

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Electricity Market Transparency
Provisions of Section 220 of the Federal
Power Act

Docket No. RM10-12-000

**Comments of the
Electricity Consumers Resource Council
(ELCON)**

The Electricity Consumers Resource Council (ELCON) appreciates the opportunity to comment on the January 21, 2010 Notice of Inquiry (the NOI) seeking input on whether the Commission's Electricity Quarterly Report (EQR) filing requirements should be extended to market participants excluded from the Commission's jurisdiction under Section 205 of the Federal Power Act.

In these comments, ELCON addresses a single, discrete issue not specifically addressed in the NOI. ELCON seeks clarification that any changes to be implemented by FERC do not expand the applicability of the EQR requirements to qualifying facilities ("QFs").

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. Most ELCON members

have facilities in multiple wholesale electric markets. Many member companies own and operate cogeneration facilities that are QFs under the Public Utility Regulatory Policies Act of 1978 (PURPA). These facilities are an integral part of each company's manufacturing process.

ELCON Comments

The NOI seeks comment on whether the EQR requirements should be applied to market participants that are excluded from the Commission's jurisdiction under Section 205 of the Federal Power Act. The NOI identifies three categories of facilities to which the EQR requirements could be extended: (i) federal facilities; (ii) municipalities; and (iii) certain cooperatives with Rural Electrification Act financing and that sell less than 4,000,000 MWh of electricity per year. The NOI also notes that FERC "is also considering other refinements to the existing EQR filing requirements."

The NOI does not specifically address QFs. ELCON seeks clarification, however, that FERC does not intend to use this proceeding to expand the EQR requirements for QFs, in addition to the categories of facilities explicitly referenced in the NOI.

In many cases, QFs currently are exempt from the EQR requirements. As stated in Section 12.12 of the Commission's EQR Filing Requirements Guide:

In general, QF energy transactions are not reportable, as they have "exempt" status. However, some utilities with a QF exemption have a Part 35 tariff on file with the Commission, in which case transactions under that tariff are reportable. (*Source*: Notice of October 21, 2002, Paragraph 28.) . . . Specifically, QFs that have market-based rate authority have Part

35 tariffs on file with the Commission and must file an EQR. However, contracts and transactions undertaken while a QF do not have to be included in the filing. A QF is subject to the reporting requirements of Section 205 of the FPA, including having to file the EQR, if it (a) is between 30MW and 80MW, (b) is not geothermal or a cogenerator (c) filed for certification after 12/31/94 or (d) begun after 12/31/99.¹

The Commission established the current framework governing the regulatory status of QFs in Order 671, issued in February 2006. There, the Commission decided to retain the exemption from Sections 205 and 206 of the Federal Power Act for QFs of 20 MW or smaller, QF sales made pursuant to contracts executed prior to the effective date of Order 671, and QF sales made pursuant to a state regulatory authority's implementation of Section 210 of PURPA. The Commission determined that these provisions "strike a balance by ensuring that QF sales are regulated by either the states or the Commission while at the same time easing the burden on the smallest facilities" and recognizing "that expectations reflected in current contracts should be protected."²

Although ELCON would have struck the balance differently and retained broader QF exemptions, in any event there have been no intervening developments that warrant revisiting Order 671. As FERC observed in the NOI, in adopting the EQR requirement, Order No. 2001 explained that a primary purpose was to enable the Commission "to identify situations that indicate the possible exercise of market power

¹ <http://www.ferc.gov/docs-filing/eqr/news-help/require-guide.pdf>.

² Order 671-A, 115 FERC ¶61,225 at paras. 15, 18.

that warrant specific investigation.”³ This concern is not raised by QFs that are exempt from the Section 205 requirements for the precise reason that they do not raise market power issues.

Accordingly, there is no benefit that would outweigh the burdens of expanding the EQR requirement to currently-exempt QFs. ELCON urges the Commission to retain the current framework governing when QFs do and do not have to file EQRs.

³ FERC Stats. & Regs. ¶31,127 at paras. 1, 4.

NOTICES AND COMMUNICATIONS

Notices and communications with regard to these proceedings should be

addressed to:

John P. Hughes
Vice President, Technical Affairs
ELECTRICITY CONSUMERS RESOURCE
COUNCIL
1111 Nineteenth Street, NW, Suite 700
Washington, DC 20036
Email: jhughes@elcon.org
Phone: (202) 682-1390

W. Richard Bidstrup
CLEARY GOTTLIEB STEEN &
HAMILTON LLP
2000 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20006
Email: rbidstrup@cgsh.com
Phone: (202) 974-1500

Respectfully submitted,

/s/ W. RICHARD BIDSTRUP
W. Richard Bidstrup
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2000 Pennsylvania Avenue, N.W.
Washington D.C. 20006
Counsel for ELCON

Dated: March 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: March 30, 2010

/s/ W. RICHARD BIDSTRUP
W. Richard Bidstrup