

**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**

**REPLY COMMENTS OF  
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON) AND  
THE AMERICAN FOREST & PAPER ASSOCIATION (AF&PA)**

The Electricity Consumers Resource Council (“ELCON”) and the American Forest & Paper Association (“AF&PA”) offer these reply comments, supplementing their Initial Comments concerning FERC’s pending proposal to implement Section 210(m) of the Public Utility Regulatory Policies Act (“PURPA”).

**I. Introduction And Summary**

ELCON and AF&PA urged in their Initial Comments that before waiving QF purchase obligations, EPCRA 2005 requires FERC to make a QF-specific determination that non-discriminatory access to long-term markets truly exists. ELCON and AF&PA urged that FERC adopt an interpretation that is more faithful to the statutory mandate and more faithful to the extant PURPA mandate of encouraging cogeneration.<sup>1</sup>

The PURPA Section 210(m) NOPR has drawn an outpouring of expression of concern from affected organizations, including ELCON and AF&PA, the American Chemistry Council, the American Iron and Steel Institute, the American Petroleum Institute, Public Interest Organizations (on behalf of ten groups including the Project for Sustainable FERC Energy

---

<sup>1</sup> AF&PA’s Initial Comments also contained detailed recommendations for any Final Rule including suggested minimum filing requirements for any utility seeking a case by case determination under 210(m). While many other Parties, as noted hereafter, have made meritorious suggestions which may lead to additional requirements, AF&PA continues to believe each of its recommendations should be embodied in any Final Rule in order to comport with Congressional intent and the plain meaning of the statute. See AF&PA Initial Comments at 44-47.

Policy, the Natural Resources Defense Council, and renewable energy groups), the American Wind Energy Association, the U.S. Combined Heat and Power Association, Deere & Company, Dow Chemical Company, Independent Energy Producers Association, Occidental Chemical, the National Petrochemical and Refiners Association, the Southeast Electricity Council, Utah Industrial Consumers, the Louisiana Energy Users Group, the Energy Producers and Users Coalition and the California Cogeneration Council. A common theme sounds in many of these comments: organized markets are not sufficiently developed to enable a generic finding that all QFs in these markets have access to long term power supply contracts. Discrimination in transmission persists and was not eradicated by adoption of Order No. 888 or Order No. 2000.

The proposed rule would establish irrebutable presumptions (1) that four Commission-approved regional markets are sufficiently competitive to provide any QF a fully valid and competitive market for its power both in the form of energy and capacity, and (2) that all QFs located in the service territory of any member utility with an OATT on file at the Commission thereby have a transparent and workable gateway to that market. In doing so, the proposed rule contradicts the clear intent of Congress to establish case-by-case procedures for eliminating mandatory utility purchase obligations with respect to individual QFs.

The proposed rule would categorically eliminate purchase obligations when QFs are connected to utilities that are participating in FERC-approved RTOs or ISOs with organized markets. Since Order No. 2000 and FERC RTO precedent does not inquire into individual QFs' access to long-term markets, the fact that a QF resides in an organized market does not justify waiver of utility purchase obligations within the RTO. The proposed rule would further presume that access to short-term markets in an organized market is equivalent to a finding of access to long-term markets under Section 210(m)(1)(A)(ii). FERC appears to regard a market in excess

of one year as a long-term market—despite the reality that QFs must have access to multi-year long-term contract opportunities and that QFs may not be as readily dispatchable as is the case with merchant generation.

It would contradict Section 210(m)(3) for the Commission to exempt a utility from purchase obligations merely because it is located in one of the organized markets. Section 210(m)(3) provides that a utility may seek relief throughout its service territory from the otherwise applicable QF-specific exemption process. This subsection authorizes an application for a determination on a utility-specific service territory basis that the utility qualifies for waiver of the mandatory purchase obligation. Section 210(m)(3) expressly applies whether the utility is in a region described under either subsection (m)(1)(A), (B) or (C).

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 long-term firm transmission rights is predicated on the need for such rights to accommodate long-term power supply arrangements specifically in regions with ISOs and RTOs.<sup>2</sup> As to MISO in particular an executive recently presented a paper decrying the absence of a long-term contract market. Many QFs by the nature of their operations require access to long-term contract opportunities: many are not dispatchable in the same way merchant generation is dispatchable because the primary purpose of the QF is to serve its steam host. FERC cannot leap to the conclusion that all QFs have access to long-term markets without grappling with the need to find that multi-year supply opportunities exist within, as well as outside of, the organized markets.

---

<sup>2</sup> Docket Nos RM0608-000 and AD05-7-000.

FERC paves the way to categorically relieve purchase obligations even for utilities outside of RTOs and ISOs because they are required to offer an OATT. Under the proposed rule, FERC would presume that QFs connected to such a utility have access to the transmission and interconnection services contemplated by Section 210(m)(1)(B). The proposed rule would establish a “rebuttable presumption” that non-discriminatory access to market conditions described in subparagraphs (A), (B) and (C) exists when a QF is provided transmission access pursuant to a FERC-approved OATT and interconnection services pursuant to FERC-approved interconnection rules. See proposed Section 292.309(c). However this presumption of non-discriminatory access is made in practical effect irrefutable: FERC also proposes that evidence that a utility has not properly implemented or administered its OATT cannot be used to rebut the presumption of non-discriminatory access. The QF’s remedy in the event of improper implementation or administration is to file a complaint.

Contrary to the NOPR, the existence of an OATT does not enable FERC to categorically conclude that QFs, in fact, have meaningful access to markets in which to sell capacity and energy. Lack of access can result from frank discriminatory treatment or insufficient transmission capacity. For many QFs, the only entity physically capable of acquiring QF output is the utility with which the QF is interconnected. Often insufficient transmission capacity prevents a QF from using transmission service or participating in markets. Since QFs may compete directly with utilities in wholesale markets, many utilities have traditionally had no incentive to construct the type of transmission infrastructure that would enable QFs to participate actively in wholesale markets or obtain transmission service. FERC’s own rulemaking proceeding acknowledges that discrimination is pervasive and difficult for the customer to prove:

How can FERC make a finding that there should be a presumption of non-discriminatory transmission access?

Further indication that Congress did not intend for FERC to waive purchase obligations by rule arises from comparison to section 210(n) where Congress expressly mandate a rulemaking with respect to QF qualification for new facilities.. FERC's February 7, 2006 Report on Status of Energy Policy Act of 2005 Activities identifies at least 11 rulemakings or orders relating to electricity, electric and gas markets, and PUHCA 2005 that EAct 2005 explicitly references for Commission action. This further confirms that a rulemaking utilizing generic exemptions is inappropriate and contrary to statutory intent.

In addition to the corrections to the proposed rule outlined above, FERC should continue the mandatory purchase requirements with respect to QFs that are connected at distribution voltage and small QFs, as such QFs certainly do not have nondiscriminatory access to transmission. FERC should also clarify its rulemaking to make crystal clear that utilities who are appropriately relieved of mandatory purchase obligations under Section 210(m)(1) cannot use this determination as a regulatory out of pre-existing contracts and seek to evade otherwise applicable obligations to sell back up and standby power at just and reasonable rates.

The attached affidavits from member cogenerators emphasize that QFs play an important role in energy efficiency and reducing costs and that it is essential under Section 210(m) to conduct case-by-case review to determine whether there is opportunity to enter realistic long term bilateral contracts and to preserve open access to standby electricity. As currently drafted, the proposed rule "would discourage not only future investment in new QF's but also deter capital investment to upgrade existing facilities . . . ." Affidavit of The P&G Distributing

Company at 3-4; see also Affidavit of Corning Incorporated at 2; see also Affidavit of Smurfit at 2-3; Affidavit of Eastman Chemical, 5-6.

## **II. FERC Should Make Case-by-Case Findings Prior To Relieving Utilities Located In Organized Markets From Mandatory Purchase Obligations Under Section 210(m)(1)(A)**

FERC acknowledges that in proceedings under Section 210(m)(1)(B) and (C) it must make findings to relieve mandatory QF purchase obligations only on a case-specific basis. In contrast, the proposed rule would allow FERC to make a generic finding under subparagraph (A) 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.<sup>3</sup> We believe that this conclusion follows both from the text of Section 210(m)(1) and (m)(3), from deficiencies in the organized markets, and from the Congressional objective that FERC continue to encourage QF generation.

