

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

**New PURPA Section 210(m) Regulations
Applicable To Small Power Production
And Cogeneration Facilities**

Docket No. RM06-10-000

**INITIAL COMMENTS OF
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON)**

The Electricity Consumers Resource Council (“ELCON”) offers these initial comments concerning FERC’s pending proposal to relieve utilities of mandatory purchase obligations from qualifying facilities (“QFs”) and other aspects of implementation of Section 210(m) of the Public Utility Regulatory Policies Act (“PURPA”) as amended by the Energy Policy Act of 2005 (“EPAAct 2005”). These comments represent in effect an Executive Summary of a complete set of comments to be filed on February 27, 2006.

Summary of Concerns

ELCON’s comments address four discreet questions: (i) As a matter of legal interpretation, does FERC’s Section 210(m) rulemaking faithfully implement the new statutory regime? (ii) Should FERC irrebuttably presume that QFs have non-discriminatory access to long-term contracts in organized markets? (iii) Should FERC irrebuttably presume that QFs enjoy non-discriminatory access in regions with open access transmission tariffs? (iv) Under what circumstances should utilities be excused from the obligation to supply standby power?

We urge that FERC address its implementation of Section 210(m) against the backdrop of a statutory mandate whereby Congress chose to amend PURPA, not to repeal it. FERC has a continuing duty to foster QF generation. FERC must implement Section 210(m) in a fashion

which harmonizes its continuing obligation to foster QFs with its new authorization to waive QF purchase obligations where non-discriminatory access to long-term markets exists.

Where QFs have nondiscriminatory access to long-term markets, Congress has determined via enactment of Section 210(m) that utility purchase obligations should be lifted. ELCON believes that FERC's proposed implementation of Section 210(m) departs from the statutory mandate: FERC's proposal would irrebuttably presume that a QF has access to long-term markets because it is located in an organized market. FERC's proposal would also irrebuttably presume that a QF has access to transmission when its host utility is subject to the OATT. Instead, findings should be made case-by-case, with the burden on the utility to show that the QF in fact has non-discriminatory access to long-term markets.

ELCON urges FERC to re-think its proposed implementation of Section 210(m) and adopt an interpretation that is more faithful to the statutory mandate and more faithful to FERC policy of encouraging independent generation.

- *FERC has a statutory obligation imposed by Congress that, before waiving QF purchase obligations, it make a facility-specific determination that non-discriminatory access to long-term markets truly exists.* FERC acknowledges that in proceedings under Section 210(m)(1)(B) and (C) it must make such findings on a case-specific basis, but provides that it may make a generic finding under (A) excusing utilities from QF purchase obligations, based on the fact that the QF is located in an organized market with an auction and a day ahead market. ELCON strongly disagrees:

- The introductory language in Section 210(m)(1) requires facility-specific findings under (A) as well as (B) and (C): No utility shall be required to enter into a new contract or obligation to purchase electric energy from a QF "if the Commission finds

that *the* qualifying cogeneration facility or qualifying small power production facility *has nondiscriminatory access*”

- Basing a waiver on a generic finding that a QF is located in a FERC-approved RTO or ISO does not meet all of the elements of the statutory language. Even if certain RTOs and ISOs satisfy the requirements of subparagraphs (A)(i) (access to independent, auction-based energy markets) and (B)(i) (transmission and interconnection services provided by regional transmission entity under a nondiscriminatory open access tariff), the conditions in no way address subparagraphs (A)(ii) (access to long-term markets) or (B)(ii) (a meaningful opportunity to sell long- and short-term capacity and energy). The statute requires that the utility make specific showings, supported by evidence, about the existence of and nondiscriminatory access to long-term markets.
- Administrative convenience cannot justify a shortcut in the face of a statutory mandate to assure that QFs have access to long-term markets.¹ For example, FERC’s RTO approval process has not imposed as a criterion that long-term capacity markets exist. Rather RTO approval is based on findings that the RTO has independent governance and adequate scope and configuration. *None of the RTO criteria address a QF’s access to long-term markets. There is therefore no rational basis to assume*

¹ While the Commission generally enjoys discretion in whether to proceed to make findings on a generic or case-specific basis, that discretion is cabined by the requirement that FERC faithfully implement its statutory duty. In Atlantic City Electric v. FERC, 295 F.3d 1 (D.C. Cir. 2002), the D.C. Circuit invalidated FERC’s decision to require the generic reformation of pre-existing wholesale power contracts to reflect transmission pricing under the ISO regime for failure to make particularized findings required under the Mobile-Sierra public interest standard. While the instant rulemaking of course does not implicate the Mobile-Sierra doctrine, the case stands for the proposition that the Commission’s latitude to decide when to make generic findings and when to make case-specific findings must yield to its statutory mandate. See also AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992) (remanding OSHA’s rule making generic findings that multiple air contaminants presented “significant risk”).

that such markets exist based on the mere fact of RTO approval. Thus FERC cannot make a Section 210(m)(1)(A)(ii) finding based on the fact that a region has RTO approval.

