

Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

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Tel ephone (202) 974-1500
Facsimile (202) 974-1999

April 20, 2001

ELECTRONIC FILING

The Honorable David P. Boergers
Secretary
Federal Energy Regulatory Commission
Dockets Room, Room 1A
888 First Street, N.E.
Washington, D.C. 20426

Re: Petition Requesting Waiver of Commission Rules, Public Utility
Commission of Texas, Docket No. EL01-60-000; Petition for Declaratory
Order, Cogen Lyondell Inc., et al., Docket No. EL01-49-00

Dear Secretary Boergers:

Enclosed for filing please find the Industrial Consumers' motion to intervene and comments in Docket No. EL01-60-000, Public Utility Commission of Texas' Petition Requesting Waiver of Commission Rules, and comments in Docket No. EL01-49-000, Cogen Lyondell, Inc.'s Petition for Declaratory Order.

We ask that you email confirmation of receipt of Industrial Consumers' electronic filing to kvanderstoep@cgsh.com.

Sincerely,

/signed/

Sara D. Schotland

Enclosures

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

_____)
COGEN LYONDELL, INC.) Docket No. EL01-49
_____)

_____)
PUBLIC UTILITY COMMISSION OF) Docket No. EL01-60
TEXAS)
_____)

MOTION TO INTERVENE AND COMMENTS
OF INDUSTRIAL CONSUMERS

Industrial Consumers, the Electricity Consumers Resource Council (ELCON), the American Chemistry Council (ACC), and the American Plastics Council (APC), offer these supplemental comments in support of the Petition for Declaratory Order submitted by Cogen Lyondell, Inc., et al., as amended by petitioners in their March 7, 2001, filing. Industrial Consumers also file this motion to intervene and comments in response to the Public Utility Commission of Texas' Petition Requesting Waiver of Commission Rules.

ELCON and ACC filed on March 30 a motion to intervene in Docket No. EL01-49 in support of the Petition for Declaratory Order filed by Cogen Lyondell and 14 other cogenerators in Texas. Industrial Consumers intervened because they believe that the issues presented extend far beyond the confines of Texas and can occur in other states that implement restructuring.

Petitioning cogenerators ask FERC to declare that purchasing utilities will retain their mandatory PURPA¹ purchase obligations after they complete their corporate restructuring required by state law. The utilities maintain that under state law, the transmission and distribution (“T&D”) companies will be the only entities that remain as electric utilities as defined under Texas’ restructuring law, SB7. These entities are prohibited by state law from purchasing electricity except to serve their own needs.

Petitioners maintain that the new holding companies and their non-T&D subsidiaries continue to qualify as electric utilities under PURPA’s definition and thus must buy power from QFs. Petitioners point out that PURPA’s definition of electric utility and PURPA’s mandatory purchase requirements should preempt state law. Moreover, it is the generation affiliates of the restructured entities who can adjust dispatch to accommodate QF power and thus should have the PURPA obligation.

In summary: Industrial Consumers support electricity restructuring legislation that introduces the benefits of retail competition and eliminates market power. At such time as markets have become workably competitive, the rationale for mandatory PURPA obligations may cease to exist and repeal of those PURPA obligations may be logical and appropriate. However, Congress has not yet seen fit to repeal any part of PURPA. Industrial Consumers strongly oppose de facto revocation of PURPA by state legislatures and by restructuring utilities. Only Congress can repeal federal law and adopt an orderly phase out of PURPA that protects pre-existing investor expectations. PURPA should not be shredded through individual state initiatives.

¹ Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §824a-3.

1. PURPA Must Be Enforced Unless And Until It Is Repealed By Congress

In enacting PURPA, Congress's "basic purpose...was to increase the utilization of cogeneration and small power production facilities and to reduce reliance on fossil fuels." Am. Paper Inst. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 417 (1983). In Environmental Action, Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991), petitioners challenged FERC's approval of a merger that excluded QFs from access to the firm transmission. The Commission argued that allowing QFs mandatory transmission access would give them an unwarranted competitive advantage by enabling them to exercise their statutory right to force utilities to buy the power. The court rejected this argument and cautioned FERC against "administrative repeal" of PURPA rights:

...[S]uch advantage as a QF may have stems directly from the Congress's policy choice to encourage the sale of power by QFs rather than by traditional utilities. *See API*, 461 U.S. at 417, 103 S.Ct. at 1930 ("basic purpose of §210 of PURPA was to increase the utilization of cogeneration and small power production facilities and to reduce reliance on fossil fuels"). The Commission's effort to place QFs "on an essentially equal competitive footing with competing suppliers," *Opinion No. 318-A*, 47 FERC at 61,740, by giving such suppliers the access it denies to QFs would effect an administrative repeal of this congressional choice; by definition, this is not in the public interest. Put otherwise, the PURPA establishes a specific public interest in encouraging QFs by giving them certain rights.

Id. at 1062.