### **A. The Text of Section 210(m)(1) Dictates A Case-Specific Approach**

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 where an RTO satisfies the requirements of subparagraphs (A)(i) (access to independent, auction-based energy markets) and (B)(i) (access to transmission and interconnection services provided by regional transmission entity under a nondiscriminatory open access tariff), that is insufficient to satisfy the

---

<sup>3</sup> See Legal Analysis Attachment to ELCON’s Initial Comments at pages 6-15.

requirements of subparagraphs (A)(ii) (access to long-term markets) or (B)(ii) (a meaningful opportunity to sell long- and short-term capacity and energy). Moreover, under each of the two prongs in (A) and (B), there must be a finding that the access is “nondiscriminatory.” In this regard, it is noteworthy that Commissioner Brownell was just reported to have made the following remarks at the KEMA Executive Forum:

There’s “no question” continued discrimination is happening despite Order 888, Brownell said. But it’s not just outside RTOs. Even an organized market can disadvantage certain stakeholders – especially in the planning process, Brownell said.

Restructuring Today, Mar. 2, 2006, at 3. Most significantly, the statute requires that the utility make specific showings, supported by evidence, about the existence of and nondiscriminatory access to long-term markets. Instead, the proposed rule would in effect read subparagraphs (A)(ii) and (B)(ii) and the threshold “nondiscriminatory access” finding out of the statute and impose the burden of proof on the QFs that the statute is to protect instead of on utilities, as Congress intended.

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.

ELCON and AF&PA urge the Commission to construe subparagraph (A) of Section 210(m)(1) to require “non-discriminatory” access to transmission and “competitive” markets for QF sale of long-term capacity and energy. There is no reason to believe that Congress intended a lesser showing of protection for QFs in MISO, NYISO, PJM, or ISO-NE than for QFs elsewhere. Rather, it is reasonable to interpret the statute as requiring that markets must be competitive throughout the U.S. The language of subparagraph (C) requires a region’s market to be, at a minimum, “of comparable competitive quality as markets described in subparagraphs (A) and (B)” [emphasis added]. It would not make sense to reference (A) unless the long-term markets noted or assumed in (A) are “competitive” markets.

We believe that the most logical explanation for the textual difference between subparagraph (A) and subparagraphs (B) and (C) is that Congress was more concerned that QFs would lack access to long-term and short-term markets for capacity and energy outside of the organized markets and was therefore more prescriptive about the type of evidence appropriate to relieve QFs from purchase obligations under (B) and (C). We believe that some QFs in PJM, ISO-NE, NYISO and MISO may have such access and some do not. The NOPR (at ¶ 14) states that subparagraph (A) was crafted to apply to regions in which an ISO/RTO administers day-ahead and real-time markets and which “bilateral long-term contracts for the sale of capacity and electric energy are available to participants/QFs in these markets.” If such long-term contracts are, in fact, not available to QFs, Congress could not have intended for the FERC to ignore (or refuse to consider evidence regarding) that situation without undercutting the purpose and protections of PURPA.

**B. Section 210(m)(3) Further Indicates A Congressional Intent That Each Utility Whether Or Not Located Within An Organized Market Bears The Burden Of Showing That QFs To Which It Is Connected Have Non-Discriminatory Access**

Section 210(m)(3) requires that a utility seeking to be relieved from a mandatory purchase obligation must file an application at FERC setting forth facts that demonstrate that the conditions provided in (m)(1)(A), (B), or (C) -- nondiscriminatory access to the transmission services and competitive markets for short- and long-term capacity and energy -- have been met for the QFs in the utility's service territory. Section 210(m)(3) states that each such utility must provide a "factual basis" for rescinding their purchase obligations, and that such basis must "describe why the conditions set forth in" the statute "have been met." Thus, FERC is required under the statute to consider evidence on the access and markets actually available to QFs in the utility's territory. Section 210(m)(3) provides no exemptions for utilities in ISO/RTO regions or utilities with OATTs or reciprocity tariffs. Moreover, the statute explicitly states that QFs are to be provided with notice of utility filings and an opportunity to comment on the factual evidence provided in support thereof. FERC's proposed categorical waiver for utilities in RTOs and ISOs would subvert the Congressional purpose evident in Section 210(m)(3) to require a utility specific demonstration and opportunity to rebut regardless whether a QF is located in an organized market.

**C. Through Evolving Analysis Of Relevant Factors, FERC Can Ease Its Administrative Burden Under Section 210(m)(1)(A)**

The NOPR in effect repeals all QF purchase obligations within the organized markets by adopting an irrebutable presumption that mere presence in the RTO footprint solves QF access concerns. Some QFs do have such access and we are not disputing that fact, but others clearly do not. See Affidavit of Lloyd Webb, Eastman Chemical, located in Tennessee, discussing the lack of liquidity at its location remote from the PJM hub. *Id.* at 3. ELCON and AF&PA suggest

that there are factors that should be taken into account in the analysis whether a QF within the organized markets has non-discriminatory access to long-term markets. These include

- access to one or more liquid trading hubs;
- access to short-term and long-term FTRs; and
- whether the QF is dispatchable.

It may be anticipated that the initial proceedings interpreting Section 210(m) will draw a host of intervenors (as did the aborted Alliant application). Many of these intervenors will be more interested in developing the Commission's precedential interpretation than in the outcome with respect to the specific application. The fact that there will be many intervenors in the initial adjudications is no reason to throw out the baby with the bathwater and dispense with adjudications in favor of categorical repeal of purchase obligations in the four organized markets.

It is logical and prudent for FERC to implement new regulatory programs comparably via case-by-case adjudication. There are numerous instances where FERC adopted a case-by-case approach to implement new programs: from approval of independent power producers, to conditions for independent and affiliate power marketer approval, to comparability of access (where adjudications preceded adoption of Order 888). The first important cases will develop the Commission's precedent and signal to the regulated community the factors that FERC regards as relevant before relief is granted under Section 210(m)(1)(A).

A side benefit of developing its approach to implementation of section 210(m)(1)(A) on a case-by-case basis is reduced vulnerability to judicial review as FERC will have allowed "more process" and avoided a challenge to its rules based on the fact that the Commission's RTO approval process does not involve a showing of QF access to long-term markets.

**D. Markets In ISOs And RTOs Do Not Offer True Long-Term (3-5 Years Or More) Sales Opportunities But Rather Short-Term Sales At LMP Prices**

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. While suppliers will offer QFs a bilateral contract in the organized markets, the rates and terms and conditions of such contracts typically are not truly long-term and are discriminatory. Contracts whose terms and conditions have the net effect of putting the cogenerator out of business is not what was intended in the legislation.

The “long-term” bilateral markets that exist are predominately sales for resale -- generators selling to load serving entities (LSEs) that in many cases have divested generation or are capacity short. The LSE has to buy to meet native load requirements -- usually provider of last resort (“POLR”) services -- and has no recourse other than buying in short-term spot markets or, over a very long term planning horizon, building new capacity. These contracts are short term in nature -- typically for a period of 6 to 18 months. The rates embedded in these contracts are based on an estimate of LMPs (spot energy prices) plus a huge risk premium. In fact, QFs cannot sell (or "put") their surplus power at the LSE’s avoided or incremental costs. The QF has little choice but to dump its surplus power in the short-term LMP markets (day-ahead or real-time). An LSE has no incentive to buy from the QF unless the rate is below the expected LMP rate.

As AF&PA notes in its February 27, 2006 comments, QFs need access to long-term markets:

[R]eal-time and day-ahead, bid-based markets are, in themselves, inadequate to support baseload operations with limited dispatchability. Bidding into an hourly energy market subjects QFs to unworkable dispatch risks which may require either 1) bidding a price too low to support fixed cost recovery in order to avoid dispatch or 2) jeopardizing industrial or other processes required to be primary under newly enacted §210(n). For these reasons, “wholesale markets for long term sales of capacity and electric energy” which do

not permit QFs to make long-term sales of baseload capacity are inherently discriminatory to QFs because most QFs, by design, are configured to operate with limited dispatchability. Therefore, the existence of an Open Access Transmission Tariff and/or a day-ahead and real-time market are not sufficient to meet the statutory test.