- Had Congress intended that the presence of a FERC-approved RTO alone would serve as basis for waiver of the QF purchase obligation, the statute would have so provided. Instead, the statute establishes only one, narrowly circumscribed method for utilities to seek generic relief from the QF-specific exemption process – an application for a determination on a utility-specific service territory basis that the utility qualifies for waiver of the mandatory purchase obligation (PURPA Section 210(m)(3)). Section 210(m)(3) explicitly covers the findings of subparagraph (m)(1)(A), as well as those of subparagraphs (B) and (C). This provision further supports statutory interpretation that generic relief is to be granted, if at all, only following careful consideration on a utility-specific service territory basis and not on a broader region-wide basis.
- *A QF-specific review would establish that, in many cases, QFs do not have nondiscriminatory access to long-term bilateral markets whether in RTOs or otherwise.*

Considerable evidence establishes that markets either are in their infancy (*e.g.*, MISO), or are not functioning *vis-à-vis* long-term sales of capacity or energy.

- Even where long-term transmission access exists -- a questionable assumption in the organized markets given the absence of long-term FTRs -- that does not equate to non-discriminatory access to long-term wholesale markets. Therefore the statutory prerequisites to waiver of the QF purchase obligation, whether under subparagraphs (A), (B) or (C), are not satisfied.

- It will be difficult for FERC to sustain on judicial review a generic finding that ISOs and RTOs offer long-term markets for power when FERC's own recent rulemaking announcing FTRs is predicated on the need for FTRs to jump start long-term power markets specifically in regions with ISOs and RTOs.
- Even in PJM, much less in less-developed RTOs, ELCON members find that the RTO has delegated transmission and interconnection decisions to host utilities. Requests for access to markets are consistently defeated by host utilities and RFPs are consistently rejected on the basis of host utility's insistence that QFs fund costly transmission upgrades—upgrades that will make the QF uneconomic to the steam host.
- Contrary to the implications of the NOPR, many QFs do not have nondiscriminatory access to markets to sell power because of continuing discrimination in transmission access. FERC itself has acknowledged that the OATT does not accord all market participants nondiscriminatory access in its recent Notice of Inquiry seeking comments on proposed reforms to the pro forma OATT. 112 FERC ¶61,299 (Sept. 16, 2005), Docket RM05-25-000. In the press release announcing the NOI, FERC states:

While Order No. 888 set the foundation for competition in wholesale electric markets, it did not eliminate the potential for undue discrimination and preference in providing transmission service. Public utilities continue to have the discretion and incentive to interpret and apply OATT provisions to their advantage.

The Commission's preliminary determination, based on the experience of nearly 10 years since implementation of Order No. 888, is that reforms to the pro forma OATT are necessary to prevent undue discrimination and preference in the provision of interstate transmission service or (b) the QF is connected to the distribution system not the FERC-jurisdictional transmission system.

- Paragraph 31 in effect adopts an irrebuttable presumption that presence of an OATT equates to non-discriminatory access because the presumption of open access “cannot be rebutted by an argument that the utility has not properly implemented or administered its OATT.” Yet FERC’s OATT notice of inquiry emphasizes the difficulty of making such a demonstration. It will be difficult for FERC to sustain on judicial review an irrebuttable presumption that the OATT provides non-discriminatory transmission access for all QFs when its own pending notice of inquiry recognizes the continuation of patterns of abuse -- if anything exacerbated as transmission owners feel the pressure of competition from independent generation. The concern over potential discrimination will only be exacerbated in a scenario like Energy Independent Coordinator of Transmission (ICT) where the utility and not the RTO provide service.
 - While the problem of discrimination in transmission is pervasive, a fortiori, QFs of whatever size connected at distribution voltage do not have access to markets. The scenario of QFs connected at distribution voltage and the circumstances of small QFs illustrate why generic conclusions are inappropriate.
- *Utilities’ obligations to supply back-up power are another significant concern.* Under Section 210(m)(5), Congress provides that the obligation to sell standby and backup power can be terminated if the Commission finds that “competing electric suppliers are willing and able to sell and deliver electric energy to the qualifying co-generation facility or qualifying small power production facility; and the electric utility is not required by state law to sell electric energy in its service territory.” FERC’s proposal does not adopt protections to provide that just and reasonable rates will be charged. No such finding can be made unless and until FERC conducts

an investigation to assure itself that there is sufficient competition among suppliers that market power will not be exercised in the sale of power.

- *The proposed rule would not comport with Congressional objectives, reiterated in EPAct 2005, to promote power production from QFs.* The proposed rule would discourage the development of new QFs in a particular region, or discourage upgrading existing QFs. ELCON members believe that the practical impact of the rule would be to discourage any *new* QF investment by industrials -- a potentially cataclysmic impact for generation reliability, generation competition, fuel efficiency, and environmental impacts. Even as to existing facilities, QF operation can become uneconomic, resulting in conversion from QFs to simple steam boilers to meet steam requirements essential for industrial processes. Where cogeneration is necessary for projects which must generate both steam and power, the size of the cogeneration component will be reduced, resulting in less efficient applications. Such a result is contrary to Commission policy to encourage independent competition in generation. PURPA has not been repealed. Rather, Congress has enacted a statutory amendment, Section 210(m), which authorizes FERC to lift purchase obligations if and only if a viable market exists and, most importantly, the QF has nondiscriminatory access to that market.

- *PURPA abuses are a problem of the past.* Past efforts of states to bolster the development of renewable resources with exaggerated estimates of utilities' avoided costs have run its course, and other non-PURPA related incentives, such as Resource Portfolio Standards and federal production tax credits, are now the rule. The states that have borne the burden of implementing PURPA have learned their lesson and are no longer inclined to duplicate past abuses.

