workload, and this summer, the firm welcomed two law clerks, Lane Kisonak and Erin Thomas who you can read more about [here](#).

Unfortunately, the firm's recent successes have been tempered by sad personal news: my husband, [Bruce Israel](#) passed away on May 27, 2015 following a ten month battle with brain cancer. Just a year ago, along with our daughters, we embarked on a 16-day vacation to Italy and Israel, as I fretted, like any dutiful lawyer, about leaving my cases behind for two weeks. But as I learned, the work is always waiting; life is not. Don't let this summer pass you by.



Carolyn Elefant

## Repurposing PURPA

Although traditionally, April brings showers, this past May brought a torrent of another sort: legislative proposals to amend or repurpose PURPA. As the table below shows, between late April and May, a total of eight PURPA-related bills were introduced. Predictably, at least one of the bills proposed to absolve utilities of the obligation to purchase power from qualifying facilities if a state regulatory agency determines that the utility has no need for additional generation. Currently, a utility may only terminate its mandatory purchase obligation by making application to FERC and demonstrating that QFs have access to competitive markets.

In contrast, other bills would expand the scope of PURPA to provide the benefit of interconnection for distributed generation facilities, or to empower states to set rates at above avoided cost for QFs that are 2 MWs or smaller.

The details of each bill as well as how it would change the current regime are summarized in the table below.

