

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Applicability of Federal Power Act Section
215 to Qualifying Small Power Production
and Cogeneration Facilities**

Docket No. RM07-11-000

**COMMENTS OF THE
ELECTRICITY CONSUMERS RESOURCE COUNCIL
("ELCON")
AND
THE AMERICAN IRON AND STEEL INSTITUTE
("AISI")**

The Electricity Consumers Resource Council ("ELCON") and the American Iron and Steel Institute ("AISI") offer the following comments on the Commission's March 16, 2007 rulemaking ("the March 16 NOPR") proposing to eliminate the exemption of qualifying small power production and cogeneration facilities ("QFs") from the requirements of section 215 of the Federal Power Act.

FERC proposes to withdraw the QF exemption based on findings that (a) only about one quarter of QFs exceed the 20 MVA/20 MW threshold; and (b) FERC's assumption that "there does not appear to be a meaningful distinction between QF and non-QF generators that would warrant exemption of QFs from mandatory reliability standards."

In these comments, ELCON and AISI will explain that FERC should not conclude that QFs can and should be treated like non-QF generators; rather, the primary function of QFs distinguishes QFs from other generators. Over-registration of QFs should be avoided: QFs should be registered only if a QF has a material impact on the reliability of the bulk power

system; if registration is required, then the Commission should consider a separate category for QFs.

SUMMARY

ELCON and AISI members, as owners and operators of large manufacturing facilities, are strong supporters of grid reliability. ELCON and AISI do not oppose the registration of QFs if particular facilities are found to materially affect the reliability of the bulk power system. In fact, ELCON and AISI have cooperated with recent efforts by the North American Electric Reliability Council (“NERC”) staff to draft registration criteria that would address the unique operational characteristics of QF cogenerators.

Unfortunately, the NOPR would impose an automatic or per se rule that would force the registration of all QFs above 20 MVA/MW regardless of whether the QF’s operations have any effect on reliability or the registration actually results in improved reliability of the bulk power system. Certain regions, in contradiction to NERC efforts to establish consistency across regions, are threatening to impose automatic registration at what appear to be arbitrary lower limits without justifying the effect on materiality. Past experience and the application of NERC’s registration process to date has recognized that most QF facilities indeed do not affect reliability. Further, NERC has applied a “netting” concept that recognizes that often QF generation never reaches the grid, or does so on a limited basis. However, ELCON and AISI are concerned that the March 16 NOPR could be misconstrued as requiring that ALL QFs above 20 MVAs be registered *regardless of whether they may have a material effect on the reliability*

of the bulk power system. Recent registration initiatives adopt an interpretation that QFs *automatically* be registered if above 10 MVA capacity.¹

ELCON and AISI strongly oppose an automatic registration requirement based on nameplate capacity ratings. ELCON and AISI further oppose categorization of QFs with conventional power plants without regard to operational constraints and host facility requirements. Not only is such a result unneeded to serve the reliability provisions of section 215, but forcing all QFs larger than 20MWs into the registration mold needlessly without regard for unique requirements impairs the viability of QFs without serving the needs of reliability.

In these comments ELCON and AISI offer two principal recommendations:

--FERC should clarify that only those QFs which have a material impact on bulk electric system reliability should be registered. Over-registration will unnecessarily burden NERC resources, and impair QF development in derogation of FERC's statutory mandate and important national policy objectives.

--FERC should recognize a separate category for QFs to recognize their operational requirements and constraints.

ELCON and AISI recommend that FERC encourage the establishment of an ad hoc NERC task force under the Standards Committee that would review the criteria for determining if and when a QF has a material impact on the reliability of the bulk power system. This criteria would be used by standards drafting committees to address the unique physical characteristics of QFs at industrial sites with respect to compliance with applicable reliability standards. Such an

¹ ERCOT QF Draft White Paper at 3, available at <http://nodal.ercot.com/docs/tntarc/mo/rto/qf/QFWhitePaperdraft022504.doc>. WECC has considered a supplemental criterion that would force all generators 20 MVA and above into its registry.

approach will (a) implement Section 215 in a fashion that recognizes the special characteristics and contributions of QFs; (b) avoid disabling differences in implementation of the registration requirements between the regions; and (c) comply with FERC's statutory obligations under the Public Utility Regulatory Policies Act ("PURPA").