ELCON members are net buyers of power. ELCON members would never support buy back rates that are above a utility's avoided costs. In fact, ELCON has long advocated full repeal of PURPA Section 210 when and if there are functioning markets. But that day is not yet at hand. QFs do not have non-discriminatory transmission access to long term markets. We are seriously concerned that categorical elimination of PURPA purchase obligations while discrimination continues and the markets are flawed will have the effect of discouraging competition and on-site generation. This would force an industrial steam host to resort to inefficient steam boilers to meet their thermal requirements.

We repeat, without the assurance of a competitive market for the sale of surplus power or the procurement of backup services, the industrial steam host will be discouraged from using cogeneration. This will make the manufacturing process less efficient, less productive, and therefore less competitive in global markets. The continued encouragement of industrial cogeneration will support the Commission's resource adequacy goals, preserve the Nation's manufacturing base and its employment, and promote fuel efficiency and environmental compliance.

Description of ELCON

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.

Notices and Communications

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**LEGAL AUTHORITY ADDENDUM TO
INITIAL COMMENTS OF
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON)
DOCKET RM06-10-000, NEW PURPA SECTION 210(m) REGULATIONS**

This legal memorandum is submitted as an addendum to the Initial Comments of the Electricity Consumers Resource Council (“ELCON”) concerning FERC’s pending proposal to relieve utilities of mandatory purchase obligations from qualifying facilities (“QFs”) arising under the Public Utility Regulatory Policies Act (“PURPA”) as amended by the Energy Policy Act of 2005 (“EPAAct 2005”). This memorandum addresses whether, as a matter of legal interpretation, FERC’s Section 210(m) rulemaking faithfully implement the new statutory regime.

Where QFs have nondiscriminatory access to wholesale markets, Congress has determined via enactment of Section 210(m) that utility purchase obligations should be lifted. However, Congress chose to amend PURPA, not to repeal it. FERC has a continuing duty to foster QF generation. FERC must implement Section 210(m) in a fashion that carefully tracks the narrow path spelled out in the statute to foster QFs while authorizing FERC to waive a utility’s purchase obligations where the QF at issue in fact has non-discriminatory access to long-term markets.

We believe that FERC’s proposed implementation of Section 210(m) departs from the statutory language and may be vulnerable on judicial review. FERC’s proposal would (i) irrebuttably presume that a QF has access to long-term markets because it is located in an

organized market and (ii) in practical effect also irrebuttably presume that a QF has access to transmission when its host utility is subject to the OATT. This would effectively read out of the statute the introductory language in Section 210(m)(1) and the findings required by Sections 210(m)(1)(A)(ii) and (B)(ii). We believe that (m)(1) allows the utility's purchase obligation to be lifted only on a QF facility-specific basis, with the burden on the utility to show that the QF in fact has (i) access to long-term markets and (ii) that such access is on a non-discriminatory basis. (Utility specific waivers are addressed by (m)(3).) FERC's proposal does not go far enough to elucidate the protections that need to be in place, viz. a finding of no market power, to assure that utilities will supply power at just and reasonable rates.

(i) *Need For Case By Case Findings Before Purchase Obligations Are Eliminated.*

FERC acknowledges that in proceedings under Section 210(m)(1)(B) and (C) it must make such findings on a case-specific basis, but provides that it may make a generic finding under subparagraph (A) to excuse utilities from QF purchase obligations where the QF is located in an organized market with an auction and a day ahead market. We believe that FERC has a statutory obligation imposed by Congress that, before waiving QF purchase obligations, it make a facility-specific determination that non-discriminatory access to long-term markets truly exists.

- The introductory language in Section 210(m)(1) requires facility-specific findings under (A) as well as (B) and (C): No utility shall be required to enter into a new contract or obligation to purchase electric energy from a QF "if the Commission finds that *the* qualifying cogeneration facility or qualifying small power production facility *has nondiscriminatory access*"
- Basing a waiver on a generic finding that a QF is located in a FERC-approved RTO or ISO does not meet all of the elements of the statutory language. Even if certain

- RTOs and ISOs satisfy the requirements of subparagraphs (A)(i) (access to independent, auction-based energy markets) and (B)(i) (transmission and interconnection services provided by regional transmission entity under a nondiscriminatory open access tariff), the conditions in no way address subparagraphs (A)(ii) (access to long-term markets) or (B)(ii) (a meaningful opportunity to sell long- and short-term capacity and energy). The statute requires that the utility make specific showings, supported by evidence, about the existence of and nondiscriminatory access to long-term markets.
- Administrative convenience cannot justify a shortcut in the face of a statutory mandate to assure that QFs have access to long-term markets. FERC's RTO approval process has not imposed as a criterion that long-term capacity markets exist. Rather RTO approval is based on findings that the RTO has independent governance and adequate scope and configuration. *None of the RTO criteria address a QF's access to long-term markets. There is therefore no rational basis to assume that such markets exist based on the mere fact of RTO approval.* Thus FERC cannot make a Section 210(m)(1)(A)(ii) finding based on the fact that a region has RTO approval.
 - Had Congress intended that the presence of a FERC-approved RTO alone would serve as basis for waiver of the QF purchase obligation, the statute would have so provided. Instead, the statute provides that utilities may seek relief from the QF-specific exemption process – an application for a determination on a utility-specific service territory basis that the utility qualifies for waiver of the mandatory purchase obligation (PURPA § 210(m)(3)). Section 210(m)(3) explicitly covers the findings of subparagraph (m)(1)(A), as well as those of subparagraphs (B) and (C). This

provision further supports statutory indication that Congress did not intend that a utility should obtain relief from purchase obligations merely because it is located in one of the organized markets.

