

**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

**SECOND SUPPLEMENTAL COMMENTS OF
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON)**

The Electricity Consumers Resource Council (“ELCON”) offers this second set of supplemental comments concerning FERC’s pending proposal to implement Section 210(m) of the Public Utility Regulatory Policies Act (“PURPA”) as mandated by the Energy Policy Act of 2005 (“EPAct 2005”). These supplemental comments provide ELCON’s proposed criteria for determining whether Qualifying Facilities (“QFs”) have meaningful, non-discriminatory access to markets in which to sell capacity and energy. We propose these factors without prejudice to our position, as expressed in our earlier comments,¹ that PURPA Section 210(m)(1)(A) requires that FERC process utility requests for waiver from QF purchase obligations on a facility-specific basis, including in the four organized markets with approved RTOs.

These criteria are needed to ensure that QFs have market access. PJM, for example, recently recognized in its comments on the OATT rulemaking proposal that even the proposed changes would “not go far enough to mitigate vertically integrated utilities’ incentives to impede their competitors’ access to markets” and that changes “are crucial to providing all parties the access to the grid they require to have a true opportunity to engage in competitive, real-time

¹ Comments of ELCON dated February 21, 2006, our reply comments with the American Forest & Paper Association (“AFPA”), dated March 24, 2006, and our first supplemental comments, dated August 25, 2006, in Docket No. RM06-10.

transactions.” Comments of PJM Interconnection, LLC, Docket No. RM05-25 (Aug. 7, 2006) at 2.

Proposed Criteria

ELCON proposes that the Commission consider the following factors in determining whether a QF has meaningful, non-discriminatory access to markets in which to sell capacity and energy: (1) size of the QF and whether it is connected at distribution voltage; (2) protection of QF and its thermal host; (3) access to interconnection; (4) access to transmission; (5) access to long-term contracts; (6) adequacy of representation on governing boards; and (7) determination that competitive conditions exist and that there is no discrimination in transmission and interconnection services by an independent compliance monitor.

Small Qualifying Facilities and Qualifying Facilities Connected at Distribution Voltage

Appropriate presumptions would be that QFs connected at distribution voltage and QFs below 20 MW lack nondiscriminatory market access. As ELCON and other commenters have observed, small QFs cannot be presumed to have access to markets. A small QF effectively may not have nondiscriminatory access to markets because its thermal and electrical demands are highly variable on a daily basis, its wholesale sales are unpredictable, or it has no access to a mechanism to schedule transmission service or make sales in advance on a consistent basis, either because of the variability of its electricity production or because of market rules that prevent the QF from scheduling transmission service or participating in organized markets. Reply Comments of ELCON and AF&PA (Mar. 24, 2006) at 20-21. *Cf.* Edison Electric Institute (“EEI”) Supplementary Reply Comments, Docket No. RM06-10-000, at 4-5 (May 26, 2006) (proposing similar, though more restrictive criteria). 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 ¶ 918 (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).) In addition, while the problem of discrimination in transmission is pervasive, generally QFs connected at distribution voltage certainly do not have access to markets. (The scenario of QFs connected at distribution voltage and the circumstances of small QFs illustrate why generic conclusions are inappropriate.)

Protection of QF and Thermal Host

It is essential that the thermal host of a QF will be held harmless if the waiver is granted, that is, the waiver does not restrict in any way the QF’s ability to generate thermal energy to serve the host load. Moreover, as a threshold matter, two or more providers unaffiliated with the host utility should be willing and able to deliver standby and backup power to the QF at just and reasonable rates (as established by the Commission regulations under §292.305 of its Rules), or there should be a demonstration that a requirement to provide Standard Offer or default service establishes a continuing obligation to serve for purposes of section 210(m)(5).

Access to Interconnection

Market access requires access to interconnection. The current pro forma OATT was designed for an industry structure preceding the rise of merchant generators. Merchant generators, including QFs, generally construct facilities before entering into agreements with specific customers of the electrical output. Both types of generators require access to interconnection services (i.e., a physical connection to the transmission providers network) before, and separately from, delivery services (i.e., the actual delivery of power to specific

customers). Absent such interconnection services a QF obviously lacks access to the market. Interconnection agreements between QFs and the host utility must be on an equal footing with such agreements (or equivalent) with any merchant or utility-owned generator.

