

**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

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

The Electricity Consumers Resource Council (“ELCON”) offers these 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 (“EPAAct 2005”).

I. Introduction

The Commission’s January 19, 2006 proposed rule to implement new PURPA Section 210(m) provides for the termination of public utilities’ mandatory purchase requirements with respect to QFs located in organized markets that meet specific EPAAct 2005 criteria. FERC’s proposed rule would presume that all Day One and Day Two ISO and RTO markets meet the statutory criteria for termination of the purchase obligation. Under the proposed rule, existing QFs would also be at risk of losing their PURPA rights upon the termination of their contracts, and utilities’ obligation to sell back-up power could be terminated.

A consistent theme in the comments of ELCON, other consumers and cogenerators¹ is that competitive capacity and energy markets do not yet exist, that in formulating the rules FERC has ignored the statutory scheme of PURPA, and that implementation of the proposed rules will have a devastating effect on existing QFs and significantly reduce the number of new QFs (e.g. energy efficient, environmentally friendly cogeneration) that will be developed as well as have a negative impact on power consumers. Thus, there is a broad impact on society as a whole. Several Congressmen have submitted comments in this docket to the same effect.² EEI, PJM and the Public Interest Organizations (“PIOs”) have filed supplemental comments providing additional information and, particularly in the case of EEI’s comments as supplemented by PIOs’ views, make new suggestions for addressing the mandatory purchase obligation under Section 210(m) that recognize problems with the proposed rule’s generic findings and provide a useful starting point toward making the final rule consistent with FERC’s statutory mandate.

¹ See, eg, comments submitted by the American Chemistry Council, American Iron and Steel Institute, Council of Industrial Boiler Owners, Dow Chemical Corporation, The Fertilizer Institute, Occidental Chemical Corporation to Docket RM06-10.

² Senators Alexander, Carper and Collins submitted a letter in this docket expressing concern that the NOPR “is based on ‘expectations’ about the competitive quality of a market without any examination of how well that market functions for QFs.” They point out that “Congress requires the Commission to make a fact-based, evidentiary finding that the enumerated criteria of the relevant market test actually exist with respect to each application for relief.” They also voiced misgivings about FERC’s apparent shifting of the burden of proof to the QFs, stating that the statute was drafted with the intent that each utility applying for relief from the purchase requirement has the burden of demonstrating that “the market in question actually operates in an open, fair and fully competitive manner.” Congressmen Boucher, Pickering and Brown also submitted a letter to FERC expressing concerns about the approach taken in the NOPR. Former Congressman Ottinger submitted his comments as one of the original co-authors of PURPA. He stated: “[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 to competitive wholesale markets is essential to implementation of both Acts, and EPAct 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.”

The purpose of these supplemental comments is to apprise the Commission of the findings by the Delaware Cabinet Committee on Energy that competitive markets are not working in the State -- an indication why automatically terminating utility purchase and sale obligations in PJM and other RTOs is poor policy and inconsistent with the statute -- and to support the supplemental comments of the PIOs.

II. Brief Summary of ELCON's Prior Comments

ELCON has commented on the instant NOPR by filing initial comments (on February 21, 2006) and reply comments (with AF&PA on March 24, 2006). In these comments, ELCON stated that FERC goes too far with its generic findings in favor of widespread elimination of PURPA's mandatory purchase obligations.

ELCON maintained that before waiving utility purchase obligations, FERC has a statutory obligation imposed by Congress that it "[must] make a facility-specific determination that non-discriminatory access to long-term markets truly exists." Organized markets are not sufficiently developed to enable a generic finding that all QFs in regions with such markets have access to long-term power supply contracts.

The proposed rule would establish presumptions that (1) four Commission-approved regional markets are sufficiently competitive to provide any QF fully liquid and competitive markets for its power in terms of both short-term and long-term energy and capacity, and (2) all QFs located in the service territory of any member utility with an OATT on file at the Commission have a transparent and workable gateway to that market. ELCON believes that the proposed rule contradicts the clear Congressional intent to require a showing that relevant competitive markets are available to QFs via

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 Day 2 markets. Since Order No. 2000 and FERC RTO precedent do 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 its local utility's purchase obligation. 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 need multi-year long-term contract opportunities and that QFs (especially cogeneration facilities) may not have the operational flexibility of merchant generation.³

The NOPR also paves the way to categorically eliminate 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 the non-discriminatory access to the transmission and interconnection services contemplated by Section 210(m)(1)(B). However, this presumption of non-discriminatory access is made in practical effect irrebutable since FERC also proposes

³ It would also 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).

that even if a utility has not properly implemented or administered its OATT, this evidence cannot be used to rebut the presumption of non-discriminatory access.

In fact, contrary to the NOPR, the existence of an OATT does not provide support for FERC's categorical conclusion that QFs, in fact, have meaningful access to markets in which to sell capacity and energy. Lack of access can result from intentional discriminatory treatment or insufficient transmission capacity. 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 compete actively in wholesale markets or obtain transmission service.

III. Supplemental Comments

A. Edison Electric Institute

On May 25, 2006, the Edison Electric Institute (EEI) submitted supplemental reply comments to Docket RM06-10. In part, EEI's comments propose that the Commission recognize the following circumstances where a QF effectively may not have non-discriminatory access to markets:

(1) where a small industrial cogenerator (with a nameplate capacity of 5 MW or less) has:

(a) highly variable thermal and electrical demand on a daily basis;

(b) highly variable and unpredictable wholesale sales on a daily basis;

and

(c) 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;

(2) where a QF is very small, and cannot aggregate its electricity production with other nearby facilities, and can demonstrate that it is not directly or indirectly modeled in the energy management or market information system, cannot directly sell any product or service into the RTO or ISO market and appears to the RTO or ISO only as a reduction to load; or

(3) 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 Supplemental Reply Comments at 4-5.