Industrial Consumers strongly oppose retroactive impairment of statutory PURPA rights. In New York State Electric & Gas Corp., 71 FERC ¶ 61,027 (1995), FERC appropriately declined to retroactively impair QF contracts. While the instant dockets involve non-firm rather than fixed-price contracts, the very same concern is presented as in the NYSE&G case: an effort by a state legislature to retroactively alter settled expectations. Apart

from the fact that the states are preempted from directly or indirectly negating PURPA, legislation that undermines the settled expectations of the parties is anathema. Industrial Consumers endorse this fundamental principle, notwithstanding our concern as ratepayers that utility power purchase costs be as low as possible. “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). QFs such as the petitioning entities 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.” 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 energy facilities.

2. Enactment Of The Texas Restructuring Law Does Not Justify Abrogation Of Generation Utilities’ Purchase Obligations

Industrial Consumers anticipate that Texas utilities seeking to avoid their PURPA obligation will argue that as a result of Texas’s restructuring law, retail competition has arrived in Texas. Industrial Consumers disagree with this rationale for several reasons. First, the utilities have proposed that all PURPA power be sold into a balancing market once deregulation takes place in Texas. This balancing market is poorly defined and ill-conceived at this point and will not reflect the utilities’ avoided cost. Until PURPA is repealed at the federal level, the

utilities in Texas need to comply with the basic requirements of PURPA, one of which is that QF PURPA power sold to the utility reflect the utility's avoided cost.

Our second concern involves transition from regulated to unregulated markets after PURPA repeal. In a deregulated market, after PURPA repeal, Industrial Consumers' position is that the utilities should no longer have a mandatory purchase obligation. This is based on the premise that there will be open liquid markets for cogenerators to sell their power. Though we believe that this will eventually take place in Texas, the balancing market proposal by the utilities has inhibited the development of such market opportunities. Proposals by QFs to develop a transitional period of avoided cost payments under a market proxy to allow alternative markets to develop have met with resistance from the utilities. Industrial Consumers take no position on the merits of the QFs' proposal.

Our third concern is that utilities not be allowed to establish a precedent to avoid existing obligations under PURPA simply by reorganizing the company via the "unbundling" process. FERC has long been vigilant to avoid utility restructuring devices whose purpose is to evade statutory restrictions. To assure compliance with PURPA's 50 percent limitation on utility ownership, FERC scrutinized utility ownership structures.² Similarly, FERC should exercise vigilance to assure that Texas utilities do not restructure themselves in a manner that eludes PURPA purchase requirements.

² Dominion Resources, Inc., 43 FERC ¶ 61,079 (1988).

3. Safeguards For Electricity Consumers Must Be Enforced

While Industrial Consumers believe that PURPA's mandatory purchase obligation must continue until repealed by Congress, we also caution FERC not to allow the Texas PUC or other state PUCs to inaccurately or inappropriately define avoided costs. There have been many errors in the past in setting avoided costs, causing harm to electricity consumers. By definition, if done properly, customers cannot be harmed by the mandatory purchase provision. However, without this mandatory purchase provision, QFs have no market for their power in the transition to competition.

DESCRIPTION OF INTERVENORS

The Electricity Consumers Resource Council (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, including: steel, aluminum, chemicals, petroleum, motor vehicles, industrial gases, machinery, glass, agricultural and food products, rubber, computer chips, paper and electronics. The member companies of ELCON consume approximately 5 percent of all electricity in the United States.

The American Chemistry Council (ACC) is a nonprofit trade association whose member companies represent more than 90 percent of the productive capacity of basic industrial chemicals in the United States. The manufacturing processes of many ACC member companies are highly energy-intensive. In addition, the chemical industry uses a substantial amount of self-generated electricity. Total electricity used by the industry, purchased plus self-generated,

represents approximately 18 percent of industrial electricity consumption in the United States and approximately 6 percent of national electricity consumption.

The American Plastics Council (APC) is a national, non-profit trade association for the United States plastics industry headquartered in Arlington, VA, and has regional offices across the country. APC's members represent the nation's largest producers of resin, which includes both monomer and polymer production and distribution. Several APC member companies hold interest in QFs in Texas and throughout the United States.

NOTICES AND COMMUNICATIONS

Notices and communications should be addressed to:

Dr. John Anderson
Executive Director
The Electricity Consumers Resource Council
1333 H Street, N.W.
The West Tower, 8th Floor
Washington, D.C. 20005

Tom Choman
American Chemistry Council
1300 Wilson Boulevard
Arlington, VA 22209

Marty Durbin
Director, Federal & International Affairs
American Plastics Council
1300 Wilson Blvd. Suite 800
Arlington VA 22209

Sara D. Schotland, Esq.
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Respectfully submitted,

/signed/

Sara D. Schotland
CLEARY, GOTTLIEB, STEEN &
HAMILTON
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1801
202-974-1500

Dated: April 20, 2001

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Intervene and Comments of Industrial Consumers were today mailed to parties on the service list of these proceedings by U.S. mail, postage prepaid.

Dated at Washington, D.C., this 20th day of April, 2001.

/signed/

Kari Vander Stoep
Law Clerk
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1801
(202) 974-1500