Summary of Proposed PURPA Legislation Spring/Summer 2015

BILL NO.	WHAT THE BILL WOULD DO	CONGRESSIONAL & STAKEHOLDER REACTIONS	STATUS OF THE BILL	SIGNIFICANCE OF THE BILL
<b>S. 1001</b>	<ul style="list-style-type: none"> <li>Amend PURPA § 2002(c)–(d) (42 U.S.C. § 8642c)–(e) to require mandatory CP purchase requirements if a state retaining agency determines that the utility has no need to acquire additional generation.</li> </ul>	<p>Senators have many CP (another bill) but in support of § 1001, on the grounds that it would be burdensome to the current CP purchase obligations, and mitigate the risk of large projects being broken down to game the system and even higher PURPA prices at customer expense.</p>	<p>Introduced Apr. 22, 2015 by Sen. Leahy (D-VT) hearing held on May 14 (Dante &amp; Energy).</p>	<p>Currently FERC governs mandatory CP purchases under EPACT 2005, a utility may apply to FERC for exemption based on a review of CP markets. This bill would grant state utility commissions authority to exempt their utilities from mandatory CP purchases on the basis of lack of need for generation, without FERC involvement and without regard to access to markets.</p>
<b>S. 1002</b>	<ul style="list-style-type: none"> <li>Amend PURPA § 2002–(d) (42 U.S.C. § 8642c)–(e) to provide definition for cogeneration technology, qualified waste heat resources, and waste heat to power tech.</li> <li>Amend PURPA § 2002(d) establish guidance for information standards for generation rights (GR).</li> <li>Call for establishment of model rules/procedures to be used in determining for power acquisition to cogeneration.</li> </ul>	<p>Sen. VP Weingart supported these changes on grounds that they would reduce consumer costs, contending that CP power cost currently needed to replace coal-fired generation and state agencies indicate CP contract costs.</p>	<p>Introduced May 6, 2015 by Sen. Wyder (D-ND) hearing held on May 14 (Dante &amp; Energy).</p>	<p>This bill has the goal of facilitating state adoption of modernized interconnection procedures, tariff schedules, and reporting standards. It would lower regulatory barriers facing industrial and other large-scale heat-generating facilities in deploying their efficient energy resources.</p>
<b>S. 1010</b>	<ul style="list-style-type: none"> <li>Amend PURPA § 2112(c) to direct states to consider requesting DER eligibility for "full and reasonable" rate treatment for some energy storage, demand response, and ancillary service transactions with electric utilities, regardless of CP status.</li> <li>Direct state commissions to consider setting rates above the market-based cost of alternative energy.</li> <li>Limit state on customers served by distributed generation (DG).</li> <li>Direct state commissions to designate a smart grid coordinator or distribution system operator.</li> <li>Consider non-interconnection alternatives when additional program transmission projects.</li> </ul>	<p>Sen. VP Weingart testified April 9, 2015, stating that it would bring federal agencies into program reviewed for states by extending "full and reasonable" rate treatment to DER regardless of CP status, and that another bill provides some utility state projects. He also criticized the inclusion of a "social benefit" element for DG.</p> <p>Center for American Progress VP Greg Dalton supports the bill because of its supportive efforts for residential PV systems.</p>	<p>Introduced May 6, 2015 by Sen. King (D-AR) hearing held on May 14 (Dante &amp; Energy).</p>	<p>§ 1211 represents a comprehensive, novel approach to PURPA reforming for DG, and addresses the ongoing need for coordination of these resources.</p> <p>It is call for state agencies to use a "social benefit" criterion as well as consider non-interconnection alternatives to utility projects is also noteworthy—and will likely earn attention from retail-based generation stakeholders.</p>
<b>S. 1012</b>	<ul style="list-style-type: none"> <li>Amend PURPA § 2112(c) by directing states to ensure: <ul style="list-style-type: none"> <li>1. The degree to which distributed resources constitute ancillary services, including safety and demand response, and</li> <li>2. The effect of net metering and customer-owned DG on utility resource planning and customers who are not served by DG.</li> </ul> </li> </ul>	<p>Sen. VP Weingart supported § 1211 for state commissions to examine how costs and benefits are allocated between customers and others in the DG market.</p> <p>QAP Custom disagreed, arguing that § 1211 focused on the "challenge of net metering, rather than the opportunities."</p>	<p>Introduced May 6, 2015 by Sen. Murkowski (R-AK) hearing held on May 14 (Dante &amp; Energy).</p>	<p>This bill is generated on differing DG and net-metering and, if passed, could limit the opening in participation in such programs.</p>
<b>S. 1013</b>	<ul style="list-style-type: none"> <li>Amend PURPA § 2002(c)–(d) (42 U.S.C. § 8642c)–(e) to allow state agencies and non-regulated utilities to set rates above the market-based cost of alternative energy for CP and fixed-cost facilities of DER resources.</li> </ul>	<p>This proposal was not specifically discussed during the Senate Energy Committee's May 14 hearing, but similar proposals have been introduced by previously affected groups such as the American Electric Council.</p>	<p>Introduced May 6, 2015 by Sen. Wyder (D-ND) hearing held on May 14 (Dante &amp; Energy).</p>	<p>This proposal would allow facilities with capacities 12 MW to receive payments exceeding the usually-calculated avoided cost rates.</p>
<b>S. 1040</b>	<ul style="list-style-type: none"> <li>Amend PURPA § 2112(c) to set out a definition of "electric grid resilience" and require utilities consider resilience in integrated resource planning.</li> <li>Require utilities consider enhancing electric system "resilience and operational flexibility," "adaptation to climate change-related risks," and "enhanced DER and microgrid functionality."</li> </ul>	<p>QAP Custom testified in support of § 1240, arguing that cost of "Electric Grid Resilience Energy Resilience" ("GRID") is clear why § 1240 is in "body needed."</p>	<p>Introduced May 6, 2015 by Sen. Cantwell (D-WA) hearing held on May 14 (Dante &amp; Energy).</p>	<p>§ 1240 is directed toward grid reliability and resilience, rather than CP and rates. To that extent, the bill is novel.</p>
<b>S. 1042</b>	<ul style="list-style-type: none"> <li>Amend PURPA to add a new energy storage portfolio standard, requiring net electric supplies to provide energy storage at a 2% of the annual average peak power demand by 2020, and 2% by 2025.</li> <li>Applicable storage includes Customer-associated storage, supplier-owned/generators, third party (TPO) owned storage.</li> <li>Offers a storage owner (and retailer) to net electric supplies upon a determination of utility hardship to suppliers or ratepayers.</li> </ul>	<p>QAP Research analyst Tom Mangrove commented on this bill's prospects, arguing it "is the most [bill] before the forum."</p> <p>36 North Dakota partner Katherine Morrison expressed cautious optimism toward the bill, saying, "I'm sure, but it is a target."</p>	<p>Introduced May 21, 2015 by Sen. Murkowski (R-AK) referred to Senate Energy.</p>	<p>§ 1042, if passed, would make the first federal energy storage target (in two stages). It would also generate much-needed coordination amongst entities including utilities, ATOs, and customers.</p>
<b>HOUSE (S. 1001), (S. 1002), (S. 1010), (S. 1012), (S. 1013), (S. 1040), (S. 1042)</b>	<ul style="list-style-type: none"> <li>Amend PURPA to direct state utility commissions to consider requesting electric plants for higher use of technologies to improve infrastructure resilience, mitigate power outages, and maintain power flow to health (fully integrated facilities).</li> <li>Direct commissions to consider authorization of cost recovery for such technology.</li> <li>Technologies include DG, microgrids, energy storage, and advanced energy projects.</li> <li>Direct commissions to consider ensuring that utility merger take through-billed generation into a long-term resource plans over a 10-year planning period.</li> </ul>	<p>Ranking Member Frank Pallone (D-NJ) argued that the bill makes a "new step in the right direction" but is also "grounded in the past" by relying on "old" CP, and renewables in favor of regulated generation.</p> <p>Distributed and Wind Energy Association (DWEA) President Mike Beery praised the draft bill as a "first" but cautioned that it should specifically incorporate distributed renewables.</p> <p>Southern Company (SO) Tom Fanning supported the amendments, citing their positive effects on regulated generation, especially for the substation market.</p>	<p>Underwent hearing in House Energy and Commerce Committee, May 28, 2015.</p>	<p>The House discussion draft encompasses many of the issues brought up in ongoing Senate legislation. As part of the Committee's "Subcommittee of Alternative" initiative, this bill will also be used to incorporate legislation regarding energy employment, generation energy security, and reduction of government waste and consumer costs.</p>