- Considerable evidence establishes that markets either are in their infancy (*e.g.*, MISO), or are not functioning *vis-à-vis* long-term sales of capacity. It will be difficult for FERC to sustain on judicial review a generic finding that ISOs and RTOs offer long-term markets for power when FERC's own recent rulemaking announcing FTRs is predicated on the need for FTRs to jump start long-term power markets specifically in regions with ISOs and RTOs.

(ii) *Irrebuttable Presumption of Non-Discriminatory Access Under OATT*. It will be difficult for FERC to sustain on judicial review what is in practical effect an irrebuttable presumption that the OATT provides non-discriminatory transmission access for all QFs when its own pending notice of inquiry recognizes the continuation of patterns of abuse -- if anything exacerbated as transmission owners feel the pressure of competition from independent generation.

- FERC itself has acknowledged that the OATT does not accord all market participants nondiscriminatory access in its recent notice of inquiry seeking comments on proposed reforms to the pro forma OATT. 112 FERC ¶61,299 (Sept. 16, 2005), Docket RM05-25-000. FERC states in the press release announcing the NOI:

While Order No. 888 set the foundation for competition in wholesale electric markets, it did not eliminate the potential for undue discrimination and preference in providing transmission service. Public utilities continue to have the discretion and incentive to interpret and apply OATT provisions to their advantage.

- Paragraph 31 of the proposed rule in effect adopts an irrebuttable presumption that presence of an OATT equates to non-discriminatory access because the presumption

of open access “cannot be rebutted by an argument that the utility has not properly implemented or administered its OATT.” Yet FERC’s OATT notice of inquiry emphasizes the difficulty of making such a demonstration. 112 FERC ¶61,299 at ¶5.

(iii) *Termination of Obligation To Sell Back-Up Power.* Under Section 210(m)(5), Congress provides that the obligation to sell standby and backup power can be terminated if the Commission finds that “competing electric suppliers are willing and able to sell and deliver electric energy to the qualifying co-generation facility or qualifying small power production facility; and the electric utility is not required by state law to sell electric energy in its service territory.” FERC’s proposal should be modified to provide protections to assure that the utility will charge just and reasonable rates in sales to QFs. No such finding can be made unless and until FERC conducts an investigation to assure itself that there is sufficient competition among suppliers that market power will not be exercised in the sale of back up power to QFs.

Discussion

EPAct 2005 amends PURPA by adding Section 210(m), which grants utilities entering new contracts relief from the mandatory QF purchase obligations “if the Commission finds that *the qualifying cogeneration facility or qualifying small power production facility* has nondiscriminatory access to:

- (A) (i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or
- (B) (i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether

a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

- (C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

Section 210(m) is absolutely clear that before a utility's mandatory purchase requirement will be lifted, the QF in question needs to have "non-discriminatory access" to "wholesale markets for long-term sales of capacity and electric energy" (Section 210(m)(1)(A)(ii)). A showing of the mere existence of day-ahead and real-time markets (Section 210 (m)(1)(A)(i)) does not suffice. Similarly, Section 210(m)(1)(B)(ii) requires that the QF has opportunity to make long-term as well as short-term sales. A showing that the market has an independent transmission operation (Section 210 (m)(1)(B)(i)) by itself does not suffice.

A. The Statute Requires FERC To Make Case-Specific Findings Prior To Relieving Utilities Of QF Purchase Obligations Under Section 210(m)(1)(A) As Well As (B) and (C)

FERC proposes to make a generic finding that utilities that belong to RTOs automatically qualify for relief from QF purchase obligations under Section 210(m)(1)(A), in contrast to the case-specific findings that FERC acknowledges that it must make under 210(m)(1)(B) and (C). Compare ¶22 ("FERC proposes to find the MISO, PJM, ISO-NE, and NYISO satisfy the requirements of section 210(m)(1)(A)") and ¶29 ("The Commission proposes to determine on a case by case basis whether a utility has met the requirements of sections 210(m)(1)(B) and 210(m)(1)(C) for relief from its purchase obligation").

FERC bases this interpretation on the textual distinction between (A) and (B) noting, for example, that "unlike subparagraph (B)(ii), subparagraph (A)(ii) does not require the Commission to consider "evidence of transactions within the relevant market when determining

whether QFs have meaningful opportunities to sell into wholesale markets outside the host utility.” ¶16.

While the Commission generally enjoys discretion in whether to proceed to make findings on a generic or case-specific basis, that discretion is cabined by the requirement that FERC faithfully implement its statutory duty. In Atlantic City Electric v. FERC, 295 F.3d 1 (D.C. Cir. 2002), the D.C. Circuit invalidated FERC’s decision to require the generic reformation of pre-existing wholesale power contracts to reflect transmission pricing under the ISO regime for failure to make particularized findings required under the Mobile-Sierra public interest standard. While the instant rulemaking of course does not implicate the Mobile-Sierra doctrine, the case stands for the proposition that the Commission’s latitude to decide when to make generic findings and when to make case-specific findings must yield to its statutory mandate.¹ Here, multiple aspects of the statutory mandate compel the conclusion that a case-specific determination is required under subparagraph (A) as well as under subparagraphs (B) and (C).