Likewise, the Energy Producers and Users Coalition and the Cogeneration Association of California noted in their February 27, 2006 comments:

The Commission must keep carefully in mind the fundamental differences between a cogeneration operation and other electric power market suppliers. A cogeneration facility is operated to meet the thermal energy demands of an integrated host facility like a petroleum refinery or an enhanced oil field production operation. The cogeneration facility produces electric power, but its main purpose is not to serve the needs of an electric power grid or “market.” It is not a merchant generation facility, or a utility power plant, or a wholesale electric generator, rather it is a steam or thermal processing plant. As a result, “market rules” that are designed to meet the operations of utility power plants are not “markets” conducive to cogeneration operations.

It follows that for any “market” to be a reasonable substitute for the mandatory purchase obligations of PURPA that market must provide opportunities to the QF that support the operating characteristics of cogeneration.

Accordingly, an important issue that FERC needs to address in implementing Section 210(m) is the definition of “long-term.” A one-year contract is not a long-term supply opportunity such as would justify abrogation of utility purchase obligations under Section 210(m). QFs have historically relied on long-term contracts to attract project finance. We submit that long-term markets are markets of several years duration -- at least the timeframe for planning a new generator, which is 3-5 years for a gas-fired combined cycle unit.

Proposed Guideline (4) in FERC’s recent NOPR on Long-Term Firm Transmission Rights in Organized Electricity Markets, RM06-8-000 and AD05-7-000, states that the term lengths of long-term firm transmission rights, including rights of renewal, should be “sufficient to meet the needs of load-serving entities to hedge long-term power supply arrangements made or planned to satisfy a service obligation.” NOPR at ¶ 53. The feasibility of long-term firm

transmission rights is tightly intertwined with future investments in generation, transmission, and demand response. In the Long-Term Firm Transmission Rights rulemaking, ELCON, AF&PA, and other commenters have emphasized the need that FERC provide long-term firm transmission rights that are truly formed for terms of at least 10 years with firm rollover rights. In its comments in Docket No. RM06-8, the Transmission Access Policy Study Group (“TAPS”) stated:

[T]he absence in today’s RTO market of long-term rights to support delivery to load of such resources at predictable provides undermines the ability of load serving entities (“LSEs”) to make and finance such investments, or enter into long-term power purchase commitments that IPPs require to support their financing. . . . The Commission should revise the definitions to make clear that, in organized markets where annual FTRs are available, the focus of this rule is long-term rights for very long-term power arrangements poorly served by annual FTRs, e.g., ten year minimum term.

Comments of the American Public Power Association, the Energy Producers and Users Coalition and the Cogeneration Association of California, and New England Public Systems also discussed the lack of availability of long-term firm transmission rights.<sup>4</sup>

Comments filed by AF&PA highlighted the challenges faced by RTOs and ISOs in designing and providing long-term transmission rights in a truly nondiscriminatory fashion. AF&PA emphasized that correct implementation would require great care and could not be done precipitously. These comments highlighted the significant work that still remains to be done to assure the proper tools are in place in the Organized Markets to support long-term contracting.

**E. Long-Term Capacity And Energy Problems Characterize The Organized Markets**

EEI’s February 27, 2006 comments in this docket suggest that each of the organized markets offer an opportunity for long-term sales. EEI urges that this finding applies not only to

---

<sup>4</sup> Further, the June 27, 2005 comments of TAPS on the Staff Discussion Paper suggested a rolling ten-year term that affords the holder unconditional renewal rights or at least through the end of a ten-year-plus contract term. For example, the holder would be required to notify the ISO or RTO in year one if it wanted the FTR in year 11; in year two, it would notify the ISO or RTO if it wanted the FTR in year 12, etc. TAPS Comments at 19 20

MISO, PJM, ISO-N.E. and NYISO but also to CAISO and SPP. To the contrary, the existing RTOs themselves have acknowledged long-term capacity problems.

FERC's recent Long-Term Firm Transmission Rights NOPR 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 underlies the current situation that there is no adequate long-term market for capacity and energy at present.

PJM admits that its market design may not adequately address the new generation resources. PJM acknowledges that "it may not adequately address such needs with respect to new resources or future load growth." PJM June 27, 2005 comments submitted to FERC in response to the FERC Staff Discussion Paper in Docket AD05-7, p. 5 and fn. 5. Several commenters including public power in the pending docket on long-term firm transmission rights have observed that "because the FTRs that RTOs now offer are of relatively short terms (e.g. one year or less), they do not address public power entities' long-term generation resource needs, including load growth." APPA Concept Paper, Docket AD-5-7, p.6.

In an August 31, 2005 filing, PJM also testified that, at present, its market structure does not allow a meaningful opportunity for long-term sales of capacity.

Recent events underscore that PJM's current capacity market rules no longer provide adequate assurances of continued regional reliability.... PJM has seen few generation additions, but high rates of generation retirements in some of the same areas where load is growing fastest...

These short-term capacity markets were designed to accommodate short-term competitive load switching under retail choice, but have not demonstrated the capability to sustain long-term generation investment.<sup>5</sup>

A September 20, 2005 colloquy between Chairman Kelliher and Commissioner Brownell about the ISO-NE market at the Oral Argument in Docket No. ER03-563-000, referenced the concern over the collapse of generation additions and the threat that proposes to reliability and just and reasonable wholesale power prices in New England: “[V]ery little new generation is being added in Southwest Connecticut and Northeast Massachusetts. At the same time, demand continues, inexorably, to grow.” Commissioner Brownell associated herself with these remarks.

*A fortiori*, a generic waiver of utility purchase obligations is inappropriate in the nascent MISO Day 2 market, which has only been operating since April 1, 2005. It is wholly premature for FERC to waive utilities’ mandatory QF purchase obligations within MISO based on the hope and promise that long-term markets will emerge for QF power. FERC should follow its precedent in Cogen Lyondell, 95 FERC ¶61,243 (2001). There the Commission sided with the Texas QFs when the Texas Public Utility Commission sought to terminate QF purchase obligations effective upon restructuring and introduction of retail competition. FERC recognized that it was premature to waive QF purchase obligations at the inception of ERCOT restructuring because of the limitations in the long-term market for capacity and energy.<sup>6</sup>

A liquid forward market is not available in the MISO region to allow QFs to compete with traditional utilities.<sup>7</sup> Currently, only the day-ahead and real time (spot) markets are up and running in the MISO region, and there is no long-term resource adequacy plan for the region.<sup>8</sup>

---

<sup>5</sup> PJM Interconnection, L.L.C., Docket Nos. ER05-1410-000 and EL05-148-000, Reliability Pricing Model Filing, Volume 1 (August 31, 2005),

<sup>6</sup> Cogen Lyondell, 95 FERC ¶61,243 (2001) (emphasis added)

<sup>7</sup> A clearinghouse function has not yet been set up in MISO, for example by NYMEX, to provide price discovery in the bilateral markets.

<sup>8</sup> Capacity Needs, slide no 4

Although in its approval FERC characterized long-term contracts as “the single most essential requirement for obtaining financing for new generation,”<sup>9</sup> MISO’s own documents show that it is only now developing a long-term power market. For example, MISO is presently debating whether to develop an energy-only market with forward contracting for capacity cost recovery, or a capacity market such as LICAP or RPM that creates non-bypassable capacity charges. As MISO itself has noted, resource adequacy is “by definition ... a long-term, or investment issue,” and is one that raises certain structural problems within the market:

Resource Adequacy is important for at least two reasons that are fundamental to the future of the industry. First, the financial consequences are significant. ...Second, to date the primary focus of ISOs/RTOs has been on designing, implementing and operating short-term electricity markets. ...

