

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

New PURPA Section 210(m) Regulations)
Applicable to Small Power Production and) Docket No. RM06-10-000
Cogeneration Facilities)

**REQUEST FOR REHEARING OF
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL (“ELCON”),
AMERICAN IRON AND STEEL INSTITUTE (“AISI”),
AMERICAN CHEMISTRY COUNCIL (“ACC”), AND
THE COUNCIL OF INDUSTRIAL BOILER OWNERS (“CIBO”)**

Pursuant to Rules 212 and 713 of the Rules and Regulations of the Federal Energy Regulatory Commission (the “Commission”), the Electricity Consumers Resource Council (“ELCON”) the American Iron and Steel Institute, (“AISI”), the American Chemistry Council (“ACC”), and the Council of Industrial Boiler Owners (“CIBO”) (together, “Industrial Parties”) hereby move for rehearing of the Commission’s final rule concerning the criteria for relief applicable to utilities that seek relief from new purchase obligations from qualifying facilities (“QFs”).

I. OVERVIEW OF THE FINAL RULE

A. Criteria for Relief in the Four Organized Markets

The Final Rule finds that the Midwest ISO, PJM, ISO-NE, and NYISO all meet the criteria of section 210(m)(1)(A). These RTOs are independently administered and offer auction-based day ahead and real time wholesale markets for the sale of electric energy; and within the regions represented by these RTOs there is nondiscriminatory access to wholesale markets for long-term sales of capacity and electric energy.

The Final Rule creates three rebuttable presumptions:

(1) For all four of the above markets, with the exception of small QFs (below 20 MWs), the Final Rule finds that the existence of an OATT, or a reciprocity tariff filed by a non-jurisdictional utility, creates a rebuttable presumption that QFs have “nondiscriminatory access to” the relevant wholesale markets. To the extent that a QF raises issues about the adequacy of an electric utility’s implementation of an OATT, such issues are more properly addressed in a complaint proceeding and will not be considered in the context of petitions for the termination of mandatory purchase requirements. However, a QF may raise other issues, such as operational characteristics and transmission limitations, to attempt to rebut the presumption of market access when it files a response to an application submitted pursuant to section 210(m)(3) of PURPA and 18 C.F.R. § 292.310.

(2) For all four of the above markets, the Final Rule establishes a rebuttable presumption that QFs with a net capacity no greater than 20 MWs, do not have nondiscriminatory access to wholesale markets.

Unless an electric utility seeking the right to terminate its requirement to purchase small QF power specifically rebuts this small QF presumption, and that electric utility’s request is granted by the Commission, a small QF would be eligible to require the electric utility to purchase its electric energy.

(3) The Final Rule finds that the four RTO/ISOs with “Day 2” markets, i.e., the Midwest ISO, PJM, ISO-NE, and NYISO, qualify as markets under section 210(m)(1)(A) and establishes a rebuttable presumption that these organizations provide large QFs (above 20 MWs net capacity) interconnected with member electric utilities with nondiscriminatory access to the “Day 2” wholesale markets set forth in section 210(m)(1)(A). An electric utility member of one of these four RTOs filing for relief must submit certain information, including information about

transmission constraints within its service territory, in order to give potentially affected QFs information that may be useful in rebutting the presumption that they have access to all aspects of the applicable “Day 2” markets.

A QF above 20 MWs net capacity may rebut the presumption of nondiscriminatory access by showing that it in fact lacks access. Factors that may be sufficient to rebut the presumption include:

(1) The QF has certain operational characteristics that effectively prevent the QF’s participation in a market. Such operational characteristics might include, but are not limited to: (a) highly variable thermal and electrical demand (from the QF host) on a daily basis, such that the QF cannot participate in a market; or (b) highly variable and unpredictable wholesale sales on a daily basis.

(2) The QF 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 the QF’s electric energy production or because of market rules that prevent the QF from scheduling transmission service or participating in organized markets. Such operational characteristics might include, but are not limited to, dispatchability or some other characteristic.

(3) A QF lacks access to markets due to transmission constraints. A QF may show that it is located in an area where persistent transmission constraints in effect cause the QF not to have access to markets outside a persistently congested area to sell the QF output or capacity. In evaluating transmission constraints, the Commission will consider, on a case-by-case basis, among other things, the opportunity for QFs, on a nondiscriminatory basis, to obtain transmission upgrades to relieve constraints and whether the structure of the relevant market provides for the opportunity for the QF to sell notwithstanding the constraint.