# Federal Court Freezes Federal Funding of Highway 23 Project Due to Deficient Environmental Impact Statement

by Erin Thomas, LOE Intern

A recent ruling, [1000 Friends of Wisconsin Inc. v. United States Dept. of Transportation](#), (E.D. Wis. May 22, 2015), by a Wisconsin federal district court – which vacated a Wisconsin Department of Transportation (WisDOT) approval of a 20-mile highway expansion based on multiple National Environmental Policy Act (NEPA) violations - may offer ammunition to stakeholders challenging approval of natural gas pipelines by the Federal Energy Regulatory Commission (FERC). The Wisconsin court found that the DOT's environmental impact statement (EIS) failed to adequately describe the methodology used to produce the traffic forecasts that purportedly justified the need

for the project and to explain how updated predictions by the state Department of Administration, which downgraded estimated population growth by two thirds, would affect WisDOT's original forecasts.

This case originated in 1999 when state legislators placed the Highway 23 expansion project in the budget without the recommendation from the Transportation Commission and required the WisDOT Wisconsin to begin construction. Because federal funds would be used to build the project, WisDOT was required to prepare an EIS which suffered from two major infirmities. First, the EIS lacked a comprehensive explanation of how the two different forecasting tools, which were part of a complex methodology, were applied to reach WisDOT's projections. As the court explained, NEPA requires an agency to "identify any methodologies used" to arrive at conclusions that appear in an impact statement. 40 C.F.R. § 1502.24 WisDOT's failure to explain its methodologies violated the CEQ regulations and further precluded meaningful public participation and judicial review of WisDOT's decision.