Long-term markets such as those for capacity and financial transmission rights are ... problematic because ...in the absence of a proper market, i.e., one with both buyers (demand) and sellers (supply), the RTO has to serve as one side of the market.<sup>10</sup>

FERC has given MISO until June 1, 2006 to address resource adequacy requirements in a way that takes account of unique characteristics of MISO’s market participants, encourages long-term investment while supporting short-term reliability, and does not exacerbate seams with neighboring PJM.<sup>11</sup>

In a May 19, 2005 presentation to its Board of Directors on Capacity Markets, Ron McNamara, MISO’s Vice President of Marketing Management stated that the key problem was not reliability, lumpiness of investment or capped prices “although all of these are issues...The

---

<sup>9</sup> 109 FERC ¶61,157 at ¶¶ 302-03

<sup>10</sup> Discussion Paper on Resource Adequacy for the Midwest ISO Energy Markets, SAWG/OMS RAWG meeting materials August 3, 2005, available at [http://www.midwestmarket.org/publish/Document/2b8a32\\_103ef711180\\_-79520a48324a?rev=5](http://www.midwestmarket.org/publish/Document/2b8a32_103ef711180_-79520a48324a?rev=5) (last visited Mar. 21, 2006). See also OMS RAWG August 24, 2005 document reviewing the August 3 Discussion paper, which notes in the opening paragraph, “[I]t is clear that MISO -- unlike some ISOs/RTOs, is resisting taking on the role of a market principal who will correct flaws in spot market design or ‘manage’ price volatility through an organized separate capacity market.”

<sup>11</sup> 108 FERC ¶61,163 (2004), order on reh’g 109 FERC ¶61,157 (2004), order on reh’g 111 FERC ¶61043 (2005).

problem is greater than that and one that must be solved: *The real problem is an inability/difficulty to long-term contract.*<sup>12</sup> He called for “guesses” on the average duration of bilateral contracts in the industry and the percentage of load under contract. Under this scenario, the effect is that “[l]ong-term price signal in electricity is either weak or non-existent.”<sup>13</sup>

Even once MISO implements a long-term market for energy and capacity, it will be necessary to determine that this market indeed meets the statutory requirements, *i.e.*, that it is competitive and that QFs and alternative energy suppliers do in fact have nondiscriminatory access to this market.

### **III. The OATT Does Not Assure Non-Discriminatory Access**

#### **A. Transmission Access Is Not A Reality Due To Insufficient Transmission Capacity And Subtle, Yet Pervasive Discrimination**

Often QFs have no access to organized markets or transmission services regardless of whether the utilities to which they are interconnected technically participate in organized markets or provide transmission and interconnection services on an open access basis. To the contrary, the only entity physically capable of acquiring QF output is the utility with which the QF is interconnected. In many instance, insufficient transmission capacity prevents a QF from using transmission service or participating in markets. Many utilities have traditionally had no incentive to construct the type of transmission infrastructure that would enable QFs to participate actively in wholesale markets or obtain transmission service. Indeed, to the extent that QF output may directly compete with utility output, the utility would have a clear disincentive to construct such transmission infrastructure or to otherwise facilitate QF integration into wholesale markets.

---

<sup>12</sup> Ron McNamara, MISO, Presentation to the Board of Directors, May 19, 2005, slide 8 (emphasis in original).

<sup>13</sup> Id. slide 9.

It will be difficult for FERC to sustain on judicial review what is in practical effect an irrebutable 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. FERC expresses concern about continuing discrimination in transmission:

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.

Notice of Inquiry, Preventing Undue Discrimination and Preference in Transmission Services, Docket No. RM05-25 (Sept. 16, 2005) at ¶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. FERC notes that transmission discrimination is difficult to prove -- thus acknowledging the insufficiency of a complaint process. The NOPR's proposed exclusion of evidence that an electric utility has not properly implemented or administered its OATT is inconsistent with the Commission's own recognition

that the OATT affords electric utilities ample discretion to administer and implement the provisions of their OATTs to the detriment of transmission customers.

Occidental Chemical Corporation's February 27, 2006 comments in this docket provide a telling demonstration that an OATT does not equate meaningful access to truly competitive wholesale markets. Persistent lack of available transmission has consistently restricted sales from Occidental's Taft (Louisiana) QF to essentially one market – purchases by Entergy. The Commission has clearly recognized that merely having an OATT does not end the inquiry as to whether the utility has the ability to discriminatorily restrict and deny transmission access. In Entergy Services, Inc., the Commission on rehearing reversed its determination that Entergy was unable to exercise transmission market power simply because it had a Commission-approved OATT. “[C]redible concerns” had been raised on a broad range of matters, including OATT violations and implementation by Entergy of interconnection and transmission services under its OATT. Entergy's institution of an Available Flowgate Capability (“AFC”) methodology has resulted in a situation where Occidental's Taft QF is unable to access the Entergy transmission grid, precluding it from consummating sales not only to buyers other than Entergy, the utility to which its QF is interconnected, but even to Entergy itself as a buyer of power through its wholesale merchant power procurement function.

Dow's February 27, 2006 Comments similarly contradict the assumption that an OATT offers non-discriminatory access to QFs. Dow states:

While Entergy maintains an OATT and has proposed the implementation of an Independent Coordinator of Transmission (ICT), a number of entities (including Dow) have demonstrated that the ability to rely on Entergy's transmission services and to serve load directly or indirectly connected to Entergy's transmission system is greatly hampered by a lack of transmission infrastructure.<sup>14</sup> Moreover, such transmission access is complicated further with respect to QFs because Entergy does not include QF output in

---

<sup>14</sup> See, e.g., Entergy Services, Inc., 111 FERC ¶ 61,507 at P 19 (2005).

its transmission models.<sup>15</sup> Thus, it would be wrong to assume that QFs on the Entergy system have nondiscriminatory access to transmission and interconnection services and competitive wholesale markets based solely on Entergy's administration of an OATT and/or its retention of an ICT.

**B. Mandatory Purchase Obligations Should Be Retained For QFs Connected At Distribution Voltage And Small QFs**

QFs connected at distribution voltage clearly do not have nondiscriminatory transmission access such as would justify waiver of mandatory purchase obligations. The Commission's Small Generator Interconnection Policies are of no assistance because it often is not economically or technically feasible for small QFs to interconnect at transmission voltage levels. To take but one example, the location of hydropower QFs is dictated by the site of dams. In order to reach RTO/ISO markets, smaller hydropower facilities would have to pay a wheeling charge and pay to step up the power to transmission level. Some facilities might be able to sell power to a marketer or aggregator; however, the price typically offered by marketers is below market. A QF that is captive to the local distribution utility (absent relief under state law) does not enjoy nondiscriminatory access: all kinds of costs and procedural barriers can be unilaterally imposed by the distribution utility to deny or hinder access to the "market." It should be noted that utilities derive certain benefits when purchasing QF power at the distribution level, including the avoidance of transformation and line losses.

Accordingly, a rebuttable presumption that QFs interconnected at distribution line voltages should retain the purchase obligation is a reasonable threshold that takes cognizance of market conditions and comports with the statutory intent to promote innovation and development of small facilities.

Many small QFs do not have nondiscriminatory access, as required by the statute, to wholesale markets even within RTO/ISO footprints. Instead, they face significant barriers to

---

<sup>15</sup> See Entergy Services, Inc., 109 FERC ¶ 61,281 at P 18 (2004).

participation in regional markets. Many small QFs do not have long-term contracts in place with utilities, so their power purchase arrangements are vulnerable to economic pressures that may cause existing facilities to shut down and prevent the development of new facilities. Just because a utility may offer a long-term contract, the terms are not necessarily economic for the small QF with little bargaining power to negotiate those terms. Fees and other costs associated with participation in RTO/ISO markets are often prohibitive for small QFs. A larger generator is able to amortize these costs over all of its generation. For small QFs, however, these costs would render many projects uneconomic.

With respect to how to define “small,” ELCON and AF&PA agree with the suggestion of Granite Ridge that FERC retain the mandatory purchase obligation in connection with facilities with installed capacity of 5MW or less, and that FERC create a rebuttable presumption that there is NO nondiscriminatory access to markets for facilities over 5MW and interconnected at distribution level voltages.<sup>16</sup>

Affording special consideration to QFs below 20 MW would conform to FERC’s recent determination that QFs that are 20 MW or smaller are exempt from Sections 205 and 206 of the Federal Power Act. (Order No. 671, Revised Regulations Governing Small Power Production and Cogeneration Facilities, 114 FERC ¶ 61,102, at ¶ 98 (2006).) Additionally, the Commission has determined that the capacity limit for “small” generators is 20 MW. (Order Nos. 2006 & 2006-A, Standardization of Small Generator Interconnection Agreements and Procedures, 111 FERC ¶ 61, 220 & 113 FERC ¶ 61,195 (2005).)

---

<sup>16</sup> As FERC recognized in Order No. 888, there is no bright-line voltage level that distinguishes “distribution” facilities from “transmission facilities.” This is why the Order establishes a “Seven Factor” test.