FERC finds that a denial of actual access to distribution facilities for purposes of selling power into the wholesale market would constitute sufficient evidence to find that section 210(m) has not been satisfied (and hence to retain the mandatory purchase obligation). ¶89.

B. CAISO and SPP

FERC states that it would be premature to find now that the CAISO and SPP which have only “Day 1” markets would meet the criteria of section 210(m)(1)(A) once their ongoing market redesigns become effective. However, FERC finds that: the CAISO and SPP meet the section 210(m)(1)(B)(i) criterion because they are Commission-approved regional transmission entities that provide transmission and interconnection services pursuant to open access transmission tariffs that provide nondiscriminatory treatment to all customers. A member electric utility of the CAISO or SPP may rely on this finding in its application to be relieved of the obligation to enter into new contracts to purchase QF electric energy, but must make all the other showings required under section 210(m)(1)(B) before its request may be granted. ¶11.

C. ERCOT

The Final Rule finds that ERCOT meets the criteria of section 210(m)(1)(C).

D. Preservation of Existing Contracts

The Final Rule preserves the rights or remedies of any party under existing contracts or obligations, in effect or pending approval before the appropriate state regulatory authority or non-regulated electric utility on or before August 8, 2005, to purchase electric energy from or to sell electric energy to a QF.

E. Reinstatement of the Mandatory Purchase Requirement

The Final Rule also sets forth a process by which a QF may seek the reinstatement of the requirement to purchase electric energy, by showing that the conditions necessary for the removal of the requirement to purchase are no longer met.

F. Termination of the Requirement to Sell Electric Energy to QFs

The Final Rule provides for applications to remove the requirement to enter into new contracts to sell electric energy to QFs. The statute provides that if the Commission finds that competing retail electric suppliers are willing and able to sell and deliver electric energy to a QF, and the electric utility is not required by state law to sell electric energy in its service territory, the requirement to sell should be terminated. The Final Rule makes no findings or presumptions with respect to an electric utility's obligation to sell electric energy to QFs. QFs must have at least two competing suppliers who are not affiliated with the utility before the utility is relieved of its purchase obligations under section 201(m)(5). ¶201.

FERC clarifies that lifting of the PURPA obligation to purchase QF electricity for a particular utility does not relieve such utility of its obligation to sell supplemental, backup, and standby power. ¶200.

G. Reinstatement of the Requirement to Sell Electric Energy to QFs

Lastly, the Final Rule provides for applications to reinstate the requirement of an electric utility to sell electric energy to QFs, by showing that the conditions necessary for the removal of the requirement to sell are no longer met.

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

Industrial Parties believe that the final rule represents an improvement over the proposed rule in several important respects, among them that FERC will require utility filings in the four organized markets under section 210(m)(1)(A) allowing for case-specific adjudication.

However, significant issues remain that are the subject of this rehearing request.

(1) It is black letter law that under the Administrative Procedure Act, the applicant for relief has the burden of proof. In the four organized Day 2 markets, utilities should be required to show that QFs have access to transmission and access to markets. This is not a mere

technicality; utilities will have access to superior knowledge of transmission and long-term contract availability as against QFs large or small. Imposing the burden of proof on QFs would contravene the statutory purpose: PURPA has not been repealed, and FERC remains obligated to implement it.

(2) In all markets, FERC must impose a searching inquiry to determine whether there is meaningful access to transmission. The Final Rule notes that transmission constraints will be a means to challenge the availability of transmission access but takes off the table inquiry as to discrimination in transmission on the basis that OATT reform is a mere proposal. It would be anomalous to remove from consideration in determining access complaints of discrimination.

(3) FERC has made a commendable start in identifying three factors that QFs can employ to rebut the proposition that they have access to markets in the Day 2 markets. However, these criteria should be enhanced, for example to recognize that QFs that cannot sell 50MW blocks have only very limited access to financial markets, at disadvantageous terms.

(4) FERC erroneously assumes that Day 2 markets provide access to long-term markets. No such presumption is appropriate given that PJM, ISO-NE, NYISO, and MISO were certified as RTOs with nary a showing as to the adequacy of long-term markets.

(5) FERC's review of the showings that are required for utilities to be relieved of purchase obligations pursuant to section 210(m)(1)(B), in California as an example, must take into account that a competitive market cannot be found when there is no transparency or no retail access.