Second, the court found that WisDOT failed to consider updated demographic data produced by the Department of Administration showing a future decline in population. The WisDOT conceded that the updated predictions indicate a lower growth than stated in the impact statement but did not revisit the possibility of alternatives, such as comprehensive passing lanes instead of construction of a four-lane highway, in light of the update.

Accordingly, the court vacated WisDOT's decision and remanded the case with instructions to WisDOT to decide whether, looking at the updated demographic information, the four-lane expansion is necessary or whether other reasonable alternatives can be taken that would have fewer environmental impacts.

The case has significance for FERC pipeline cases for several reasons. First, the Wisconsin ruling makes clear that agencies must consider newer, more accurate information is released that can influence findings. Because natural gas pipelines can take many months to several years from the pre-filing stage to approval, the need for a project may change in the interim and FERC cannot ignore these changes. Second, the Wisconsin ruling highlights the connection between project need and an adequate alternatives analysis. Just as the court found that WisDOT should have considered more benign project alternatives (such as lane changes instead of a highway expansion), when confronted with data on declining need, so too, FERC must closely scrutinize a company's alleged need for a project and evaluate whether the need can be met by more modest alternatives such as operational changes or a smaller diameter pipeline.

**Removing Barriers to  
Municipal Rooftop Solar-**

# New ILSR Report

by Lane Kisonak, LOCE Intern



On June 1, the Institute for Local Self-Reliance (ILSR)'s Democratic Energy Initiative released its [report](#) on the state of municipal solar power across the country. In the Institute's view, leadership by local governments may culminate in

over 5,000 MW of cheap PV solar on municipal land and rooftops by 2021. Even though cities remain unable to directly access substantial federal tax credits or depreciation schedules, must work on slim operating and capital budgets, and are often barred by states from entering third-party power purchase agreements (PPAs), determined locales such as lower-income New Bedford, MA, or overcast Kansas City, MO, have built cost- and carbon-saving (as well as job-creating) solar arrays by improvising a spectrum of strategic arrangements with developers and government entities.

Positive spillover effects of municipal solar include the inspiration of private-sector imitators, stronger competition with incumbent utilities, and valuable negotiating experience for city officials, residential installers, and solar companies alike. Still, inherent roadblocks—such as tax equity investors' preference for larger-scale projects, the complexity of municipal decisionmaking, and steep transactional costs—will complicate efforts to emulate the success enjoyed by the cities subject to this report's case studies. The Institute's efforts to highlight this particular market will be useful to interested cities as they attempt to overcome those barriers and fulfill municipal solar's economic and environmental potential.

*If you are a governmental or municipal entity seeking additional information regarding solar PPAs, please contact the firm at 202-297-6100 or [carolyn@carolynelefant.com](mailto:carolyn@carolynelefant.com).*

*Image courtesy of [vitasamb2001](#) at [FreeDigitalPhotos.net](#).*

## Energy Shots - Little Bytes of Cool Energy Developments!

### A Credit Card That Makes It Easy Being Green



Most consumers are familiar with the myriad of credit cards that offer cash rebates. But a new credit card, [Sustain:Green](#) gives back another kind of green: an offset on CO2 emissions

associated with users' spending. As described by reports [Springwise](#), the card monitors users' spending and purchases two pounds of carbon for every dollar spent through a Brazilian rainforest conservation project which runs an offset program. Customers can also monitor their spending and offsets on the Sustain:Green website. Because Sustain:Green doesn't charge a fee, and automates the process of purchasing offsets, the card (contrary to what Kermit the Frog would [have us think](#)) makes it easy being green.

## Will E-Shaming Encourage Energy Efficiency?



Call it a different kind of [e-shaming](#): electricity-use shaming. That's what the energy advocacy group, [Urban Green Council](#) had in mind in creating [Metered NYC](#), a site that will put New York City municipal buildings' energy use on display to incentivize others to increase energy efficiency measures. As [Capital New York](#) explains, "If people see their neighbors installing solar panels and saving money, the theory goes, they will want to do the same."