FERC remains obligated under Section 210(e) of PURPA to avoid unnecessarily burdening QFs with utility-type regulation. FERC should apply Section 215 to QFs in a fashion that recognizes the special operating characteristics of QFs and their protected status under PURPA. This approach serves the dual objectives of assuring that those facilities that should be registered are registered and reflecting an awareness of the unique operating characteristics of QFs.

SPECIFIC COMMENTS

I. FERC'S IMPLEMENTATION OF SECTION 215 MUST RECOGNIZE THAT QFs ARE DIFFERENT FROM OTHER GENERATORS

A. The Primary Function Of Qualifying Cogeneration Facilities Is To Support Industrial Thermal Processes, Not To Supply Power To The Grid

FERC's statement in the March 16 NOPR that there does not appear to be a material difference between cogenerators and merchant generators of similar size shows a lack of understanding of the underlying functions of these two very different facilities. Cogeneration facilities exist primarily to provide steam and other forms of thermal energy to a related industrial process. QF support of the industrial host is not a matter of discretion or flexible adjustment. The QF is intended to continuously support a manufacturing process often on a 24 by 7 basis. The primary function of on-site cogeneration facilities is to reliably serve the host industrial operations and these facilities are often highly integrated with the manufacturing

processes they serve. In many cases the electric power produced by cogeneration facilities is used to serve the demand of the industrial host and production is often equal to or less than the total demand of that industrial host. When the cogeneration facility's generation capacity is larger than the industrial host's demands, excess power, if any, is either sold to the interconnected utility, generally at the point of interconnection. The utility is generally responsible for managing the impacts of these deliveries on the reliability of the bulk power system.

On the other hand, utility and merchant generators are usually engaged solely in the business of producing and selling electricity as their primary business function, and are independent of a third party manufacturer. As a result, merchant plants can generally increase or decrease their production to accommodate the need for more or less electrical power on short notice without additional operational constraints that may be faced by cogeneration facilities. A change in schedule for a merchant plant's scheduled maintenance outage only impacts when electrical power is produced. In contrast, a change in the schedule for maintenance of a cogeneration facility could interrupt manufacturing processes of the thermal host. The development of cogeneration is driven in large part by a need for thermal energy to support manufacturing, not a need to produce and sell electricity into the market. Accordingly, a cogeneration facility's thermal obligations may constrain the ability of the plant to increase or decrease the amount of electric power produced at any given point in time. The cogeneration facility's maintenance outage may also be directly tied to the time when the equipment using the thermal energy is scheduled for maintenance. Because the industrial processes supported by many cogeneration units are the *raison d'être* for the facility as a whole, this linkage should be

respected. In summary, clearly a merchant generator's primary role is as a supplier of electric energy to the grid independent of a thermal host's requirements. An industrial QF's primary role is to support a manufacturing operation with thermal energy.

PURPA has made it possible for more industries to install the necessary equipment and develop the ability to co-generate electricity and steam for their own needs in most states. Under PURPA, electric utilities are obligated to sell standby, back-up and maintenance power to QFs on a non-discriminatory basis. Back-up power is electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a QF's own generation equipment during an unscheduled outage of the facility. The statutory requirement to provide standby, back-up and maintenance power on a non-discriminatory basis is very pertinent to this proposed rulemaking because this PURPA mandate only applies to QF generators. The burden of an unscheduled outage at the QF facility is often borne by the utility providing back-up service. The provision of this service is not at the discretion of the utility; it is required by PURPA. Non-QF merchant generators do not have this unique requirement to serve host facilities nor are the merchant generators entitled to back up service as a statutory right.

B. QF Operations Support Critical Infrastructure

ELCON and AISI members are large-scale industrial end users such as oil companies, chemical companies, pulp and paper companies and companies in the steel industry. It is a national priority to ensure that refineries and other critical manufacturing plants are served with power and are able to operate.² As FERC implements Section 215, the Commission must take into account the role of industrial cogeneration in supplying critical industrial infrastructure.

² Executive Order No 13228 (Oct. 8, 2001).

Failure to differentiate the special characteristics of industrial QFs from merchant generators would undermine an important national objective. It is important that as FERC proceeds to implement Section 215, it avoid the error of lumping QFs with other generation and tailor its policies such that industrial end users can continue to be assured that their manufacturing facilities can rely upon on-site cogeneration facilities, especially during recovery periods after hurricanes and at other times of national emergency.