(6) Electric suppliers should not be relieved of their obligations to provide standby and backup power to QFs absent a showing of a competitive market.

III. REQUEST FOR REHEARING

A. Utilities Bear the Burden of Proof in the Four Organized Markets

1. FERC Has Improperly Subverted the Usual Rule, Statutorily Established in the Administrative Procedure Act, That the Applicant for Relief from an Obligation Has the Burden of Proof

In a recent case, the U.S. Court of Appeals for the District of Columbia observed:

Well-established FCC precedent imposes the burden of proof on the complainant in section 208 proceedings. So does our own. Such an allocation is consistent with the Administrative Procedure Act (APA), which takes into account the distinction between statutory provisions that do and do not mention the burden of proof, and which directs that: “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d). It is likewise consistent with the Supreme Court’s allocation of the burden of proof under the analogous provisions in the ICA [Interstate Commerce Act] and with our own allocation of the burden under the analogous provisions in the NGA [Natural Gas Act].

Hi-Tech Furnace Sys. v. FCC, 343 U.S. App. D.C. 138 (D.C. Cir. 2000). Among other statutory precedent, the Court in Hi-Tech cited Pub. Serv. Comm’n of New York v. FERC holding that “under § 4 [of the NGA] the company has the burden of showing that [its] proposed rates are just and reasonable, while under § 5 the Commission must show that the [filed] rates it would alter are not just and reasonable.... The unifying principle is that the proponent of change bears the burden.” 866 F.2d 487, 488 (D.C. Cir. 1989) and ANR Pipeline v. FERC, 771 F.2d 507, 513 (D.C. Cir. 1985) (discussing different burdens of proof under NGA).

2. An Agency May Not Use a Presumption to Shift the Burden of Proof if the Result Is Not in Keeping with the Statutory Purpose

For example, in a proceeding before the Interstate Commerce Commission involving an application for a contract carriers permit opposed by existing carriers, the agency put the applicant in the position of overcoming the presumption that “the service of existing carriers will be adversely affected by a loss of ‘potential’ traffic, even if they may not have handled it

before.” The Supreme Court held that the presumption put the Commission in the position of favoring the protestants over the applicant in violation of the agency’s statute:

By indulging in a presumption “that the services of existing carriers will be adversely affected by a loss of ‘potential’ traffic, even if they may not have handled it before,” and by assigning to the applicants the burden of proving the inadequacy of existing services, the Commission favored the protestants’ interests at the expense of the shippers’ in a manner not countenanced by anything discoverable in Congress’ delegation to it of responsibility.

ICC v. J-T Transp. Co., 368 U.S. 81 (1961). Congress did not repeal PURPA and its continued solicitude for the viability of QFs as an industry remains as an overarching mandate. It would run counter to the statute to impose the burden of proof on QFs when the relevant information concerning transmission and access to markets are likely in the possession of the utility rather than the QF.

3. FERC Lacks the Experience to Impose a Rebuttable Presumption in the Day 2 Markets

FERC’s application of a rebuttable presumption that the Day 2 markets provide access where QFs exceed 20 MW is not appropriate because FERC does not have sufficient experience to impose such a presumption. Implementation of section 210(m) is uncharted territory. In many regulatory contexts, FERC has acquired sufficient experience to apply a rebuttable presumption.

[I]n applying our new regulation implementing section 210(n)(1)(A)(i) of PURPA, § 292.203(d)(1) of our regulations, we will apply a rebuttable presumption that new cogeneration facilities that are 5 MW or smaller satisfy the requirement that the thermal energy output of the new cogeneration facility is used in a productive and beneficial manner. We will apply this presumption because it is our experience that such small cogeneration facilities are not generally designed with a “sham” use of thermal output whose only purpose is to achieve QF status. Rather, such smaller cogeneration facilities are designed to meet the thermal needs of the facility’s steam host and any electrical output available for sale is a byproduct of the thermal process.

FERC Revised Regulations Governing Small Power Production and Cogeneration Facilities, 18 C.F.R. §§ 131, 292 (2006), 114 F.E.R.C. ¶ 61,102 (FERC 2006)¹ Here, FERC has no experience determining whether the nascent markets are sufficiently competitive to relieve QF of purchase obligations.