*Image Courtesy of [TungPhoto](#) at [FreeDigitalPhotos.net](#)*

## Uber, AirBnB and the "You-tility" of the Future



Who ever thought that energy regulatory law could be disruptive? Yet with technologic advancements, clean energy has become just as sexy an upstart as Internet darlings like [Uber](#) and [Air Bnb](#). And central to all of these concepts are the consumers themselves, observes Peter Sopher at the [EDF Blog](#), who are now empowered to own and sell energy without a utility as the middleman. Do you agree that we'll see the You-tility of the future any time soon - or do energy companies have a stronger grip on monopoly than the taxi cab and hotel business?

## Certify Regulatory Professionals?



My colleague, [Scott Hempling](#), one of today's keenest energy regulatory minds takes on the topic of certification for regulatory professionals in a two-part Regulatory Essay, [here](#) and [here](#). In [Part I](#), Scott contends that regulation can improve with certification, and in [Part II](#), Scott identifies potential certification entities and offers opening



thoughts on a possible curriculum.

Although I have long bemoaned the pure quality of many energy regulatory practitioners who seem to believe that jargon and acronyms are a substitute for substantive mastery, narrow rather than broad certification requirements concern me. If certification involves more traditional education - such as courses or exams - it can prove to be a costly endeavor which would place small firms like mine at a disadvantage since we'd bear both the actual cost of the program as well as lost opportunity costs associated with attending. If certification disproportionately burdens smaller firms, industry stakeholders would have fewer rather than more choices. On the other hand, a more flexible certification requirement that takes account of publications, testimony and cases argued would provide lawyers with incentive to contribute useful information to the industry or take on *pro bono* causes to obtain credit for certification.

Finally, with the energy industry changing at the speed of light, can certification keep pace? As a small firm practitioner representing clients at the cutting edge of emerging legal issues, I often see new issues long before they become mainstream. For a certification course to have value for my clients and practice, it would need to teach me not so much what the black letter law is, but how to change the law moving forward to give my clients an edge. If there's a program on [Disruption 101](#), sign me up!

What's your view on certification? Join the conversation in the comment section [here](#).

## LOCE News



### **LOCE Testifies Before House Energy & Power Subcommittee:**

On May 13, 2015, I testified in my capacity as a board member of the [Pipeline Safety Coalition](#) on the discussion draft of a bill to address

Hydropower Regulatory Modernization and FERC Process Coordination Under the Natural Gas Act. The proposed legislation would streamline the pipeline certificate process by enforcing deadlines for state and federal agencies to act on certificate applications and also by subordinating those agencies' regulatory responsibilities to FERC. You can read my testimony [here](#), and more on the proposed legislation [here](#).

### **Welcome LOCE Summer Interns Lane Kisonak and Erin Thomas**

LOCE is pleased to welcome GW law students, Lane Kisonak and Erin Thomas as summer associates. Their intros are below:

## Lane Kisonak

Lane Kisonak is a rising third-year student at the George Washington University Law School, and intends to practice law in pursuit of a sustainable, reliable, and diversified energy system. In the fall of 2014, he volunteered as a Law Clerk at Oceana, an international non-profit organization dedicated to ocean conservation via strategic litigation and multi-faceted policy campaigns. In the summer of 2014, he worked as a Law Clerk for the U.S. Senate Judiciary Committee. He has course experience on FERC/state agency rulemaking and grid efficiency/technology/infrastructure, as well as environmental advocacy.



## Erin Thomas

Erin is a rising 2L at The George Washington University Law School pursuing environmental and energy law. Her past experience includes working at the Cleveland Metroparks Zoo where she developed a passion for environmental and energy issues while educating guests on how they can do their part to help. She also interned at SustainU Clothing Company in Morgantown, WV where she ran a nationwide collegiate clothing drive, the One Shirt campaign, which included over 100 universities. Erin hopes to develop her interests while living in the D.C. area and at the Law Offices of Carolyn Elefant this summer.

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