II. TO AVOID OVER-REGISTRATION, ONLY QFs THAT HAVE A MATERIAL IMPACT ON THE GRID SHOULD BE REGISTERED

NERC proposed, and FERC approved in its July 20, 2006 order, a registration process for users, owners and operators of the Bulk-Power System based on fourteen primary functions defined in NERC's Functional Model. As ELCON emphasized in its comments in RM06-10-000, over-registration is as pernicious a result from the standpoint of enforcing reliability as under-registration.

First over-registration will only distract the compliance staff at both NERC and the regions from concentrating their efforts on identifying and monitoring the compliance of entities that can have a material impact on Bulk-Power System reliability. Devoting excessive resources to registration is also inefficient, because NERC and the regional staffs will quickly reach a point of diminishing returns on the extra dollars spent.

At its December 12 and 13, 2006, meeting, NERC's Compliance & Certification Committee ("CCC") discussed the over-registration concern in the context of its opposition to FERC's proposed definition of "bulk power system." The CCC unanimously passed a motion that reads, in pertinent part:

The CCC believes that FERC's proposals would create significant problems for NERC's implementation of its Compliance Enforcement Program that are counterproductive to the intent of the Energy Policy Act of 2005.

First, the FERC definition of Bulk Power System would significantly increase the number of entities that would be required to register with the NERC Compliance Enforcement Program and sweep into the registry many entities that would have no material impact on bulk electric system reliability. This would greatly increase the cost and complexity of maintaining the registry, perform(ing) compliance audits and other program administrative activities. This can only distract NERC and the Regional Entities from their plenary responsibilities under the law....

NERC's comments to FERC in Docket No. RM06-16-000 reiterated concern about over-registration. FERC summarized NERC's concerns in Order No. 693, 118 FERC ¶ 61,218 (March 16, 2007):

60. ...NERC states that the Commission should focus on approving an initial set of Reliability Standards for the core set of users, owners and operators that have the most significant impact on the reliability of the Bulk Power System. NERC maintains that this core set has been defined through its use of the terms "bulk electric system" and "responsible entities" provided in the NERC Glossary, the "Applicability" section of each Reliability Standard and substantive requirements of the standards themselves, and NERC's registration of specific entities that are responsible for compliance with the Reliability standards...

62. NERC also asserts that there is no reasonable justification for subjecting 'thousands of small entities' to the costs of compliance when there is no reasonable justification to do so in terms of incremental benefit to the reliability of the Bulk Power System.

FERC agreed with the rationale of NERC and other commenters "that, at least initially, expanding the scope of facilities subject to the Reliability Standards could create uncertainty and might divert resources as the ERO and Regional Entities implement the newly created enforcement and compliance regime...Rather, for at least an initial period, the Commission will rely on the NERC definition of bulk electric system and NERC's registration process to provide as much certainty as possible regarding the applicability to and the responsibility of specific entities to comply with the Reliability Standards in the start up phase of a mandatory Reliability

Standard regime.” Id. at 75. Similarly, in discussing registration of users, the Commission determined to rely on NERC’s registration process:

92. ...The Commission has previous found NERC’s compliance registry process to be a ‘reasonable means to ensure that the proper entities are registered and that each knows which Commission-approved Reliability Standards are applicable to it.

....

95. We believe that NERC has set reasonable criteria for registration and thus we approve the ERO’s compliance registry process as an appropriate approach... Thus, at this juncture, the Commission will rely on the NERC registration process to identify the set of entities that are responsible for compliance with particular standards.

Moreover, over-registration will burden moderate-size QFs to no useful purpose. The WECC proposal that all QFs above 20 MW must be registered would require registration of approximately 265 units with aggregate site generation of between 20 MW and 100 MW, likely interconnected at less than 100 KV. Moderate-sized QFs do not have the staff or expertise to manage the interface issues with WECC/NERC, standards which were written largely for electric utilities or merchant generators.³

Additionally, over-registration of QFs could allow electric utilities to cease honoring the terms and conditions of interconnection agreements with customers with behind-the-meter co-generation facilities.

Finally, concern over grid reliability does not justify over-registration of QFs. The most serious blackout incidents in recent years resulted from poor utility management practices with respect to tree cutting and inability of NERC to force compliance with reliability standards that were not mandatory. QFs have not been associated with these reliability failures.