**C. Existence Of A Power Procurement Process Does Not Assure A Competitive Market**

FERC inquires whether for purposes of Section 210(m)(1)(B)(ii), the Commission can presume the existence of a competitive market from the mere existence of a power procurement process. NOPR ¶21. An organized power procurement process does not necessarily assure a meaningful opportunity to sell capacity, including long-term, short-term and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the QF is interconnected.

The fact that there is an RFP process to acquire energy and capacity is not inherently indicative of a competitive wholesale market. The critical question is whether potential suppliers have access to other potential buyers apart from the monopsony buyer holding the RFP. FERC should seek a demonstration of contractual sales of capacity or energy to utilities other than the interconnected utility in response to RFPs.

**D. Unreasonable Wholesale Distribution Charges May Inhibit QF Sales**

Once a utility is relieved of its mandatory purchase obligation, it may charge the QF a rate for the movement of power over its distribution system to or from the wholesale market that the QF must access. In a decision issued on February 22, 2006, PJM Interconnection, Docket Nos. ER06-407, ER06-408, FERC ruled that it had no jurisdiction over interconnection service agreements governing the interconnection of a QF to a utility's local distribution system or to Wholesale Distribution Charges ("WDCs") imposed by utilities in such agreements. In particular, the Commission found that it does not have jurisdiction under Order No. 2003 because the existing interconnection and sales between a QF and the utility is not Commission-jurisdictional delivery service. This is the case even though the interconnection was governed by PJM's OATT. If the Commission determines not to review such charges as a part of generator

interconnection service, it is essential that such charges be reviewed for a determination of whether they are just and reasonable as part of delivery service subject to Commission jurisdiction. In the sequel to the above-cited proceeding, PJM Interconnection, Docket No. ER06-509, the Commission in its letter of March 13, 2006 requesting additional information has indicated that it may do so.<sup>17</sup>

On review of any such charges, whether by the Commission or a state utility commission, there must be safeguards to ensure that they are not excessive. In RTOs where delivery charges are to be paid by network load and not by generators, QFs should not be discriminated against by imposition of any delivery charge. In those markets where generators are subject to delivery charges, utilities may seek to impose excessive charges on the basis of a contract path theory allocating (and effectively double counting) distribution system costs to the QF based on its putative “access point” to the wholesale market, although the physical reality is that the QF generated power flows only to the nearest power consumer and the QF interconnection actually creates distribution and transmission capacity for the utility at no cost. In the case cited above, the utility proposed to charge \$730,000 in annual WDCs to the two wind turbine facilities with an aggregate capacity of 83 MW. Imposition of unreasonable WDCs by utilities is likely to make many other existing and prospective new QFs uneconomic. Given the explicit Congressional purpose to continue to incent QFs, Congress could not have contemplated the outcome that a QF whose mandatory purchase obligation by the utility is terminated would not have economically viable access to wholesale markets because of utility-imposed WDCs.

---

<sup>17</sup> In Docket Nos. ER06-407, -408, the Commission stated that “[t]his ruling is without prejudice to ComEd filing for a wholesale distribution charge as part of a separate delivery service, rather than generator interconnection service, as proposed by the company, if ComEd’s distribution system is used subsequently to provide wholesale delivery service.” In Docket No. ER06-509, the Commission requested explanations for “why the WDC should not be included as a rate for delivery service in PJM’s OATT” and whether there could be “a ‘Wholesale Transmission Rate’ (for the recovery of costs associated with the use of ComEd’s distribution facilities for delivery of power to PJM’s transmission system) applicable to generators . . . that interconnect with ComEd’s distribution system to access to PJM’s transmission system.” Commission Letter of Mar 13, 2006.

#### **IV. The Obligation to Sell Back-Up and Standby Power Should Be Terminated Only If The Statutory Criteria Are Fully Satisfied**

Section 210(m)(5) provides that the mandatory obligation to sell can be terminated only if “competing retail electric providers are willing and able to sell and deliver electric energy to the qualifying cogeneration 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 must carefully give each prong of this requirement full force and effect. ELCON and AF&PA urge that the Commission require QFs have available at least two competing suppliers who are not affiliated with the utility before relieving the utility of its sales obligations under Section 210(m)(5). This is required by the statutory language referring to “competing retail electric providers” in the plural. To implement the clear Congressional intent that the sales obligation should be terminated only where the QF has true competitive access to alternative supply, the providers should not be affiliates of each other or of the utility.

As to the second prong of Section 210(m)(5), the Commission should interpret these regulations to require any utility that has an obligation to provide Standard Offer or Default service is “required by state law to sell electric energy in its service territory.” Typically the state has imposed such obligations where necessary to achieve just and reasonable rates or adequate, reliable service. QFs should not be deprived of any benefit that the state has determined to be appropriate for retail customers.

#### **V. Existing Contracts And Obligations Should Be Fully Protected**

Under Section 210(m)(6), the statute preserves the “rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on the date of enactment of this subsection, to purchase electric energy from or to sell electric energy to a [qualifying facility]...” As Section 210(m)(6)

reflects, companies that invest in cogeneration should have all of their existing contracts and obligations grandfathered, and should not retroactively be denied the benefit of their investment. “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.” Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994). In New York State Electric & Gas Corp., 71 FERC ¶61,027 (1995), FERC appropriately declined to retroactively impair QF contracts. QFs made their investments on the basis of a statute (PURPA §210) and a regulatory regime (18 C.F.R. §292) that requires utilities to purchase their power at avoided cost. As FERC stated in NYSE&G: “We note that utilities have been quick to defend, and properly so, their right to recover legitimate, prudent and verifiable ‘stranded costs,’ based on claims that such costs are the product of settled and reasonable investor expectation. The same principle applies to the investors in QF projects.” Id., at 61,117 (footnote omitted).

The reliance interest of these investments should be respected not only out of fairness to QF cogenerators and small power producers, but in the broader policy interest of encouraging badly-needed investment in environmentally sensitive technologies. Accordingly, FERC should emphasize that even where mandatory purchase obligations are terminated as to new contracts, existing contracts and obligations may not be reopened.

## **VI. QFs Continue To Foster Important FERC Policy Objectives**

Enactment of PURPA served twin aims of encouraging environmentally-friendly generation and increasing the development of independent power generation. These goals continue to be important priorities for the Commission. The Commission should interpret its statutory mandate faithfully keeping in mind these objectives that remain valid and important priorities after the 2005 EPAct Amendments.

### **A. QF Generation Is A Substantial Component Of Resource Adequacy**

The need for independent generation is as great now as when PURPA was adopted. Competition will only become a reality -- and market power be reduced -- as adequate generation develops. Even in those regions that have an operating RTO, a few players dominate the market, and competition remains a work in progress. The solution is continued encouragement of QFs and assurance that QFs can “put” their power to utilities until markets are truly competitive.

FERC’s Order 2006 providing standardized interconnection procedures (Docket RM02-12) was intended to increase energy supply, preserve grid reliability, and lower wholesale electricity costs for customers by increasing the number and types of generators in the electric market, including development of non-polluting alternative energy resources.<sup>18</sup> Order 2006 was a responsible action by FERC to increase the number and participation of generators in wholesale markets. Order 2006 recognized the continued need for independent generation and the role that independent generation serves in assuring adequate power supply, reducing customer costs, and providing competition to vertically-integrated utilities. It is perplexing and arbitrary for FERC to impose demand curve capacity purchase obligations rationalized as necessary to incent new generation<sup>19</sup> while at the same time adopting a broad and unsupportable interpretation of Section 210(m) which would go farther than Congress intended and repeal QF purchase obligations wherever an RTO has been established.

FERC should acknowledge its continuing statutory mandate to continue to foster the development of badly needed QF generation and scrupulously to determine on a utility-specific basis whether QFs have access to long-term markets before a given utility is relieved of purchase

---

<sup>18</sup> FERC Press Release May 12, 2005, “Commission Issues Standard Rule For Small Generator Interconnection; Action Will Facilitate Needed Infrastructure Development ”

<sup>19</sup> FERC for example approved ISO-NE’s LICAP and NYISO’s demand curve in an effort to promote generation. *ISO New England, Inc* , 111 FERC ¶ 61,185 (2005), *reh’g denied*, 112 FERC ¶ 61,254 (2005); *New York Independent System Operator, Inc* , 103 FERC ¶ 61,201, *reh’g denied*, 105 FERC ¶ 61,108 (2003)

obligations. The most recent report of the Energy Information Administration states that over 9% of generation (total net summer basis) comes from QFs.<sup>20</sup> It would be arbitrary and capricious for FERC to predicate regulatory actions in certain dockets on the paramount objective of encouraging cogeneration and then precipitously relax QF purchase obligations before real markets for long term power exist and before discrimination that impairs QF access to the transmission grid has been eradicated.