FERC allows QFs to rebut the presumption of transmission access. However, FERC places the burden on the QF notwithstanding (a) a pending rulemaking pointing out the discrimination that exists in transmission and (b) informational imbalance. FERC recognizes that “some QFs may not have access to the level of information that electric utilities have” referring to small QFs. ¶104. FERC misses the point that even large QFs are not on the same informational plane as utilities thereby making it inappropriate to place the burden of proof on transmission access on QFs regardless of size. FERC provides that utilities in their applications must provide information on transmission availability but is not sufficiently prescriptive as to the detail utilities should provide. Industrial Parties believe that available precedent for the degree of information on transmission access is UniSource Energy Corporation, Docket No. EC04-92-000, 109 FERC ¶ 61,047 (2004). There, monitoring and reporting was imposed concerning six general areas:

- (1) generation dispatch of Tucson Electric and loadings on constrained transmission facilities in relevant areas;
- (2) details on binding transmission constraints in relevant areas, such as transmission refusals;
- (3) operating guidelines and procedures designed to relieve transmission constraints and their

¹ Industrial Parties, however, do not agree that 5 MW was the appropriate threshold for the productive and beneficial criteria at issue in that proceeding, and in any event that level is no relevance to the access to markets based threshold (20 MW in the final rule) for this proceeding. See also FERC Transactions Subject to FPA Section 203, 18 C.F.R. §§2, 33 (2005), 113 F.E.R.C. ¶ 61,315 (FERC 2005) (“Rather, the Commission will adopt a rebuttable presumption that amended section 203(a) applies to the transfer of any existing generation facility unless the utility can demonstrate with substantial evidence that the generator is used exclusively for retail sales. In our experience, utilities do not ordinarily separate the dispatch of their plants for retail sales and wholesale sales; rather, they dispatch all their units on an integrated basis to serve all load (retail and wholesale). Therefore, a utility proposing an unusual procedure by which it dispatches certain plants “only” for retail load will have the burden to demonstrate that any particular generating facility will never be used to make wholesale sales.”)

effectiveness; (4) information concerning the volume of transactions and prices charged by Tucson Electric in markets affected by Tucson Electric before and after it implements redispatch or other congestion management actions; (5) the calculation of Available Transmission Capability and Total Transfer Capability, as well as Tucson Electric's communication of data regarding such calculations to the westTTRans.net OASIS; and (6) Tucson Electric's plans for the construction of expansions to its transmission facilities.

B. The Rebuttable Presumption Factors Should Be Improved

Industrial Parties support the rebuttable presumption factors listed in ¶ 77 of the Final Rule. Further improvement and elaboration to the factors and how they are implemented is required.

1. In Processing Utility Applications for Waiver of QF Purchase Obligations in all Markets, FERC Should Consider Evidence of Discrimination

FERC commendably proposes to include among rebuttable presumptions that QFs can advance in Day 2 markets unavailability of transmission due to transmission constraints. However FERC rejects ELCON's argument that it cannot presume that utilities have transmission access when FERC has initiated OATT reform due to lingering concerns about significant discrimination.² FERC states that its OATT NOPR was based on a mere concern over "opportunities for discrimination." Final Rule, ¶ 53 fn 30. To the contrary, Chairman Kelliher's remarks at the time of issuance of the NOPR disclose FERC's findings as to discrimination in transmission. At the Commission meeting on May 18 announcing a NOPR to resolve ongoing discriminatory transmission practices by reforming OATT, Chairman Kelliher acknowledged that FERC had found three times previously that the existing OATT continues to allow transmission owners to discriminate and show preference when deciding which services to provide and to whom:

² Notice of Inquiry, Preventing Undue Discrimination and Preference in Transmission Services, Docket No. RM05-25, 112 FERC ¶61,299 (Sept. 16, 2005).

When the Commission finds undue discrimination and preference, we have to act, we have to do something;” “we cannot let undue discrimination and preference remain undisturbed.

The solution we advance today is not restructuring, but more effective regulation, reform of the open access rules themselves, for the first time in nearly a decade.

Ambiguities in FERC’s current open access rules frustrate everyone. They do not allow FERC to easily identify OATT violations, he remarked, while customers do not always understand why they are denied access. Meanwhile, utilities are frustrated by continuing suspicions about their transmission service practices.

We have had numerous proceedings lasting months and years, and we have not been able to prove that violations have occurred and Entergy may believe that they have complied all along, but are frustrated that they can’t demonstrate that compliance.” The ambiguities in our current rules really operate to no one’s advantage.