³ The additional requirements and risk of penalties could jeopardize the continued operation of units of this size and dampen the development of new projects. The loss of existing facilities would put additional load on the grid thereby increasing the risk of grid instability during emergencies. The additional regulatory burdens could prevent facilities from being developed in areas where they would benefit all grid customers by reducing grid demand and improving grid reliability.

III. A NERC-QF TASK FORCE SHOULD BE ESTABLISHED TO DETERMINE WHICH QFs SHOULD BE REGISTERED AND HOW NERC STANDARDS SHOULD BE APPLIED TO QFs

ELCON and AISI appreciate that it is possible that some cogeneration facilities may have a material impact on bulk system reliability. ELCON and AISI understand the need for registration in this instance. However, this scenario is the exception even for the larger units. When registration is required the operating characteristics of QFs should be taken into account.

A. Basic Principles For QF Registration

ELCON and AISI advocate that the determination of which QFs should be registered should follow fundamental principles:

i) If FERC chooses to remove or qualify the exemption from FPA Section 215 for QFs, then FERC must consider what aspects are necessary to support grid reliability by QFs without impinging upon the host facility operations, posing an increased risk of a unit trip or accelerated equipment wear or damage, result in increased emission levels or inefficient utilization of natural gas or result in penalties being assessed by the natural gas supplier or transporter. FERC must recognize that cogenerators at industrial sites are not stand-alone merchant power plants and should not be placed within the same category without distinction.

ii) Registration of QFs should apply only to the net “put” on the grid and not the nameplate capacity rating of the facility behind the meter. This principle is a more meaningful determinant of materiality.

iii) FERC should encourage NERC and the regions to address the special needs of QFs and to adopt a reliability regime that takes into account the linkage between QF and host facility operations, and not presume that QFs are just another generator.

iv) No QF should be registered without a facility-specific conclusion that impact is material and that also recognizes (a) the obligation of a third party to provide backup power; (b) the terms and conditions of the interconnection agreement, if applicable; and (c) contractual requirements to serve the host industrial operations on a primary basis.

v) For QF operations that meet the criteria for registration, FERC and NERC should allow a sufficient transition period for establishing the internal organization and process tasked with the responsibility for compliance. Unlike utility and merchant generators, industrial QFs, as end-use customers of public utilities, had no obligations to comply with NERC standards in the past.

B. Need For NERC Task Force To Focus On QF Reliability Issues

ELCON and AISI respectfully request that FERC direct NERC to create a separate ad hoc task force within the Standards Committee to review the criteria used to register industrial QFs and to draft guidelines for the treatment of registered industrial QFs in reliability standards. This task force should also seek an interim “applicability interpretation document” for each existing standard. This is necessary because the existing, approved standards were never drafted to include compliance by QFs. Additionally, FERC must ensure that the governance process of such a task force is not held captive to traditional anti-PURPA interests that would just put industrial QFs out of business: QFs must be assured ample representation to bring their interests and expertise to bear.

IV. BLANKET REGISTRATION OF ALL QFs ABOVE 20 MW IS INCONSISTENT WITH SECTION 210(e)(1) OF PURPA

The Commission remains under a statutory obligation under Section 210(e)(1) to administer exemptions from federal (and state) regulation as necessary to avoid disincanting

QFs. The March 16 NOPR fails to evaluate the blanket requirement to register all QFs above 20 MW in light of the Commission's mandate to avoid unnecessary regulation of QFs.

FERC recognized this statutory obligation when it initially implemented its Section 210(e)(1) authority in Order No. 69:

Section 210(e) of PURPA states that the Commission shall prescribe rules under which qualifying facilities are exempt in part from the Federal Power Act...if the Commission determines such exemption is necessary to encourage cogeneration and small power production. As noted in the Staff Discussion Paper, the Congress intended the Commission to make liberal use of its exemption authority to remove the disincentive of regulation. The Commission believes that broad exemption is appropriate.

45 Fed. Reg. 12232 (1980) (emphasis added). The cited legislative history includes a strong statement of Congressional intent: "The conferees wish to make clear that cogeneration is to be encouraged under this section... The establishment of utility type regulation over them would act as a significant disincentive to firms interested in cogeneration and small power production."