1. The Statute’s Introductory Language Calls for QF-Specific Determinations

In introductory language that applies with equal force to (A), (B) and (C), Section 210(m)(1) states that no utility shall be required to enter into a new contract or obligation to purchase electric energy from a QF “if the Commission finds that *the* qualifying cogeneration facility or qualifying small power production facility *has nondiscriminatory access . . .*” (Emphasis added.) By reference to the singular rather than the plural, Congress specifies that findings under Section 210(m)(1) are to be made on a QF-specific basis. The lone exception to

¹ See also AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992) (remanding OSHA’s rule making generic findings that multiple air contaminants presented “significant risk”).

this requirement – Section 210(m)(3), discussed below – does not countenance generic region-wide findings.

2. Market Access Determinations Must Be Made On A Case-Specific Basis Because Availability Of Long-Term Markets Is Not A Showing Necessary To Obtain RTO Approval

The nature of the findings required by subparagraph (A) compels QF-specific determinations. There must be “nondiscriminatory access” not only to “(i) independently administered, auction-based day ahead and real time wholesale energy markets for the sale of electric energy” but also to “(ii) wholesale markets for long-term sales of capacity and electric energy.” Congress did not say no utility is required to enter into a new contract or obligation to purchase electric energy from a QF if the utility belongs to a FERC-approved RTO. Rather, the Commission also must conclude that the access is *nondiscriminatory* and that the nondiscriminatory access also encompasses *wholesale markets for long-term sales of capacity and electric energy*.

It is important to understand that a generic finding that QFs have nondiscriminatory access to long-term markets – or to the market at all – is not inherent in RTO approval. Take for example, the FERC orders approving PJM and MISO for RTO status. PJM Interconnection, 101 FERC ¶61,345 (2002); Midwest Independent Transmission System Operator, 97 FERC ¶61,326 (2001), *order on reh’g* 103 FERC ¶61,169 (2003); 108 FERC ¶61,163 (2004) (Day 2 approval), *order on reh’g* 109 FERC ¶61,157 (2004), *order on reh’g* 111 FERC ¶61,043 (2005). FERC analyzes PJM’s and MISO’s qualification for RTO status based on application of the RTO Order 2000 criteria: scope and configuration, independence, planning and expansion, tariff administration and design, interregional coordination. Not a word in the decisions addresses QFs or their access to long-term markets. Accordingly, if FERC makes a generic finding that a

utility's membership in an RTO relieves the utility from QF purchase obligations, FERC will have relieved utilities of QF purchase obligations absent any showing that QFs have access to long-term power markets.

The history of Congressional consideration of PURPA repeal versus PURPA reform is instructive. This background highlights the importance that Congress accorded to the requirements that access be "non-discriminatory" and that for purposes of the subparagraph (A) finding, that access to long-term wholesale markets exist. Neither provision was present in either the energy bill that passed the Senate in the 107th Congress (S 1766) or the energy bills that passed the Senate (S 1005) and House (HR 6) that passed the 108th Congress. However, the provisions were added in Conference Committee in the 108th Congress and included in the legislation that was introduced in and ultimately enacted by the 109th Congress. These provisions were consciously added by Congress to secure passage of the legislation in recognition of the continued importance of promoting power production from QFs.

Access to markets implies not a theoretical access to nascent or uncompetitive markets but access to markets that are workably competitive. It is not sufficient under the statute that FERC determine that as a matter of design, an RTO might be capable of supporting competitive capacity markets and under favorable market conditions. Rather, the Commission must be able to confirm that capacity markets are, in fact, functioning such that QFs have the practical ability to sell capacity, including long-term capacity, to others. While subparagraph (A)(ii) does not expressly require a transaction-specific demonstration of meaningful access to as does (B)(ii), (A)(ii) does require demonstrations that wholesale markets for long-term sales of capacity already exist and are workably competitive and that access to such markets is non-discriminatory. Only through a case-specific adjudication can the Commission determine the

short- and long-term capacity obligations of load-serving entities in the relevant markets, and any barriers to entry into or impediments to trade within such markets.

3. Section 210(m)(1)(C) Confirms That The Showing Of Access Is To Be Based On Actual Market Conditions

Section 210(m)(1)(C) allows relief from mandatory purchase obligations where there are “wholesale markets for the sale of capacity and electric energy that are at a minimum of comparable competitive quality as markets described in subparagraphs (A) and (B).” It would be anomalous to read the statute as authorizing FERC to make a generic finding that a market allows access and is competitive, based on a theoretical, on paper, market opportunity. Such a reading would do violence to the statutory insistence under both (A) and (B) that QFs have not only real time and day ahead but also long term opportunities to market their excess power.

4. Section 210(m)(3) Supports The Argument That FERC Must Make QF-Specific Findings Of Access In Organized Markets Except Where A Utility Shows Purchase Obligations Should Be Waived On A Utility-Specific Basis

Section 210(m)(3) supports the argument that FERC must make QF-specific findings of access except where a utility shows that purchase obligations should be waived on a service-territory specific basis. Had Congress intended that the presence of a FERC-approved RTO alone would serve as basis for waiver of the QF purchase obligation, and that there is not a need for a QF-specific determination of access, the statute would so provide. It does not do so. Instead, in Section 210(m)(3), Congress provided that utilities can submit an application for a determination on a utility-specific service territory basis that the utility qualifies for waiver of the mandatory purchase obligation. This provision applies where “the conditions set forth in subparagraph (A), (B) or (C) of paragraph [(m)](1) have been met.” Section 210(m)(3), which explicitly covers the findings of subparagraph (A) as well as those of subparagraphs (B) and (C),

shows a Congressional intent that utilities are to be relieved from purchase obligations for all QFs in their service territory only following careful consideration on a utility-specific service territory basis-- not on a broader region-wide basis. If Section 210(m)(1)(A) were to be interpreted to allow utilities to escape all QF purchase obligations simply because they are located in an organized market, Section 210(m)(3) excusing utilities from their future QF purchase obligations would not have been needed. Rather, Section 210(m)(3) indicates that FERC can dispense with case-by-case adjudication of QF access only when it has made a finding on a utility-specific basis as to the utility's service territory.