### **B. Environmental And Energy Efficiency Aspects**

The role of QFs is equally important in job creation, economic development, fuel efficiency and environmental compliance. To take but one example, several ELCON members generate steam needed to elicit crude oil production from the oil field, or to operate chemical plants. The electricity generated by the QF is a by-product determined by the steam needs. If QFs become uneconomic due to FERC's new rule, the result will be (a) to force conversion to conventional boilers, which emit more pollutants and consume much more fuel or (b) curtailment of production if conversion to boilers is not practical due to emissions limits or cost. This is a significant concern for oil companies for example, who cannot recover product from today's oil fields without generation of steam to force crude oil from the ground.

### **Conclusion**

ELCON and AF&PA agree with the February 27, 2006 comments of former Congressman Richard Ottinger, an author of PURPA in 1978, that "[T]here should be no automatic opt-out permitted by the regulations merely because a utility is a member of an ISO or RTO or because there exists an Order 888 OATT or reciprocity tariff. The ability to submit evidence of actual QF experience with regard to discriminatory treatment or with lack of access

---

<sup>20</sup> Table 2.1, Energy Information Administration, Electric Power Annual 2004, DOE/EIA-0348 (Nov 2005). This includes only combined heat and power (CHP) capacity and renewable resources other than hydroelectric, as EIA does not breakdown its hydroelectric data into QF and non-QF capacity.

to competitive wholesale markets is essential to implementation of both Acts, and EPC Act Section 210(m)(3) requires that a utility seeking to opt out provide a factual basis for finding that the requirements for termination are met.”

PURPA was intended to eliminate obstacles to cogeneration by requiring utilities to interconnect with QFs, to sell back-up power to them at reasonable and non-discriminatory rates, and to purchase their power at a price equivalent to the cost of the alternative source of power to which the utility could otherwise turn.

FERC should interpret the EPC Act amendments as intended to phase out purchase obligations upon a finding that competitive markets have developed such that mandatory purchase obligations are no longer needed. FERC should not precipitously waive those obligations simply based on the finding that short-term markets exist or that jurisdictional utilities are required to comply with the OATT. FERC is well aware that there are problems with the development of long-term capacity and energy markets. FERC is sufficiently convinced of the flaws of the OATT to have initiated a rulemaking to end the discrimination. It is premature to wholesale relieve utilities of PURPA purchase obligations and such a result would contravene the intent of Congress.

### **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.

### **Description of AF&PA**

AF&PA is the trade association of the forest, pulp, paper, paperboard, and wood products industry in the United States. AF&PA's members are among the nation's largest consumers of electric power, purchasing over 82 billion kilowatt-hours of electricity annually nationwide. AF&PA's members include electricity consumers and producers.

Many of AF&PA's members operate qualifying cogeneration facilities and changes to the QF rules could have a substantial effect on their businesses. In addition, the cost and reliability of electric service to AF&PA members is likely to be affected by the outcome of this proceeding. Therefore, AF&PA is an interested party and its intervention and participation will be in the public interest. AF&PA is not now, and will not be, adequately represented by any other party in this proceeding, and may be bound or adversely affected by the Commission's action herein.

Because AF&PA's members are both consumers and producers of electricity, including that produced by QFs, and consequently may be affected by the outcome of this proceeding, good cause exists to grant AF&PA's motion for leave to intervene.

**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  
The West Tower, 8th Floor  
1333 H Street, N.W.  
Washington, DC 20005  
Voice: (202) 682-1390  
Email: [jhughes@elcon.org](mailto:jhughes@elcon.org)

Sara D. Schotland  
W. Richard Bidstrup  
CLEARY GOTTLIEB STEEN  
& HAMILTON LLP  
2000 Pennsylvania Avenue, N.W., Suite 9000  
Washington, D.C. 20006  
Voice: (202) 974-1500  
Email: [rbidstrup@cgsh.com](mailto:rbidstrup@cgsh.com)  
*Counsel for ELCON*

Donald J. Sipe  
Partner  
PRETI FLAHERTY BELIVEAU PACHIOS  
& HALEY LLP  
45 Memorial Circle  
P.O. Box 1058  
Augusta, ME 04332  
Voice: (207) 623-5300  
Email: [dsipe@preti.com](mailto:dsipe@preti.com)  
*Counsel for AF&PA*

Respectfully submitted,

  
for Sara D. Schotland

---

Sara D. Schotland  
CLEARY GOTTLIEB STEEN & HAMILTON LLP  
2000 Pennsylvania Avenue, N.W., Suite 9000  
Washington, D.C. 20006  
Telephone: (202) 974-1500

Dated: March 24, 2006

**Exhibits**

- Exhibit 1      Affidavit of John F. Flood, Senior Purchasing Manager, The P&G Distributing Company
- Exhibit 2      Affidavit of Patrick L. Jackson, Corning Incorporated
- Exhibit 3      Affidavit of Charles Scott Ackel, Environmental and Technical Services Manager for the Smurfit-Stone Container Board Division
- Exhibit 4      Affidavit of Lloyd B. Webb, Procurement Manager, Eastman Chemical Company

# EXHIBIT 1

**AFFIDAVIT OUTLINE FORM**

**UNITED STATES COURT 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**

**AFFIDAVIT OF JOHN F. FLOOD  
THE P&G DISTRIBUTING COMPANY**

1. My name is John F. Flood. My title is Senior Purchasing Manager for the The P&G Distributing Company. In this capacity I am responsible for all commercial and regulatory aspects connected with ensuring reliable and cost efficient electricity supply to all of The Procter & Gamble Company's. North American facilities.
2. Procter & Gamble is a global leader in consumer products manufacturing and marketing. P&G's purpose is to provide branded products of superior quality and value that improve the lives of the world's consumers. Our operating principles include showing respect for all individuals and valuing innovation as the cornerstone of our success.
3. As a global manufacturing company, Procter & Gamble has manufacturing facilities around the world. Within this past year we have acquired The Gillette Company which increased both the volume and diversification of consumer products we produce. P&G competes in a global market and each of our manufacturing facilities compete internally for a share of manufacturing volume. Our product lines include widely recognized brands such as Pampers, Tide, Charmin, Ivory, Crest, Folgers, Prilosec OTC, Always,

## AFFIDAVIT OUTLINE FORM

and most recent additions Gillette Razors and Duracell Batteries as familiar names found everyday around the world in the homes of consumers.

4. Each of our manufacturing facilities, domestic and international, recognizes that energy is an rapidly increasing cost contributor to both our direct cost and the indirect costs of suppliers who provide our raw materials. We continuously look to improve technology, improve our processes, evaluate our raw materials and seek out alternative sourcing to reduce our total energy consumption and manufacturing costs. We are involved in providing input on energy policy formulation as a member of ELCON at the federal level and at the state levels where we have facilities.
5. P&G's Family Care Business manufacturing operations (Charmin, Bounty) utilizes significant amounts of the natural gas and electricity in our NA manufacturing operations. We built and operate Qualified Facilities (QF's) at two domestic manufacturing sites (PJM RTO and CAISO) as integral in reducing the total energy required to manufacture paper. Hot air produced by these QF's is fully utilized in the papermaking process and electricity generated by the QF's provides a large portion of the electricity required to run the local operation. Net our total energy consumption is reduced by operation of QF's at these sites – thereby reducing costs, improving the environment, reducing utility obligation to serve requirements and securing jobs.
6. Operation of QFs provides P&G strategic advantage towards remaining competitive in a highly cost sensitive marketplace. Additional new international QF facilities have been approved which will make non domestic operations more competitive. QF options continue to be evaluated at other domestic papermaking operations. As part of

**AFFIDAVIT OUTLINE FORM**

the acquisition of The Gillette Co., we are examining the retrofit of an existing South Boston cogeneration unit within the extremely congested NEPOOL area.