Conference Report on H.R. 4018, Public Utility Regulatory Policies Act of 1978, H.Rep. No. 1750 (95th Cong.2d Sess. 1978), at 98.

FERC has recently recognized that it remains under an obligation to avoid unnecessary disincentives to QFs post enactment of the Energy Policy Act of 2005. For example, in Order No. 671, Revised Regulations Governing Small Power Production and Cogeneration Facilities (2006), the Commission re-visited and revised QF regulatory exemptions in light of the enactment of the EAct 2005. Order No. 671 recognized that EAct 2005 did not repeal PURPA Section 210(e)(1.) In fact, FERC evaluated whether to retain, modify, or eliminate specific exemptions by considering whether the particular exemption would needlessly burden QF generation:

Commission Determination

92. We will eliminate certain exemptions that were previously granted to QFs as proposed in the NOPR. However, we will clarify that QFs will retain the exemption from sections 205 and 206 of the FPA when a sale is made pursuant to a state regulatory authority's implementation of PURPA. The Final Rule will also essentially retain the pre-existing exemption from PUHCA so that a QF will not be considered "an electric utility company" under the new Public Utility Holding Company Act of 2005.

93. Section 210(e)(1) of PURPA states that the Commission "shall . . . prescribe rules under which [certain qualifying facilities] are exempted, in whole or in part, from the Federal Power Act, from the Public Utility Holding Company Act, from State laws and regulations respecting the rates, or respecting the financial or organization regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production." Section 210(e)(2) of PURPA provides that the Commission is not authorized to exempt small power production facilities of 30 to 80 MW capacity from these laws, except for geothermal power production facilities. Such facilities between 30 and 80 MW may be exempted from PUHCA and from state laws and regulations, but may not be exempted from the FPA. Thus section 210(e) requires the Commission's regulations to grant regulatory exemptions for certain QFs, in whole, or in part, and if necessary to encourage cogeneration and small power production.

The Commission explained that it had initially granted QFs multiple exemptions to comply with the statutory mandate to avoid disincenting QFs:

94. In Order No. 69, the Commission first implemented section 210(e) of PURPA. The Commission stated that a broad exemption was then appropriate to remove the disincentive of utility-type regulation from QFs, including sections 203, 205, 206, 208, 301 and 304 of the FPA.

FERC explained that "When the Commission first granted the exemptions from sections 205 and 206 of the FPA in Order No. 69, there was no market for electric energy produced by non-utility generators.... However, largely as a result of PURPA, markets for electric energy produced by non-traditional power producers developed." Id. at 95. FERC proposed to withdraw the complete exemption that QFs enjoy from Section 205 given their participation in wholesale markets and the need to assure regulatory oversight. Significantly, FERC made a predicate

finding that complete exemption from Section 205 was no longer required to avoid disincenting QF generation:

96. Therefore, in light of the significant changes that have occurred in the industry since the first QF facilities were introduced and in light of the changing electric markets and resulting market power issues that have arisen in recent years, we no longer believe that it continues to be necessary or appropriate to completely exempt QFs from sections 205 and 206 of the FPA. We conclude that such a complete exemption is not necessary to encourage the development of cogeneration and small power production facilities and, moreover, the broad nature of the exemptions currently set forth in § 292.601 removes a large number of electric energy sales from *any* regulatory oversight. Further we note that many QFs are large and their non-PURPA sales could potentially have a significant market effect.

The Commission partially modified the Section 205 exemption; it did not completely eliminate it. The withdrawal of the Section 205 exemption (a) did not apply to existing contracts, (b) did not apply to small QFs and (c) did not apply where rates were regulated by states under avoided cost authority. See Id. ¶ 97-98. FERC decided to retain exemptions providing that QFs should not be regulated under PUHCA 2005 and should not be subject to Section 203(a)(1). On the other hand, FERC determined that QFs should be subject to new EAct provisions addressing electric market transparency, false statements and market manipulation. Id. ¶ 103.

The March 16 NOPR does not reflect any consideration of the requirements of PURPA Section 210 (e). As this rulemaking proceeds, FERC should engage in a careful balancing of the objectives of Section 215 and the requirements of PURPA Section 210(e) to determine that application of reliability requirements to QFs occurs in a manner that does not disincen QF generation.