Specifically in the case of MISO, the RTO has multiple control areas, with each control area in the hands of a traditional utility. As a result of these complexities, while a utility service area wide review conducted under Section 210(m)(3) would be supportable, a generic region-wide review would not.

5. A Generic Finding Is Inappropriate Even As To Established RTOs

a. ISOs And RTOs Do Not Offer Long-Term Power Markets

FERC in this NOPR has interpreted "long-term sales of capacity and electric energy" as any indication of a bilateral market – whether long-term, competitive, robust, or not. The efforts to develop explicit "capacity markets" in PJM and other organized markets are really a consequence of not having a robust long-term bilateral (i.e., forward) market in those regions. Simply finding a bilateral contract in a region is not sufficient evidence that a QF has access to nondiscriminatory access to "long-term sales of capacity and electric energy." Access to contracts that are not just and reasonable is not nondiscriminatory access. Facility specific findings are needed to establish that access on reasonable terms actually exists in order to preserve the statutory objective of promoting QF production.

Even in PJM, the longest-established of the RTOs, there is concern about the state of the markets. PJM's March 2004 State of the Market Report acknowledges: "Market power in the Capacity Markets remains a serious concern given the structural issues of high level supplier concentration, frequent occurrences of pivotal suppliers and extreme inelasticity of demand. Market power is endemic to the structure of PJM Capacity Markets."² Commenting in support of its Reliability Pricing Model, PJM highlighted that RPM will provide "strong encouragement for long-term contracting" thus indicating that such incentives are needed.³

b. FERC And The FTC Advocate Long-Term FTRs As A Necessary Precondition To Development Of Long-Term Markets

FERC's recently-issued notice of proposed rulemaking on Long-Term Firm Transmission Rights in Organized Electricity Markets, acknowledges that long-term FTRs must be offered to facilitate long-term supply arrangements. The Commission observed that a central purpose of the need for long-term transmission rights is "to finance investments in new generation or long-term power purchase contracts." 114 FERC ¶61,097 at ¶¶9, 55. The need for this action underscores that there is no adequate long-term market for capacity and energy at present. Given FERC's appropriate initiation of a rulemaking to address long-term FTRs, it would be difficult for the Commission to sustain an argument that a long-term power market exists in ISOs and RTOs.

² See State of the Market Report 2004, at 21 available at <http://www.pjm.com/markets/market-monitor/downloads/mmu-reports/pjm-som-2004.pdf>.

³ Answer of PJM Interconnection, LLC to Comments and Protests, Docket Nos. ER05-1410 and EL05-148, Nov. 8, 2005, at p. 33.

The Federal Trade Commission has recently commented that barriers to entry remain for new generation even in markets which have the benefit of RTOs.⁴ “Just because a generator is located within an RTO does not mean that the generator is immune to the risk of transmission discrimination and transmission congestion in non-RTO areas.” The FTC notes that while short-term FTRs “appear likely to improve the competitiveness of ...markets and improve their efficiency, practicable means to address long-term transmission risk are limited.”⁵ The FTC advocates long-term FTRs plus efficient transmission investment policies to reduce the transmission risk that can deter new entrants.⁶

The FTC explains the value of entry to determining a competitive market:

In a market economy, entry is a critical factor that contributes to the development of competitive markets. Entry erodes existing market power, provides more customers with products that closely match their preferences, and brings innovations that reduce costs to market. However, efficient entry may be discouraged or delayed by high levels of risk (relative to expected returns) that cannot be managed through long-term supply contracts or other arrangements. Lack of efficient entry may harm consumers through higher prices, less customer choice, and inefficient production that wastes real resources.

Id. at 4, cit. omit. The FTC noted that long-term contracts can mitigate the long-term risks that can deter new entry:

For a potential generation entrant, transmission price uncertainty is just one of several risks associated with entry. Generation investments are long-lived and many entry costs may not be readily recoverable if the entry fails due to higher-than-anticipated costs over the life of the generation assets. Unanticipated transmission price increases due to

⁴ FERC Docket No. AD05-7, FTC Comment August 8, 2005, Long Term Transmission Rights in Markets Operated By Regional Transmission Organizations and Independent System Operators, available at <http://www.ftc.gov/be/advofileother.htm> (last visited August 31, 2005).

⁵ Id., at 2.