Access to Transmission

Market access requires access to transmission. Many QFs, regardless of the existence of an OATT, do not have non-discriminatory market access because of continuing discrimination in transmission access. The need for the host utility to establish that all QFs have the ability to deliver capacity and electric energy to the wholesale market is particularly acute where a persistent lack of available transmission has restricted the QF from that market and required each such QF to make sales to the host utility it is interconnected with pursuant to the mandatory purchase obligation under section 210. Available transmission must be sufficient to provide access to competitive wholesale markets for long-term, short-term, and real-time sales of capacity and electric energy.

FERC itself has acknowledged that the OATT does not accord all market participants nondiscriminatory access in its recent Notice of Inquiry seeking comments on proposed reforms to the pro forma OATT. 112 FERC ¶61,299 (Sept. 16, 2005), Docket RM05-25-000. Moreover, EEI recognizes that, even in areas where an OATT may be in effect, a QF may lack access to transmission.

[A] QF effectively may not have nondiscriminatory access to markets ... where an existing QF is located in an area in which persistent transmission capacity constraints effectively cause the QF to have neither physical nor financial access to markets outside the persistently congested area and there is not a sufficient opportunity to relieve the transmission constraint or to sell its output or capacity within the area on a short-term and long-term basis because of the transmission constraint.

EEI Supplementary Reply Comments, Docket No. RM06-10-000, at 4-5 (May 26, 2006)

(footnotes omitted). PJM Interconnection also concedes the continued existence of significant

“inequity, discrimination and free rider-ship” under the present OATT regulations. Reply Comments of PJM Interconnection, L.L.C., Docket Nos. RM05-25-000 and RM05-17-000, at 17-20 (Sept. 20, 2006). *See also* Comments of PJM Interconnection, L.L.C., Docket Nos. RM05-25-000 and RM05-17-000, at 24 (Aug. 7, 2006) (“Market Access Requires More Than Non-Discriminatory Access To Interconnection And Transmission Services; It Requires ‘Open Dispatch.’”); Comments of PJM Interconnection, L.L.C., Docket No. RM05-25-000, at 3 (Nov. 22, 2005) (“PJM recognizes that additional improvements are needed in its market design.”).

As PJM recognizes, one of the most important means by which FERC can improve access to transmission services is the requirement of an open dispatch requirement. In absence of open dispatch, transmission providers remain free to discriminate against QFs, and in favor of their own generation assets. Such discrimination undermines both full market access by QFs and the intent of Congress. ELCON fully endorses the sentiments expressed by EPSA with respect to the absence of an open dispatch requirement:

There is something fundamentally wrong when consumers are denied the use of newer, cleaner, less expensive power plants (which Congress sought in authorizing wholesale competition) because the transmission system is being utilized by older, less efficient plants affiliated with transmission providers.

EPSA Reply Comments, Docket Nos. RM05-25-000 and RM05-17-000, at 14 (Sep. 20, 2006). Needless to say, this sentiment applies even more strongly to QFs than other merchant generators. The absence of an open-dispatch requirement should be a factor weighing heavily against a finding of sufficient market access by QFs.

An additional obstacle to full and fair market access faced by QFs powered by wind and other intermittent power sources are imbalance penalties permitted under Order 888 pro forma tariffs. *See* Joint Reply Comments of Public Interest and Renewable Energy Organizations, Docket Nos. RM05-25-000 and RM05-17-000, at 4 (Sept. 20, 2006) (“Permitting utilities to

impose imbalance penalties that have no relation to the costs incurred to offset imbalances both limits the ability of such resources to compete in power markets and effectively authorizes discrimination against intermittent technologies. In addition, facing imbalance penalties cannot incent a wind generator to meet scheduled production when the wind is not blowing.”).

Access to Long-Term Contracts

Market access requires access to long-term contracts. An important issue that FERC needs to address in implementing Section 210(m) is the appropriate definition of “long-term.” In the context of this rule-making, FERC has suggested that “long-term” may mean as little as one year. We submit that long-term markets are markets of at least 10 and up to 20 or 30 years duration.

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. For example, 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.

See Reply Comments of ELCON and AF&PA (Mar. 24, 2006) at 11-13. QFs historically have relied on long-term contracts to attract project finance. The existence of an OATT and/or a day-ahead and real time market is not sufficient.