V. FERC IMPLEMENTATION OF SECTION 215 SHOULD RECOGNIZE THE IMPORTANT CONTRIBUTIONS OF QFs TO GRID RELIABILITY

QFs provide benefits to the transmission system by increasing the reliability of the grid through diversifying generation resources and in many cases by freeing up capacity for others to use. To avoid an arbitrary outcome at variance with the objectives of Section 215, FERC should tailor its implementation of NERC registration in a fashion that recognizes the contributions of QFs to reliability.

A. How QFs Increase The Reliability Of The Grid

Cogeneration decreases the grid's peak load requirements and benefits utilities that are load serving entities and ratepayers by relieving congestion on the transmission system, supporting the level of ancillary services offered, and reducing electric line losses and transmission costs. From a security standpoint, cogeneration facilities were also largely responsible for keeping the lights on in California during the darkest days of the 2000-2001 energy crises, many running months without certainty of payment in order to maintain the viability of critical state industrial infrastructure. Most recently, Hurricanes Rita and Katrina in the Gulf Coast area of the United States have provided additional lessons in the importance of cogeneration in sustaining infrastructure so critical to our economy and national security. On-site cogeneration at industrial facilities such as refineries and chemical plants may assist in getting those operations up and running again.

Taking California as an example, three of the largest cogeneration facilities in the state provide steam and energy for 90% of the state's crude oil production. According to the California Energy Commission:

California should particularly encourage CHP [combined heat power] at the state's petroleum refineries to make them less vulnerable to power outages. An electricity outage on September 12, 2005, in Southern California caused the shutdown of three refineries in Wilmington. These shutdowns resulted in pressure buildups that forced refinery operators to flare excess gases, affecting air quality in the area. The shutdown also impacted gasoline production and supply, causing shortages and price spikes. Increased CHP use at refineries is an important strategy that can help insulate refineries from these kinds of electric grid problems and maintain gasoline production and refinery safety.⁴

B. An Electric Grid Connecting Multiple Smaller Behind-the-Meter Generators Adds Reliability Value to the System

All other things being equal, a system comprised of many small generating units is more reliable than a system with fewer large generating units. As an example, a system of five smaller generators of 200 MW each is significantly more reliable than a similar system of two larger generators of 500 MW each. Consider the probability of losing 1,000 MW. Five 200 MW units at a 5% forced outage rate equals 3.125×10^{-7} , while two 500 MW units at a 5% forced outage rate equals 2.5×10^{-3} . The smaller unit system is 8,000 times less likely to lose all 1,000 MW of capacity simultaneously.

This reliable power is important not only for the needs of industry, but also for the special needs of schools, public facilities and hospitals. Industrial QFs generally operate at greater capacity factors than comparable utility electric plants. Historical performance records show that customer-owned generation is "on-line" and producing power in excess of 90% of the time. Additionally, industrial QFs typically schedule maintenance tasks during low electricity demand periods and produce more electricity during high demand periods. This practice ensures a steady, reliable source of electrical energy for customers.

⁴ 2005 Integrated Energy Policy Report, California Energy Commission (CEC), November 2005.

Moreover, QF facilities are dispersed, guaranteeing critical supplies of power. Diversity of QF supply protects against the disruption of power delivery from large, centrally-located generation plants.

C. QF Generation Is An Efficient and Environmentally Beneficial Form Of Reliable Generation

Cogeneration uses a single fuel source to produce two forms of useful energy, electricity and thermal power. Cogeneration facilities employ sophisticated air emissions control systems that meet and often exceed local and federal air quality standards. This efficient electric generation provides environmental benefits in terms of the conservation of fuel and also in the reduction of air emissions from two separate power and steam generation facilities.

Cogeneration is also a cost effective source of power. Because of the efficiencies inherent in the dual production, cogeneration generally results in power produced at lower total costs than power and steam produced separately.