The courts have held that the Commission has broad remedial authority under section 206 to prevent undue discrimination and preference, the chairman noted, but a record exceeding 4,000 pages has been established since FERC issued a notice of inquiry last September posing a host of questions relating to the operation of the agency’s open access rules.³

The OATT NOPR is frank in finding discrimination. FERC states:

In the wake of these industry changes, questions have arisen concerning the efficacy of various terms and conditions of the transmission providers’ OATTs. As the Commission noted in Order No. 888, it is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets, to deny transmission or to offer transmission on a basis that is inferior to that which they provide themselves. This is still the view of the Commission. We have observed that public utilities continue to have the discretion and the incentive to interpret and apply the provisions of their OATTs in a manner that can result in unduly discriminatory behavior on each particular public utility’s transmission system. This is exacerbated by the fact that, in a number of respects, Order No. 888 and the pro forma OATT allow public utilities discretion in implementing the terms and conditions of providing transmission service.⁴

FERC has a paramount statutory duty to eradicate discrimination. Associated Gas

Distributors v. FERC, 824 F.2d 981, 998 (D.C. Cir. 1987), Order No. 888, 61 Fed. Reg. 21,540,

³ Transcript of 905th Commission Open Meeting, May 19, 2006.

⁴ Notice of Inquiry, Preventing Undue Discrimination and Preference in Transmission Services, Docket No. RM05-25, 112 FERC ¶ 61,299 (Sept. 16, 2005) at ¶ 5.

31,669. In light of this obligation it is not tenable for FERC to declare off the table evidence of discrimination in transmission.

2. FERC Should Clarify and Expand on its Rebuttal Criteria to Recognize that QFs that Cannot Sell Power in 50 MW Blocks May Not Have Access to Markets

Over the counter bilateral contracts offered on the ICE electronic platform (e.g., PJM or NEPOOL Firm-LD Peak and Off-Peak contracts) stipulate a minimum lot increment of 50 MW.⁵ The 50 MW product can be a problem for large QFs because their intermittent production of surplus power cannot always or easily be packaged in 50-MW x 16-hour increments. This skews the market in favor of sales by the merchant generators, and disadvantages the sales opportunities of the QFs. QFs that cannot sell 50MW blocks have only very limited access to financial markets, at disadvantageous terms.

3. FERC Should Recognize that Lack of Fuel Diversity May Inhibit Market Access of Certain QFs

Many QFs lack fuel diversity. Accordingly, there are times when many QFs, particularly those buying interruptible gas, would not be able to fulfill contractual obligations. This characteristic could preclude QFs from entering long-term contracts.

4. FERC's Should Apply These Criteria in a Transparent Fashion, Considering Current and Future Market Conditions

To enable effective input by QFs and other interested parties, any information provided to support a utility's exemption from QF obligations must be provided to all affected QFs at the time of the filing. This should apply to any exemption filing (taking or supplying QF power). Also, if QF does a later filing, the utility needs to provide updated data and not rely on data used in original exemption.

⁵ See www.theice.com/product guide.

Further, the Commission's assessment of the application must consider that today's market does not necessarily reflect tomorrow's. For example, a gas-fired cogenerator may currently have full access to market transmission and prices today, but if significant coal capacity is built could result in coal being on the margin (as is the case in SPP today) which would mean that the cogenerator cannot contract for long term sales and would be forced into either backing down generation in off-peak or realizing significant losses. Consideration of future market dynamics is essential.

C. FERC Cannot Categorically Presume that Day 2 Markets Provide QFs with Access to Long-Term Markets

1. FERC Does Not Impose Demonstration of Adequacy of Long-Term Markets as a Condition to RTO or Day 2 Market Approval

FERC's final rule presumes that the four organized markets provide QFs with access to long-term 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. FERC provides no rationale to justify its leap 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 brushes aside evidence that establishes that markets either are in their infancy or are not functioning *vis-à-vis* long-term sales of capacity.

It is telling that at the October 13, 2006 FERC Transparency workshop PJM's Vice President-Markets Andrew Ott conceded:

COMMISSIONER WELLINGHOFF: Steve, could I follow up on that? In that regard, can anybody tell me whether or not they believe there is a real competitive long-term market out there, either in PJM or any other area of the country?