Adequacy of Representation of QFs on Governing Boards

Market access requires QF representation on governing boards of ISOs and RTOs. To ensure continued fair and equitable treatment of QFs by ISOs or RTOs, QFs must be given the same opportunity as other generators to be represented on the governing bodies of the ISOs and RTOs. This procedural requirement, in addition to the substantive requirements listed above, helps to prevent the ISOs or RTOs from circumventing the substantive requirements of market access in new, yet unconsidered ways.

Market Monitoring

As a prerequisite to FERC action, certification by an independent monitor should establish that the host utility's procedures for offering transmission services under its OATT and interconnection services pursuant to Orders No. 2003 and 2006 (and subsequent orders on rehearing) are done on a nondiscriminatory basis and without regard to ownership, technology, or fuel. These competitive attributes of the wholesale markets necessary to support relief from the mandatory purchase obligation are similar under all three tests as required by (i) section 210(m)(1)(C); (ii) the Commission's continuing duty to encourage QFs, and (iii) the Commission's own precedent regarding the importance of truly competitive markets in establishing just and reasonable rates for all sellers and consumers including QFs and their thermal hosts. The purpose of the procedure we propose is not to demonstrate or validate the reasonable expectations of a truly competitive market. Almost everyone expects truly competitive markets to provide a greater range of services and products, innovation, and opportunities for cost savings than regulation. ELCON's proposal is more limited and only attempts to protect the thermal host and preserve reasonable market access—as was the original intent of PURPA in 1978.

Here, ELCON proposes that an independent OATT/Interconnection compliance monitor (OCM) ensure that there is no discrimination in transmission and interconnection services. QFs would be given one of the following options: (1) provide the host utility with a list of qualified entities to be the OCM, or (2) have the right to approve the host utility's choice of the OCM. This entity must also be independent of the ISO or RTO. It is clear, for example, that at least one RTO (PJM) is not an impartial administrator and has, in effect, taken sides in this debate. See Reply of PJM Interconnection, L.L.C. to the Supplemental Comments of the Electric [sic] Consumers Resource Council, Docket No. RM06-10-000, September 14, 2006.

In conducting its review, the OCM should review the following:

- a. Buyers (e.g., LSEs, direct access consumers, thermal hosts of QFs, and power marketers) and sellers should reach reasonable price and delivery terms, based on fundamental market forces, under varying operational, supply and demand conditions. There are two components to this assessment. First, the OCM should determine that the wholesale market produces prices that over time will allow the recovery of variable and fixed cost as well as a return on investment that is consistent with the underlying business risk. Second, the OCM should test and evaluate the market and its liquidity over time, times of day, seasons, and varying operating conditions, including periods of tight supply. The existence of reasonable price and delivery terms would sustain the economic viability of the QF and its thermal host and preserve options for new investments, regardless of technology or fuel.
- b. There should be an absence of market power in location or time in the host utility footprint or sub-region thereof from any participant, especially the utility itself and its affiliates. Sufficient number of buyers and suppliers should exist in each segment of the market -- e.g., for long term (over 10 years and up to 20 or 30 years), monthly, balance of the month, weekly, balance of the week, day-ahead, hour ahead and real time markets -- to demonstrate that market power has been mitigated. No single buyer or seller should be a price maker in the market or sub-region of the market where any QF competes.²
- c. Transaction terms should vary and include a meaningful quantity of long-term transactions at least equivalent in length to the long-term firm transmission rights

² As an example of a market segment liquidity problem in California, Pacific Gas & Electric Company has acknowledged in a proceeding before the California Public Utilities Commission that its day-ahead transactions in the NP 15 market segment are approximately 50% of that market. *See*, Vol. 24 Tr. 3598-3599 (Coffee, PG&E) January 25, 2006 -- Consolidated Avoided Cost Proceeding R.04-04-025 and Long-Term Policy for Expiring QF Contracts-R.04-04-003. The fact that a single buyer represents 50% of a market segment demonstrates that segment of the market is not sufficiently liquid and robust.

provided pursuant to Order No. 681, indicating that the market is not materially dependent on volatile short-term spot purchases. Prevailing market conditions recognize and value the reliable long-term delivery of capacity and electric energy to the grid by nondispatchable QF operations. The market should provide real, workable and economic substitutes for existing PURPA must-take and full avoided-cost pricing obligations. The test of any such market is the maintenance of comparable procurement and market share for existing and new QFs.