B. PJM Interconnection

In response, PJM Interconnection subsequently filed supplemental comments objecting to EEI's proposal on the basis that it "does not differentiate between areas with organized markets and those without." Supplemental Comments of PJM Interconnection, June 22, 2006, at 3. PJM asserts that a QF in organized markets should be required to demonstrate unique circumstances to retain the mandatory purchase obligation and that EEI's proposal (at least for facilities of 100 kW or more) have no applicability to organized markets. PJM referenced a 2002 statement in the Congressional Record by Sen. Carper (D-Del.) to the effect that Delaware is a competitive electricity market where PURPA requirements are no longer needed.

C. Public Interest Organizations

PIOs' Supplemental Comments make three key points. First, EEI's new proposal inherently recognizes the problem with the proposed rule's broad, generic presumptions and the need for the Commission to find actual access by QFs to competitive markets. Second, contrary to the claims of PJM's supplemental comments, RTO administration of

day-ahead and real time markets does not assure the access needed by QFs. Third, PIOs propose an alternative approach requiring utilities that seek to terminate their mandatory purchase obligation “to demonstrate that they are using a non-discriminatory procurement process for short- and long-term capacity and energy to which QFs and other independent generators have full access.”

IV. ELCON’s Supplemental Comments

ELCON supports the PIOs’ position. A QF-specific review process is *required* under EAct 2005, not just optional. ELCON agrees that the Commission should presume that QF’s in the circumstances identified by EEI do *not* have access to competitive markets. Further, the Commission’s final rule should require the utility to demonstrate that the QF has real access because Section 210(m)(3) requires such a showing and because shifting the burden of proof to QFs is directly contrary to the goals of PURPA.

ELCON reiterates, and the PIOs agree, that the existence of day-ahead and real-time markets in PJM (and elsewhere) do not assure the availability of competitive long-term markets for the amounts and types of energy and capacity provided by all QFs in its region. The long-term capacity and energy markets and non-discriminatory backup power are most relevant for QFs and, despite the efforts of PJM and others, there is little evidence that access to these competitive markets is available to QFs and other energy producers. The Commission should presume QF access only where the local utility or regional power market can demonstrate that all QFs in the area have access to open, non-discriminatory resource procurement processes for long-term energy and capacity and backup power.

PJM incorrectly asserts that it operates an open, competitive market, citing Delaware as a specific example. There is growing recognition by economists and stakeholders that the experiment with wholesale and retail electricity competition has failed in FERC-approved organized markets because features of the market design are flawed and therefore real competition has not emerged.⁴ The obvious shortcomings are the failure to integrate demand in the real-time market, increasing regulatory intervention, asymmetric treatment of load and generation, and inadequate transmission infrastructure. But, in particular, there is a need to coordinate wholesale and retail market policies or “enormous consumer harm is possible.”⁵ Thus the success of wholesale and retail competition are mutually dependent. With no axe to grind on PURPA section 210(m), the Delaware Commission has recently issued a report on the state of the organized markets in Delaware that supports these concerns. Delaware Cabinet Commission on Energy, *Ensuring Delaware’s Energy Future: A Response to Executive Order No. 82* (Mar. 8, 2006).

The Executive Summary of the Report indicates that residential customers face an average increase in rates when caps are removed in May 2006 of 59% while businesses will see increases of 47-118%. The report concludes that rate increases are higher in Delaware than would have occurred under traditional regulation with the same fuel prices. Under traditional regulation, customers would benefit from fuel diversity and have lower rates. The PJM market design provides no offsetting benefits to the loss of fuel diversity in rates. Absent from the market are features of real competition that would

⁴ See, for example, Frank A. Wolak, “Why the United States Has Yet to Benefit from Electricity Industry Re-structuring,” July 11, 2006. From: ftp://zia.stanford.edu/pub/papers/wptf_new_york_jul06.pdf

⁵ Id. at 2.

work to offset the effects of having the highest price fuel on the margin. This includes demand response, elimination of barriers to new generation and transmission construction (such as locational market power), and coordination of retail and wholesale market designs. While higher prices, in and of itself, do not prove that competition does not work, it clear in this instance that competition was not allowed to work. ELCON urges that FERC acknowledge the flaws in the way markets were implemented in PJM and reflected by the Delaware report. Open, competitive markets must have robust demand response and little transmission congestion. Additionally, open, competitive markets can only exist when there is no generator participant with market power and where the market has liquid balancing energy, short term and long term energy markets to ensure QFs can contract their generation and obtain non-discriminatory backup power rates.

V. Good Cause Exists For Late Filing

Although the comment deadline has passed, FERC has received several late comments in this docket, from EEI, PJM, PIOs and now ELCON reflecting different perspectives on Section 210(m). We request that ELCON's comments be considered. The core issue in this proceeding relates to the state of competition in organized markets, making the presumption that QF's PURPA rights can be withdrawn unacceptable. The state of the markets is evolving, and until FERC determines that the requisite markets are workably competitive and available to QFs, we believe that it is appropriate for FERC to consider and evaluate the latest evidence on continuing problems in organized markets and the impact such problems have on non-utility generation and consumers.

VI. Description of ELCON

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

Notices and Communications

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