MR. OTT: I think there's a general lack, in the PJM region and elsewhere of long-term, forward liquidating. In general, I think probably about 18 months out, you can, yes, go

beyond that in the definition of long-term, three years or better. It just doesn't seem to be there I don't think anywhere.⁶

2. 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 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.

The “long-term” bilateral markets that exist are predominately sales for resale – generators selling to load service 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. The QF has little choice but to dump its surplus power in the short-term LMP markets (day-ahead and real-time). An LSE has no incentive to buy from the QF unless the rate is below the expected LMP rate.

Here, 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 are not as readily dispatchable as is the case with merchant generation as they must fulfill their host’s steam load often at the expense of generating power. The Energy Producers

⁶ (Tr. at 135-136),

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 operation of utility power plants are not “markets” conducive to cogeneration operations.

Moreover, in its recent rehearing order on long-term transmission rights, FERC observed “we concluded that the current one-year financial rights offered by transmission organizations, which are subject to financial proration during their term, did not meet the requirement of section 217(b)(4) that the Commission enable load-serving entities to secure long-term firm transmission rights to support long-term power supply arrangements.” Order on Rehearing and Clarification, Long-Term Firm Transmission Rights in Organized Electricity Markets, Order No. 681-A, Docket No. RM06-8-001 (Nov. 16, 2006) at ¶ 34.

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. 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.

The Commission should require that utility applicants present information on the short- and long-term capacity obligations of load-serving entities in the relevant markets, their practices for meeting such obligations, and any barriers to entry into or impediments to trade within such markets. Procurement programs can be part of the solution for showing that QFs have an opportunity to provide long-term power provided that the utility can demonstrate successful QFs procurement and explain that terms for procurement are non discriminatory, recognize the operating characteristics of QFs and don't load the dice of utility affiliates.

D. FERC'S Section 210(m)(1)(B) Analysis Must Recognize that Markets Cannot Be Deemed Competitive in the Absence of Retail Competition

Retail competition is a key prerequisite to a finding that a competitive market exists for purposes of Section 210(m)(1)(B). California is a prime example of circumstances that also exist in other areas.

1. California Markets Lack Price Transparency

Transparency in pricing for short, medium and long term capacity and energy, including not only pricing terms but non price terms and conditions is essential for any market. Industrial Parties doubt that there is any market for any product (milk, TVs, automobiles, SCUD missiles) that does not have some form of price transparency. Yet in the California market there is virtually no disclosure to any market participant of prices secured or approved for capacity or energy purchased by utilities. The contracts are "market sensitive" and not disclosed. Even the SCE Mountainview contract is not fully available to parties to know either prices or "sensitive" terms and conditions. RFO bids are not revealed, and winning bids and their contracts (prices or terms) are not disclosed. There is no capacity market price available so providers are left to guess if they can or should develop projects. There is no certainty as to the availability of a contract with a

sufficient term to even assure full cost recovery on investment. In short, absent full disclosure of utility procurement there is no transparency and no sufficient market.

2. Exit Fees Preclude a Competitive Market

The existence of an available transmission grid, RFOs for capacity sales and a day ahead energy market does not necessarily mean that there is a market. If the state jurisdiction has imposed exit fees on loads that would choose to move to an alternative generator, there is no real market; the entire structure is a sham and cannot be masked by a FERC determination that a capacity and energy “market” exist. Attached as Appendix A is a one page document showing the series of current exit fees imposed on loads that might choose to depart the utility systems in California. These charges are so large as to render choices over building alternative generation or seeking alternative suppliers (note direct access issues below as well) economically implausible. The result is that no load can economically move to a “market” because the “market” has been so distorted by state regulation that it is not “real” in terms of fair or accurate pricing.

3. Direct Access Is Unavailable in California, Precluding a Market for QF Power

No wholesale market can be considered viable if the retail customer is not even eligible to seek alternatives to utility service. Since PURPA is fundamentally a marriage between a host commercial and industrial facility needing process thermal energy and electricity and the utility taking the excess electricity to balance into its system grid, the inability of the commercial or industrial customer to seek alternative suppliers distorts and destroys any contemplated “market.” In California direct access for consumers is now unlawful. Absent that feature of state law and regulation being eliminated it cannot be said that a market sufficient to replace the features of PURPA lawfully exists.