VI. BLANKET REGISTRATION OF ALL QFs ABOVE 20 MW IS INCONSISTENT WITH FERC'S OBLIGATION TO PROTECT RETAIL CUSTOMERS WHO HAVE CHOSEN TO COGENERATE

QFs are an adjunct of the industrial host. QFs are used to self-supply power (whether or not there are incidental outside sales). Unnecessary regulation of QFs thus contravenes the primary obligation of FERC under the FPA to protect retail industrial customers:

The FPA requires FERC to regulate public utilities for the benefit of consumers. See Pa. Water & Power Co. v. Fed. Power Comm'n, 343 U.S. 414, 418, 72 S. Ct. 843, 96 L. Ed. 1042 (1952) ("A major purpose of the whole [Federal Power] Act is to protect power consumers against excessive prices."); California ex rel. Lockyer v. FERC (Lockyer), 383 F.3d 1006, 1017 (9th Cir. 2004) (describing "protecting consumers" as the FPA's "primary purpose"); see also Atl. Ref. Co. v. Pub. Serv. Comm'n, 360 U.S. 378, 388, 79 S. Ct. 1246, 3 L. Ed. 2d 1312 (1959) ("The [Natural Gas] Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges.").

Two FPA provisions, sections 205 and 206, 16 U.S.C. §§ 824d, 824e, govern FERC's authority and establish its obligation to regulate rates for the interstate sale and transmission of electricity. Through these provisions, the FPA empowers FERC to regulate wholesale electricity rates but not the rates charged directly to consumers by local utilities. See 16 U.S.C. § 824(a), (b)(1). The protection the FPA accords consumers is therefore indirect: By assuring that wholesale purveyors of electric power charge fair rates to retailers, the FPA protects against the need to pass excessive rates on to consumers. At the same time, by assuring that wholesale purveyors of electric power receive a fair rate of return, the FPA assures that such sellers have the incentive to continue to produce and supply power.

Public Util. Dist. No. 1 v. FERC, 471 F.3d 1053, 1058 (9th Cir. 2006).

Industrial QFs have made significant generation investments to protect their power supply both from the stand point of rate stabilization and reliability. To the extent that FERC implements Section 215 to unnecessarily impose a registration and compliance burden on cogenerators that do not have a material impact on the reliability of the bulk power system, FERC penalizes the retail industrial customer. Given the public policy to promote cogeneration and the fact that cogenerators could not have factored in Section 215 registration burdens when making this investment, it is unfair to saddle retail customers with this burden where not absolutely necessary to maintain the reliability of the bulk power system.

CONCLUSION

FERC should address the reliability obligations of QFs in a manner that harmonizes the statutory objectives of PURPA Section 210(e) and of EPCAct section 215. Congress made significant changes to QF regulation in the Energy Policy Act of 2005, most significantly with respect to enactment of Section 210(m). The Commission has been called upon to address vexing issues of statutory interpretation as it implements these new provisions addressing waiver of utility PURPA purchase obligations where certain criteria are met. The issue of EPCAct/PURPA reconciliation that the Commission must address in this docket should be far simpler: Nothing in

Section 215 suggests that Congress intended to cut back on QF rights under Section 201(e) nor is it necessary to compromise the legitimate reliability objectives of Section 215 without creating disincentives to new and existing cogeneration.

We conclude that no one has a greater self-interest in the safe and reliable operation of the North American Bulk-Power System than large manufacturers. Our estimates of the direct damage resulting from the August 2003 Blackout were as high as \$10 billion.⁵ Our recommendations should not be interpreted as an effort to escape from any legitimate responsibilities under section 215 of the FPA. However, the proper focus of Section 215 is on those entities that have a material impact on the reliability of the bulk power system. It would be arbitrary to create a per se rule that all cogeneration facilities greater than 20MW should be registered without a specific finding that such units actually have a material impact on the grid. As such, we do seek to avoid the registration of QF operations that do not materially affect reliability.

An ad hoc NERC task force appropriately constituted to assure adequate QF input will further the process of assuring that implementation efforts do not needless impair QFs or associated industrial operations.

⁵ The Electricity Consumers Resource Council, "The Economic Impacts of the August 2003 Blackout," February 9, 2004. Cited in Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations, April 5, 2004.

NOTICES AND COMMUNICATIONS

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DESCRIPTIONS OF ELCON AND AISI

ELCON is an association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable, and efficient electricity supply for all users at competitive rates. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community and many ELCON members operate PURPA qualifying cogeneration facilities. The member companies of ELCON consume approximately five percent of all electricity in the United States.

The American Iron and Steel Institute (AISI) is the principal trade association of the North American steel industry. Its member companies account for about seventy percent of the new steel production in the United States. The steel industry is one of the most energy-intensive

sectors in the United States; the cost of electricity may constitute as much as twenty percent of the manufacturing cost of a steel mill product.

Respectfully submitted,

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