7. Efficient cogeneration requires that open access to standby electricity is available during scheduled downtime and emergency situations. Our cogeneration units can and do contribute local and regional transmission stability because of ability to provide voltage and KVAR support.
8. The effect of the proposed rulemaking implementing new PURPA section 201(m) would be to highly discourage the development of cogeneration by Procter & Gamble. This is neither in the best long term interests of Procter & Gamble as a domestic employer nor in the long term energy security of the United States. Rather than issuing blanket rulings for RTO's (where we have not been able to identify any party willing seller who would enter into realistic long term bilateral contracts) FERC should examine each QF separately based on that individual QF's ability to meet the original intent of PURPA. PURPA original intent was to promote cogeneration that maximizes efficient use of energy. The cogeneration we operate clearly meets those objectives. Congress' intent to amend PURPA requires careful consideration of many factors in each market and with each QF, to do otherwise could inadvertently repeal PURPA and eliminate future benefits.
9. It appears that the Commission may have omitted addressing an issue effecting QF's currently under long term contracts. Existing QF's periodically are in need of upgrades and improvements. For example, evolution of environmental regulations gradually dictate that existing QF facilities be upgraded. A broad based generic rulemaking such as the Commission is considering could set up dynamics which would discourage not

AFFIDAVIT OUTLINE FORM

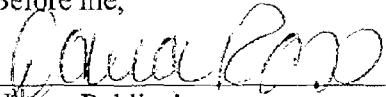
only future investment in new QF's but also deter capital investment to upgrade existing facilities because of concerns about voiding existing contracts.

  
\_\_\_\_\_  
John F Flood  
Sr. Purchasing Manager

STATE OF OHIO, Hamilton County,  
March 21, 2006

Personally appeared the above-named, in his/her capacity as of, and made oath that the foregoing statements by him/her subscribed are true to the best of his/her personal knowledge, information and belief and to the extent based upon information and belief, he/she believes it to be true.

Before me,

  
\_\_\_\_\_  
Notary Public

Print name: Dana Ross

My commission expires: Sept. 15, 2009



**DANA ROSS**  
Notary Public, State of Ohio  
My Commission Expires  
September 15, 2009

## EXHIBIT 2

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

**AFFIDAVIT OF PATRICK L. JACKSON  
CORNING INCORPORATED**

1. My name is Patrick Jackson and my title is Manager, Global Energy Management, Corning Incorporated.
2. Corning Incorporated (Corning) is a diversified, global technology company with a proud history and continued leadership in developing and manufacturing customer-driven solutions to complex problems that significantly improve people's lives. We combine our expertise in specialty glass, ceramic materials, polymers and the manipulation of the properties of light, with strong process and manufacturing capabilities to integrate scientific discovery with market need. We focus on high-growth opportunities in the telecommunications, flat panel display, environmental, and life sciences industries
3. To maintain its position as a global market leader in all its businesses, Corning Incorporated is constantly implementing measures that will increase the productivity and efficiency of its overall energy use. Starting in 2005, it has embarked on a systematic Global Energy Management plan aimed at all manufacturing sites in the United States and elsewhere.
4. Every domestic and international location is developing medium and long-term energy plans to systematically reduce energy costs and overall environmental impact. These plans will include implementing on-site Combined Heat and Power (CHP) facilities that are "Qualified Facilities" ("QFs") under the PURPA guidelines. Corning sees the effective implementation of CHP as essential to the long-term competitiveness of many of its locations, and a necessary part of building an infrastructure that uses less scarce primary fuel resources, specifically natural gas.
5. The solutions that will be implemented will generate electricity and additionally make maximum use of the heat that is wasted in traditional electricity generation. This will not only contribute to the competitiveness of Corning as a domestic employer, but also assist in reducing the pressure on natural gas imports to the United States, and will reduce the creation of greenhouse gases.

6. Effective CHP solutions require fair access to the existing grids to ensure that standby electricity is available during scheduled downtimes of the CHP units and in the very rare situations where an emergency may occur. CHP systems must also be able to deliver occasional excess electricity to the grid at reasonable rates that allow the utility to resell at a reasonable margin. Both Corning and the relevant utility will ultimately benefit from predictable and non-discriminatory access to the grid for the sale of the QF's excess energy and capacity, and for standby services.
7. Corning has facilities in one of the FERC-approved organized markets. The effect of the proposed rulemaking implementing the new PURPA section 210(m) will be to discourage the development of CHP systems by Corning. This is neither in the best long-term interests of Corning as a domestic employer, nor the long-term energy security of the United States.

  
Patrick L. Jackson  
Manager, Global Energy Management

Subscribed and sworn to before me, a Notary Public in and for the State of New York, County of Steuben, this 24<sup>th</sup> day of February, 2006.

  
Notary Public

My Commission Expires:

**LINDA K. HOUSER**  
Notary Public - State of New York  
Qualified in Chemung County  
#01HO6022311  
Commission expires March 29, 2007

# EXHIBIT 3

**UNITED STATES COURT 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**

***AFFIDAVIT OF:***

***Charles Scott Ackel, being duly sworn, deposes and says:***

FERC Members,

My name is Charles Ackel and I am the Environmental and Technical Services Manager for the Smurfit-Stone Containerboard Mill Division. I have been working in the paper industry in process, energy and environmental areas for thirty-five years. Smurfit-Stone Container Enterprises, Inc. ("SSCE") manufactures pulp and paper at twenty-three major production facilities in North America, and nine of these pulp and paper facilities are qualified co-generation facilities (QF's).

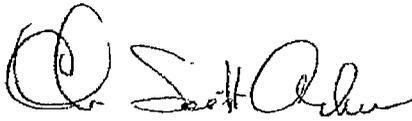
SSCE operates two pulp and paper production facilities in the PJM area served by Dominion Power that are affected by FERC's new proposed Section 210(m) regulations applicable to small cogeneration facilities in areas served by an RTO. Currently, SSCE maintains idle co-generation capacity of about 35 MW and only sells about 1.5 MW from the two QF's operating in the PJM area served by Dominion Power. If Dominion is not required to purchase co-generated power from these QF's, the additional charges to transmit this power to alternative

markets, if truly accessible, would make our co-generated power obviously more expensive and less marketable. Furthermore, FERC's proposed regulation raises questions concerning the availability and cost of standby and backup power to these two facilities if Dominion is no longer required to supply such standby and backup power.

FERC's proposal to eliminate the must-purchase PURPA requirement in areas served by RTO's will simply increase the cost of co-generated power and reduce any potential revenue from co-generated power produced by these two facilities. Under the proposed PURPA revisions, Dominion would have no requirement or incentive to purchase co-generated power but could profit from our power transmitted over its wires to other markets. Co-generation of power by our two QF's operating in PJM is currently at the mercy of Dominion and this control by Dominion would be extended to access to the market. Under the scenario painted by the proposed PURPA revisions, compensation for co-generated power sold by our two QF's operating in the PJM area would be reduced from Dominion's "avoided costs" to less than Dominion's "avoided cost" plus the cost to transmit our power to any alternative markets.

Should the regulation be promulgated as proposed, co-generators in RTO areas will see less income than co-generators in non-RTO areas even if alternative markets are truly accessible. SSCE has supported the RTO concept and, ironically, SSCE's other QFs operating outside of RTO's will be in a better position to profit from co-generation. Unless the host utility is required to take co-generated power at its avoided cost or insure that it can transmit the co-generated power for the purpose of sale to alternative markets at a cost to the co-generator equivalent to its avoided cost, then FERC will have penalized co-generators in RTO areas and

thereby further discouraged co-generation and defeated the purpose of PURPA. If implemented, FERC's proposed new Section 210(m) Regulations would 1) negatively impact our current situation, and 2) discourage us from developing any cogeneration projects and 3) specifically result in continued idle co-generation capacity at the SSCE facilities in the PJM service area.



Charles Scott Ackel

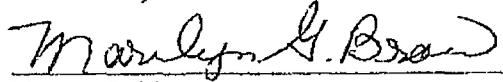
Signature

STATE OF Florida  
St. John County, ss

March 23, 2006

Personally appeared the above-named, in his/her capacity as of, and made oath that the foregoing statements by him/her subscribed are true to the best of his/her personal knowledge, information and belief and to the extent based upon information and belief, he/she believes it to be true.