⁶ FTC Staff similarly cautioned in comments filed in FERC Docket No. RM05-17-000 on August 22, 2005 that “behavioral rules such as the rules governing calculation of available transmission capacity, are unlikely to fully address transmission discrimination concerns” and recommended that “FERC continue to examine the costs and benefits of structural reforms to promote competitive wholesale electric power markets.” FTC comments available at <http://www.ftc.gov/be/advofileother.htm>. (last visited August 13, 2005).

transmission congestion could be the cause of failed entry. A reduction in long-term risk through long-term contracts (or other means) allows the generator to reduce the likelihood that it will be forced into bankruptcy (with the attendant costs that it must bear) during the useful life of the generation assets. Risk reduction also increases the likelihood that the entrant will experience an orderly depreciation of its generation assets over their useful life. If longer-term risk cannot be addressed, a potential efficient entrant may be faced with an unacceptable level of risk. As a result, it may decide not to enter.⁷

6. Why It Matters That FERC Make The Right Procedural Choice Under Section 201(m)(1)(A)

This issue presents a policy choice of cardinal importance for two reasons. First, while the instant NOPR includes “only” PJM, NYISO, ISO-NE, and MISO, at least SPP and CAISO are waiting in the wings. Thus the viability of substantial amounts of cogeneration is at stake. Second, FERC should not presume that utilities will be relieved of QF purchase obligations in organized markets. The existence of case by case adjudication not only better conforms to the statutory mandate but allows for case-specific demonstration or case specific imposition of conditions to assure that the QF in question has non-discriminatory access and that long-term markets exists.

7. FERC Could Adopt Methodologies To Avoid Undue Administrative Burden

The statutory requirement that FERC make case-specific findings does not impose on the Commission an intolerable administrative burden. For example, after initial filings, FERC would be able to cite in subsequent proceedings findings that it has recently made with respect to whether or not there is an opportunity for long-term contracts available to QFs within a given RTO if subsequently QF applicants are similarly situated to prior QF applicants. However, to make a generic finding that say all QFs in MISO have access to long-term markets is an

⁷ FTC Aug. 8, 2005 comments at 5 (cit omit.)

inappropriate abdication of the Commission's duty to consider whether existing and future QFs have access to competitive opportunities for sales and backup services.

II. FERC Cannot Irrebuttably Presume That OATT Provides Non-Discriminatory Access

In interpreting its obligations to make findings as to adequacy of transmission access under Section 210(m)(1)(B), the Commission must keep in mind its duty under Sections 205 and 206 to address undue discrimination. As FERC acknowledged in its recent notice of inquiry concerning discrimination in transmission access:

The Federal Energy Regulatory Commission (Commission) has a mandate under sections 205 and 206 of the Federal Power Act (FPA) to ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. Under these sections, the Commission must determine whether any rule, regulation, practice, or contract affecting rates for such transmission or sale for resale is unduly discriminatory or preferential, and we must disapprove any of the foregoing that do not meet this standard.

Notice of Inquiry, Preventing Undue Discrimination and Preference in Transmission Services, Docket No. RM05-25, 112 FERC ¶61,299 (Sept. 16, 2005) at ¶1.

A. FERC Has Acknowledged That The OATT Does Not Ensure Nondiscriminatory Access

Congress qualified its reference to an open access transmission tariff in Section 210(m)(1)(B) by requiring it to be one that affords “*nondiscriminatory* treatment to all customers,” mirroring and emphasizing the same term in the introduction to Section 210(m)(1). When FERC itself has so recently identified flaws in the OATT that *impede* nondiscriminatory access, it cannot in good faith find that the existence of an OATT satisfies the statutory criteria.

FERC states that the Commission's “preliminary view is that the pro forma OATT and public utilities' OATTs should be reformed to reflect lessons learned during nearly a decade of

the electric utility industry's and the Commission's experience with open access transmission. In addition, the Commission is concerned that public utility transmission providers have come to different interpretations of provisions of their OATTs and have implemented them in ways that need clarification by the Commission to avoid unduly discriminatory or preferential terms and conditions. The Commission's preliminary view is that reforms to the pro forma OATT and public utilities' OATTs appear necessary and the Commission seeks comments on how best to accomplish that.”

FERC notes that “The electric industry has changed considerably since Order No. 888 was issued. It has evolved from one characterized by large, vertically integrated utilities to an industry with increasing wholesale trade and increasing numbers of independent buyers and sellers of wholesale power.” Among other changes, FERC flags the development of new generation resources, increased regional trading, and the development of RTOs. FERC states:

In the wake of these industry changes, questions have arisen concerning the efficacy of various terms and conditions of the transmission providers' OATTs. As the Commission noted in Order No. 888, it is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets, to deny transmission or to offer transmission on a basis that is inferior to that which they provide themselves. This is still the view of the Commission. We have observed that public utilities continue to have the discretion and the incentive to interpret and apply the provisions of their OATTs in a manner that can result in unduly discriminatory behavior on each particular public utility's transmission system. This is exacerbated by the fact that, in a number of respects, Order No. 888 and the pro forma OATT allow public utilities discretion in implementing the terms and conditions of providing transmission service.

Id. ¶5. Among the specific problems FERC identifies are problems for transmission access by new generators and transmission providers delaying the processing of a competitor's request for new service. Id., at fn.10.

B. FERC Must Not Shift The Burden Of Proof To QFs To Prove The Lack Of Nondiscriminatory Access.

FERC states in the NOPR that any party claiming a lack of nondiscriminatory access under an OATT may not raise the issue here, but rather must make a Section 206 filing. The proposed rule (at ¶31) would bar a QF from arguing that transmission provider is implementing an Order 888 OATT improperly or administering it improperly or not complying with the terms of the tariff. In so doing, FERC has impermissibly shifted the burden of proof to the party whom the statute was designed to protect. In effect Paragraph 31 creates an irrebuttable presumption because by FERC's own admission, discrimination in transmission is so difficult to prove.