4. California Is a Thinly Traded Market Dominated by Utility Generation Supply

In California load serving entities like the utilities are mandated to acquire by firm contracts 95% of the total projected summer peak loads well in advance of the summer season. This means that the “market” reflected by the CAISO is only 5% of the total capacity and energy purchased by utilities. This of course relates to price transparency problems noted above, but there is another concern. Not only is this “market” painfully thin, spiking, unstable and inadequate for effectively pricing power delivered by PURPA projects as base load facilities, it turns out that utilities are dominating these short term markets. PG&E testimony recently offered before the California Public Utilities Commission indicated that their generation usually made up approximately 50% of the energy trades in this market. With that utility dominance of the recorded trades, the ability to manipulate the pricing in this market is apparent. The implications for QFs trying to rely on a hopelessly thin market price sample that is really subject to utility “dumping” of energy that is surplus to their needs, but whose costs are otherwise recovered in rates, indicates there is no “market” that can be considered sufficient to meet the objectives of section 210(m).

5. Timing and Testing Is Required

Industrial Parties do not believe that the ISO “market” once deemed operational under the planned CAISO MRTU (market restructuring plan) can be considered to produce a reasonable and reliable reflection of capacity and energy prices for a project. There would need to be sufficient time to test and review the “market” performance and reliability under a range of market conditions. At the very least this means some review time, at least a year, is needed with any of these capacity and energy markets to determine their viability to serve as reasonable surrogates for avoided cost pricing under PURPA.

F. FERC Must Find A Competitive Market Before Sellers Are Released of their QF Purchase Obligations

Just and reasonable rates require a finding that a seller does not have market power.

Under section 210(m)(5), Congress provides that the obligation to sell standby and backup power can be terminated if the Commission finds that “competing electric suppliers are willing and able to sell and deliver electric energy to the qualifying co-generation facility or qualifying small power production facility; and the electric utility is not required by state law to sell electric energy in its service territory.” Although utilities in the organized markets may assert that there are multiple retail providers, in many cases the providers either have little capability to serve the QFs profile (primarily backup power) or would attach a large premium to the price given their interest in serving a stable load. Also, the availability of power in 50 MW blocks (financial or physical) does not fit the load profile of QFs. FERC final rule does not adopt protections to provide that just and reasonable rates will be charged.

The fact that some utility or other supplier is willing to sell a QF power at some exorbitant price does not satisfy the Commission’s duty under PURPA to see that QFs are not exploited and the Commission’s duty under the FPA to charge just and reasonable rates. One or two suppliers do not a competitive market make. In Elizabethtown Gas Co. v. FERC, 10 F.3d 866 (D.C. Cir. 1993), the D.C. Circuit upheld a market-based rate for the sale of natural gas. It was competition that rendered the rate just and reasonable:

[W]e have indicated that when there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a “just and reasonable” result. See Tejas Power Corp. v. FERC, 908 F.2d 998, 1004 (D.C. Cir. 1990) (“in a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment”). See also Farmers Union Central Exchange v. FERC, 734 F.2d 1486, 1510 (D.C. Cir. 1984).

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

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

FERC can meet the zone of reasonableness test if and only if the Commission is satisfied that the seller does not possess market power in any relevant market. Only if market power does not exist will market forces drive prices towards marginal cost such that the seller makes only a normal return on investment. Only if FERC finds that market power cannot be exercised can it find that the seller’s rates are just and reasonable⁷.

G. Utility Termination Clauses Should Not End-Run Section 210(m)

Many utility contracts have a change-in-law clause that allows them to terminate current contracts. The Final Rule provides that “[t]o the extent that the parties to a contract cannot agree whether a termination clause has been triggered, the issue will be best determined in an individual case-specific proceeding in which the particulars of the contract can be examined.” ¶ 219. FERC should clarify that utilities may not use such clauses to terminate their purchase obligation without obtaining a Commission determination pursuant to the processes set out in the Final Rule.

IV. CONCLUSION

For the reasons stated herein, Industrial Parties respectfully request that this Request for Rehearing be granted. Industrial Parties respectfully request that FERC promptly revise the final rule to: (1) impose the burden of proof on utilities to establish that QFs have meaningful, nondiscriminatory access to transmission and markets before terminating the mandatory

⁷ See J. Kelliher, “Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission,” 29 Energy Law J. 1 (2005).

purchase obligation; (2) in all cases provide for a searching inquiry of meaningful access to transmission, which is especially problematic for many QFs; (3) enhance the criteria that QFs may use to show that they do not have meaningful, non-discriminatory access to transmission and markets; (4) correct the mistaken presumption that Day 2 markets provide access to long-term markets; (5) recognize that the California market cannot be deemed competitive in the absence of retail competition; and (6) establish a finding of a competitive market as a mandatory prerequisite to releasing electric suppliers of their obligation to sell standby and backup power.