Before me,



Notary Public

Print name: MARILYN G. BROWN

My commission expires: 10/27/06

MARILYN G. BROWN  
Notary Public, State of Florida  
My comm. exp. Oct. 27, 2006  
Comm. No. DD 161202

# EXHIBIT 4

**UNITED STATES COURT 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**

**AFFIDAVIT OF Lloyd B. Webb** , being duly sworn, deposes and says:

1. Person's Full Name.

My name is Lloyd B. Webb.

2. Description of industrial undertaking, process and company.

I am a Procurement Manager at Eastman Chemical Company. My business address is 200 S. Wilcox Drive, Kingsport, TN 37662. As Procurement Manager, Power, I am responsible for the procurement and sale of electricity for Eastman Chemical Company's facilities within PJM, SPP and SERC. Our facilities produce intermediate products used in the chemical, plastics and fibers intermediate and end-use markets. My activities include the negotiation of direct supply and sales contracts, standby agreements, interconnection agreements, and any contracts associated with the supply or sale of electricity. I also represent company interests at state utility commissions and as a representative to industrial user groups. I direct legal activities in conjunction with FERC and State Commission interventions.

3. Description of use of cogeneration by company and importance of cogeneration to efficiency.

Eastman cogenerates at our facilities in PJM and SPP. These are qualifying facilities. We also have a third party cogenerator at one of our sites in SERC that supplies steam to our chemical facility. This facility is also a qualifying facility. All of these cogeneration facilities were built to serve our facilities with baseload steam and in the case of our sites in PJM and SPP, baseload electricity. We also have less efficient stand-alone steam generation at these sites to provide backup if we are unable to generate sufficient steam from the cogeneration units. Our facilities in PJM and SPP have multiple generators and we operate them such that they provide steam and electricity to meet the load requirements. We have surplus electricity generation at the SPP site. The PJM site is a net purchaser of electricity although we are currently applying to PJM for an interconnection that would allow us to sell energy and capacity into PJM.

4. Importance of must take obligation to selling output successfully and of FERC required standby and backup power to operations.

We exercise our PURPA PUT rights at the SPP facility. We "put" power under a state avoided cost tariff continually to prevent from being subjected to imbalance charges which are anywhere from 30% to 500% higher than market prices. Given the restrictive market in SPP, we also "put" our entire ramp-up and ramp-down power. All of the "put" power sold in SPP is at the utilities avoided cost which is either at or below the current SPP market price. We also rely on the local utility to supply maintenance back-up and standby power under the state tariffs if we lose our generation. If we were to lose these backup options and were forced to purchase high-priced backup power out of the SPP imbalance market, we could be forced to

shut down all or part of our chemical facility. SPP market prices in the summer of 2005 often exceeded \$80/MWh. If we were forced to take power at these prices from the imbalance market for an extended shutdown of our generation, we could be forced to shut down part or all of our chemical facility. Although current SPP reserve margins are adequate, they are not in our local control area and we anticipate higher than market prices in our area until additional generation or transmission is built. Given that average imbalance market prices are higher than the current just and reasonable prices we have under our back-up agreements, we expect given the opportunity, the local utility will cancel our back-up contracts so they can free up that energy and capacity for sale into the SPP Day 1 markets.

Our PJM facility has backup and emergency backup contracts that were negotiated as bilateral agreements as the state where these facilities reside does not have QF backup tariffs in place. We run the same risks at our PJM facility as we do at our SPP facility as noted above.

We disagree with some filers who express the opinion that sufficient liquidity exists in the Day 1, Day 2 and bilateral markets to support terminating QF rights. Although markets such as the IntercontinentalExchange list hubs where you can transact physical and financial deals, the existence of the hub does not guarantee sufficient liquidity exists at these hubs. You will find on reviewing the numbers that some hubs do show liquidity while others are illiquid. An industrial QF that is located in the vicinity of an illiquid hub is exposed to counterparties exerting monopsony power.

Many industrials have discovered that counterparties are only willing to enter into bilateral contracts when the pricing reflects the forward curve for power or gas. As industrials very often have the same level of access to the markets as the counterparty, the best option for the industrial is to buy their own power rather pay the third party to source the electricity and pay

additional margin and administrative costs. Buying power directly exposes the industrial to the illiquid hub issue noted in the above paragraph.

5. Statement of Concern/Opinion regarding the availability of alternative sales

opportunities (other than to the utility) in your region. Including such observations as you are not in the business of selling electricity but of producing other products etc.

Although the Day 1 market design in SPP will allow for a replacement market for our PURPA PUT, we fear if the imbalance market functions as it has in other regions, we could face the risk of seeing negative prices during ramp-ups and ramp-downs even though the current avoided costs suggests this should never happen. If incumbent utilities decide to continue to maximize their generation and we sell a 16 hour schedule one or two wheels away, we may be forced to sell the ramp up and ramp down power at a negative price if the only market for the power is the local imbalance market. Also, there are occasions when we are forced to generate excess power to balance our steam loads. Given the efficiency of cogeneration versus using our stand-alone boilers, we will over-generate and "put" the excess power rather than shut down our cogeneration and generate steam from our stand-alone boilers and take standby power from the utility. With no PURPA PUT right, we could be forced to shut down our cogeneration and generate steam from our less efficient stand-alone boilers. We could be forced to shut down part of the chemical facility and shed load if we had to buy expensive backup power from the imbalance market.

Our experience of bidding into local non-utility RFPs has been less than encouraging – especially when competing with the local utility. Our bid ended up requiring millions of dollars of system upgrades as determined by the local utility who was also bidding into the RFP. The end result was our product was priced out of the market. As long as utilities own

generation and own, operate and control transmission in any of the markets (organized or otherwise), the opportunity for discrimination exists. We also experienced constant congestion when we bid our unit into the neighboring western SERC footprint. This continued even after a nearby generation unit that was serving this region (and was previously owned by the utility serving this region) experienced a catastrophic failure and was taken out of the market.

PJM recently completed a reliability interconnection study for our PJM facility. The reliability study which was conducted not by PJM but by the local utility's engineering staff, took twice as long as was originally projected and the findings were cursory at best. We need to decide if we want to continue with this process given at this point, the utility appears to lack motivation to support an interconnection. Neither PJM, Eastman nor any of the potential load we would serve has any recourse to incent the local utility to move this request along at a reasonable pace.

6. Concerns with overall efficiency in the use of gas and other energy products. Concerns with growing shortage of availability of other fuels and the high cost of other fuel.

Statement of belief that the elimination of PURPA protections at such a time is unsound energy policy.

We have all experienced the drastic run-up in fuel and power costs. Given the higher costs of fuels, it is critical that we use the most economical and efficient technology to supply steam and electricity to our plants. This must be underpinned by markets that support these objectives. PURPA recognized and supported these goals. Unfortunately, the current path forward does not. If FERC implements the current QF rulemaking, it puts at risk the

economics of existing cogenerators. If we cannot run our cogeneration units within their acceptable design operating range to realize acceptable heat rates (which current PURPA protections allow), we may be forced to shut down our cogeneration units and revert to buying power from the local utilities and operating our stand-alone boilers even though in the end, this will result in a higher consumption of fuels.

Opportunities exist to develop cogeneration units at other sites. With the current move to terminate PURPA rights, too much uncertainty exists to consider developing these projects and the current risk/reward equation favors generating steam from stand-alone boilers and buying electricity from the local utility.

7. Statement that all of the above is true to the best of your knowledge information and belief.

The undersigned states that all of the above is true to the best of my knowledge, information and belief.

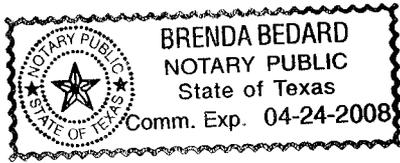
8. Notarization of Affidavit (see sample below).

Lloyd B. Welch Signature

STATE OF TEXAS  
Harrison County, ss

March 23, 2006

Personally appeared the above-named, in his/her capacity as of, and made oath that the foregoing statements by him/her subscribed are true to the best of his/her personal knowledge, information and belief and to the extent based upon information and belief, he/she believes it to be true.



Before me,

Brenda Bedard

Notary Public

Print name: Brenda Bedard

My commission expires: 4-24-08