- d. There should be sufficient market liquidity to support (i) energy market transparency and price discovery, such as would be evidenced by a liquid futures market; and (ii) an efficient allocation of financial transmission rights; e.g., any allocation of FTRs does not consume so much of the available inventory to effectively eliminate competitive trading.
- e. In situations where the host utility's uncommitted generation or affiliated generation, or marketing affiliate, competes with any sale of capacity and electric energy of a QF, there should be sufficient functional separation between the host utility and the other functions.

In order for the OCM to conduct its analysis, the host utility must provide it with data that establishes that each QF in its service territory will be able to deliver capacity and electric energy to wholesale markets on a non-discriminatory basis. The requisite transmission-related data should include, at a minimum:

- a. Clear and specific definitions and descriptions of each real-time, short- and long-term market for capacity and electric energy that the host utility claims in its 210(m) application that QFs that are interconnected with it are able to access on a nondiscriminatory basis, including the physical points of access to the market on the utility's transmission system;
- b. Clear and specific descriptions of each transmission model that is used to demonstrate that any such QF can deliver capacity and electric energy for the life of the QF facility to support long-term, short-term and real-time sales in each "wholesale market" defined under Section 210(m). The amount of capacity and/or electric energy modeled should equal the amount(s) set forth in any effective interconnection agreement between the host utility and the QF or, if an interconnection agreement does not exist or does not provide the relevant data, the QF's current FERC Form 556 on file with FERC;
- c. An explanation of all of the input data and assumptions used in the transmission models that determine the deliverability of any such QF's sales of capacity and electric energy;
- d. Specific identification and description of transmission constraints that prevent or may prevent the QF from delivering capacity and electric energy to the wholesale market that the host utility claims the QF can access on a nondiscriminatory basis; and

- e. Record of all complaints filed by QFs, State Commissions or merchant generators with FERC in the previous 5 years regarding application of the OATT, local market rules, or interconnection matters, including all disputes by such parties pending but not yet filed.

Finally, all QFs in the host utility's service territory should have a reasonable opportunity (e.g., 60 days) to review and comment on the OCM's determination before it is filed with the Commission.

Appended to this comments is a summary version of these comments identifying the factors that would underlie a sound determination whether a QF has meaningful, non-discriminatory access to markets in which to sell capacity and energy and the role of the OCM.

Notices and Communications

Notices and communications with regard to these proceedings should be addressed to:

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APPENDIX

CRITERIA FOR A WAIVER UNDER SECTION 210(m)(1) or 210(m)(3)

The host utility in an organized market, or group of host utilities filing jointly, seeking a waiver under section 210(m)(1) or 210(m)(3), must provide in the FERC application(s) seeking such waivers:

1. A demonstration that the dispatch of generation in the control area is independent of generation ownership, technology or fuel (e.g., utility-owned generation is not treated in any preferential manner).
2. A demonstration that QFs have equal representation to other generators in all applicable ISO or RTO stakeholder processes.
3. An independent OATT/Interconnection compliance monitor (OCM) certifies that the host utility's procedures for offering transmission services under its OATT and interconnection services pursuant to Orders No. 2003 and 2006 (and subsequent orders on rehearing) are done on a nondiscriminatory basis and without regard to ownership, technology, or fuel. QFs would be given one of the following options: (1) provide the host utility with a list of qualified entities to be the OCM, or (2) have the right to approve the host utility's choice of the OCM. The OCM shall make the following determinations:
 - a. Available transmission is sufficient to provide access to competitive wholesale markets for long-term, short-term, and real-time sales of capacity and electric energy.
 - b. Interconnection agreements between QFs and the host utility are on an equal footing with such agreements (or equivalent procedures) with any merchant or utility-owned generator.
 - c. The competitive attributes of the wholesale markets necessary to support relief from the mandatory purchase obligation are similar under all three tests as required by (i) section 210(m)(1)(C); (ii) the Commission's continuing duty to encourage QFs, and (iii) the Commission's own precedent regarding the importance of truly competitive markets in establishing just and reasonable rates for all sellers and consumers including QFs and their thermal hosts.
 - d. Buyers (e.g., LSEs, direct access consumers, thermal hosts of QFs, and power marketers) and sellers reach reasonable price and delivery terms under varying operational, supply and demand conditions. This means the market and its liquidity must be tested and evaluated over time, times of day, seasons, and varying operating conditions, including periods of tight supply, to insure that prices, terms and conditions are the result of fundamental market forces.
 - e. That the thermal host of a QF will be held harmless if the waiver is granted, that is, the waiver does not restrict in any way the QF's ability to generate thermal energy to continue to serve the host load.