V. 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, D.C. 20005
Voice: (202) 682-1390
Email: jhughes@elcon.org

Jim Schultz
Vice President, Environment and Energy
American Iron & Steel Institute
1140 Connecticut Ave., N.W.
Suite 705
Washington, D.C. 20036
Voice: (202) 452-7180
Email: [jschultz@steel.org](mailto:j Schultz@steel.org)

Robert Bessette
President
Council of Industrial Boiler Owners
6035 Burke Centre Parkway # 630
Burke, Virginia 22015
Email: Bessette@cibo.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
Counsel for ELCON and AISI

Owen Kean
American Chemistry Council (ACC)
1300 Wilson Blvd.
Arlington, Virginia 22209
Voice: 703-741-5804
Email: owen_kean@americanchemistry.com

Respectfully submitted,

/s/ 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: November 20, 2006

Appendix A

CUSTOMER GENERATION DEPARTING LOAD COST RESPONSIBILITY SURCHARGES (CGDL-CRS)

<u>Line</u>	<u>Description of Applicable Surcharge</u>	<u>Non-Exempt CGDL</u>		<u>Cogen CGDL</u>	
		<u>PG&E</u>	<u>SCE</u>	<u>PG&E</u>	<u>SCE</u>
		<u>E-20T</u>	<u>TOU-8-Sub</u>	<u>E-20T</u>	<u>TOU-8-Sub</u>
		<u>(\$/MWh)</u>	<u>(\$/MWh)</u>	<u>(\$/MWh)</u>	<u>(\$/MWh)</u>
		<u>(1)</u>	<u>(2)</u>	<u>(3)</u>	<u>(4)</u>
1	Public Purpose Program Charge (PPPC)	\$3.92	\$5.97	\$3.92	\$5.97
2	Nuclear Decommissioning Charge (NDC)	\$0.38	\$0.48	\$0.38	\$0.48
3	DWR Bond Charge (DWRBC)	\$4.85	\$4.85	\$4.85	\$4.85
4	DWR Power Cost Charge (DWRPC) ⁸	\$17.37 ⁹	\$5.50	\$17.37	\$5.50
5	Competition Transition Charge (CTC) ¹⁰	\$2.63	\$6.65	-	-
6	HPC/ECRA Charge ¹¹	\$4.37	N/A	\$4.37	N/A
7	Utility Procurement Charge ¹²	Unknown	Unknown	Unknown	Unknown
8	Total? Greater than:	\$33.52	\$23.45	\$30.89	\$16.80

Source: SCE data from SCE TOU-8 tariff sheets, CAL PUC Sheet 41458-E, filed Aug. 31, 2006. PG&E data from PG&E E-20 tariff sheets, Cal PUC Sheet 25300-E, filed Aug. 31, 2006.

⁸ DWRPC recovers the uneconomic portion of DWR's prospective power purchase costs. **Exemptions available up to MW cap as administered by the CEC.**

⁹ Applicable charge to CGLD is not readily apparent from PG&E's tariff; however, Community Choice Aggregation charge is \$17.37/MWh.

¹⁰ CTC recovers the cost of power purchase agreements, signed prior to December 20, 1995, in excess of proxy market price.

¹¹ SCE's Historical Procurement Charge (HPC) is determined on a customer specific basis and reflect the customer's cost responsibility for power costs incurred during the energy crisis. On March 1, 2005, the Energy Cost Recovery Amount (ECRA) superceded and replaced the Regulatory Asset Charge (RA) Charge such that after March 1, 2005, applicable customers no longer incur additional RA Charges but instead incur Energy Cost Recovery Amount (ECRA) charges adopted by the Commission in Decision 04-11-015. **Exemptions from PG&E ECRA available to certain projects.**

¹² Amount of this Commission assessed charge to CGDL is unknown but most likely will be significant.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2006, I have caused a copy of the foregoing to be served by electronic mail upon those persons designated on the Official Service List for this proceeding.

/s/ W. Richard Bidstrup
W. Richard Bidstrup

Dated: November 20, 2006