While the problem of discrimination in transmission is pervasive, a fortiori, QFs of whatever size connected at distribution voltage do not have access to markets. The scenario of QFs connected at distribution voltage and the circumstances of small QFs illustrate why generic conclusions are inappropriate.

The statute is properly read to impose on the utility the burden to show that it provides nondiscriminatory treatment to QFs before FERC may lift the mandatory purchase requirement. That parties are still free to file Section 206 complaints is an inadequate substitute for the specific findings required of FERC under the statute on a case by case basis and is inconsistent with the statute's intent to encourage QFs.

III. FERC Should Strengthen The Findings Required Before Utilities Are Relieved Of The Obligation To Sell Standby And Back-Up Power

A. In 2006, As In 1978, Utilities May Decline To Provide Standby Power At Just And Reasonable Rates

In enacting PURPA, Congress was concerned that utilities might torpedo the viability of QFs by refusing to supply standby and back up power at just and reasonable rates.⁸ As the U.S. Supreme Court explained in an early case:

Section 210...seeks to encourage the development of cogeneration and small power production facilities. Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels. But it also felt that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development.

FERC v. Mississippi, 456 U.S. 742, 750-751 (1982) (emphasis added) (citations omitted).

The concern that a utility will refuse to sell power at just and reasonable rates remains a live concern. Discrimination against QFs by utilities is not a historical artifact. As recently as June 6, 2005, FERC issued an enforcement order requiring an Iowa electric cooperative to provide simple net metering to an Iowa farmer with a small wind-energy system. Gregory Swecker, 111 FERC ¶61,365 (June 6, 2005) (FERC Docket No. EL05-92). “Requiring Midland

⁸ Congress made clear its intention to encourage the development of cogeneration and small power production facilities to reduce demand for fossil fuels:

The basic purpose of § 210 of PURPA was to increase the utilization of cogeneration and small power production facilities and to reduce reliance on fossil fuels. At this early stage in the implementation of PURPA, it was reasonable for the Commission to prescribe the maximum rate authorized by Congress and thereby provide the maximum incentive for the development of cogeneration and small power production.

American Paper Inst., Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402, 417-18 (1983) (citations omitted).

to offer net metering to Mr. Swecker and other similarly situated QFs will ensure that a principal purpose of PURPA will be met, *i.e.*, encouraging alternative sources of energy and reducing the nation's dependence on fossil fuels," FERC ruled. "Offering net metering to small wind-powered facilities, moreover, is consistent with the provisions of PURPA that ensure that utilities do not pay more than the incremental cost of power, while ensuring that wind-powered facilities are paid an avoided-cost rate for electricity sold from their QFs... ." FERC observed: "We cannot help but note that Midland has used the legal process to thwart efforts to compel it to comply with PURPA for seven years, with a long history of using every means at its disposal to avoid its obligation to purchase from Mr. Swecker's small wind-powered QF." See also Docket No. EL05-58-000, January 26, 2005 Complaint by Conoco Phillips et al. against the Los Angeles Department of Water and Power alleging that rates for standby service are unjust and unreasonable and unduly discriminatory in violation of Section 206.⁹

B. Just And Reasonable Rates Require A Finding That A Seller Does Not Have Market Power

Under Section 210(m)(5), Congress provides that the obligation to sell standby and backup power can be terminated if the Commission finds that "competing electric suppliers are willing and able to sell and deliver electric energy to the qualifying co-generation facility or qualifying small power production facility; and the electric utility is not required by state law to sell electric energy in its service territory." FERC's proposal does not adopt protections to provide that just and reasonable rates will be charged.

The fact that some utility or other supplier is willing to sell a QF power at some exorbitant price does not satisfy the Commission's duty under PURPA to see that QFs are not

⁹ The Commission declined to act and relegated petitioners to a court remedy. 110 FERC ¶ 61,368 (2005)

exploited and the Commission's duty under the FPA to charge just and reasonable rates. One or two suppliers do not a competitive market make. In Elizabethtown Gas Co. v. FERC, 10 F.3d 866 (D.C. Cir. 1993), the D.C. Circuit upheld a market-based rate for the sale of natural gas. It was competition that rendered the rate just and reasonable:

[W]e have indicated that when there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a "just and reasonable" result. See Tejas Power[], 908 F.2d [at] 1004 [] ("in a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment"). See also Farmers Union [], 734 F.2d [at] 1510 [].

Here the Commission specifically found that "Transco's markets are sufficiently competitive to preclude it from exercising significant market power in its merchant function"

See also Louisiana Energy and Power Authority v. FERC ("LEPA"), 141 F.3d 364 (D.C. Cir. 1998).

FERC can meet the zone of reasonableness test if and only if the Commission is satisfied that the seller does not possess market power in any relevant market. Only if market power does not exist will market forces drive prices towards marginal cost such that the seller makes only a normal return on its investment. Only if FERC finds that market power cannot be exercised can it find that the seller's rates are just and reasonable. See J. Kelliher, "Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission," 29 Energy Law J. 1 (2005).

Conclusion

PURPA has not been repealed. Rather, Congress has enacted a statutory amendment, Section 210(m), which authorizes FERC to lift purchase obligations if and only if a viable

market exists and, most importantly, the QF has nondiscriminatory access to that market. As a generalization, agency procedures that provide “process,” in this case through case by case adjudication and detailed findings, are accorded more acceptance by the regulated community and the courts. The most appropriate way for FERC to make that determination—and the route least vulnerable to legal challenge—is via case by case adjudication.

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Dated: February 21, 2006

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