- f. Two or more providers unaffiliated with the host utility are willing and able to deliver standby and backup power to the QF at just and reasonable rates (as established by the Commission regulations under §292.305 of its Rules), or a demonstration that a requirement to provide Standard Offer or default service establishes a continuing obligation to serve for purposes of section 210(m)(5).
 - g. Reasonable price and delivery terms exist such that the economic viability of the QF and its thermal host are sustained and options for new investments, regardless of technology or fuel, are not precluded. For example, this could be accomplished with a demonstration that the wholesale market produces prices that over time will allow the recovery of variable and fixed costs as well as a return on investment that is commensurate with the underlying business risk.
 - h. Transaction terms should vary and include a meaningful quantity of long-term transactions at least equivalent in length to the long-term firm transmission rights provided pursuant to Order No. 681, indicating that the market is not materially dependent on volatile short-term spot purchases.
 - i. Prevailing market conditions recognize and value the reliable long-term delivery of capacity and electric energy to the grid by nondispatchable QF operations. The market must provide real, workable and economic substitutes for existing PURPA must-take and full avoided-cost pricing obligations. The test of any such market is the maintenance of comparable procurement and market share for existing and new QFs.
 - j. Sufficient market liquidity to support energy market transparency and price discovery. Evidence of this could be a liquid futures market.
 - k. An absence of market power in location or time in the host utility footprint or sub-region thereof from any participant, especially the utility itself and its affiliates. There must be a determination that no single buyer or seller is a price maker in the market or sub-region of the market where any QF competes.
 - l. Sufficient market liquidity to support an efficient allocation of financial transmission rights; e.g., any allocation of FTRs does not consume so much of the available inventory to effectively eliminate competitive trading.
 - m. Sufficient number of buyers and suppliers exist in each segment of the market to demonstrate that market power has been mitigated; e.g., for long term (over 10 years and up to 20 or 30 years), monthly, balance of the month, weekly, balance of the week, day-ahead, hour ahead and real time markets each segment must not be dominated by a single seller or buyer.
4. In situations where the host utility's uncommitted generation or affiliated generation, or marketing affiliate, competes with any sale of capacity and electric energy of a QF, there is irrefutable evidence that there is sufficient functional separation between the host utility and the other functions.
 5. In order for the OCM to fulfill its obligation, the host utility must provide it with data that establishes that each QF in its service territory will be able to deliver capacity and electric energy to the wholesale market that the host utility claims each such QF can access on a

non-discriminatory basis. The requisite transmission-related data shall include, at a minimum:

- a. Clear and specific definitions and descriptions of each real-time, short- and long-term market for capacity and electric energy that the host utility claims in its 210(m) application that QFs that are interconnected with it are able to access on a nondiscriminatory basis, including the physical points of access to the market on the utility's transmission system;
 - b. Clear and specific descriptions of each transmission model that is used to demonstrate that any such QF can deliver capacity and electric energy for the life of the QF facility to support long-term, short-term and real-time sales in each "wholesale market" defined under Section 210(m). The amount of capacity and/or electric energy modeled should equal the amount(s) set forth in any effective interconnection agreement between the host utility and the QF or, if an interconnection agreement does not exist or does not provide the relevant data, the QF's current FERC Form 556 on file with FERC;
 - c. An explanation of all of the input data and assumptions used in the transmission models (such that the results can be independently replicated and verified) that determine the deliverability of any such QF's sales of capacity and electric energy;
 - d. Specific identification and description of transmission constraints that prevent or may prevent the QF from delivering capacity and electric energy to the wholesale market that the host utility claims the QF can access on a nondiscriminatory basis; and
 - e. Record of all complaints filed by QFs, State Commissions or merchant generators with FERC in the previous 5 years regarding application of the OATT, local market rules, or interconnection matters, including all disputes by such parties pending but not yet filed.
6. Utility generation (including affiliated generation) is not preferentially treated under any state or local law or regulation. If any QF is discriminated against in this manner, the host utility is automatically disqualified from receiving a waiver under section 210(m).
 7. All QFs in the host utility's service territory have a reasonable opportunity (e.g., 60 days) to review and comment on the OCM's determination before it is filed with the Commission.