

FERC Issues Final Rule on Electric Utility Mandatory Purchase Obligations under PURPA

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On October 20, 2006, the Federal Energy Regulatory Commission (“FERC”) issued its final rule implementing Section 210(m) of the Public Utility Regulatory Policy Act (“PURPA”) as amended by the Energy Policy Act of 2005. Section 210(m) provides, among other things, for termination of the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from qualifying cogeneration facilities and qualifying small power production facilities (“QFs) if the FERC finds that the QF has nondiscriminatory access to one of three categories of markets.

The final rule represents a significant change from the proposal which automatically relieved utilities of purchase obligations as to new QF contracts simply virtue of their location in one of the four organized markets. Instead, the final rule gives QFs their “day in court,” although FERC finds that there is a rebuttable presumption that utilities in PJM, Midwest ISO, NYISO, and ISO-NE meet the requirements for relief from mandatory purchase obligations when they enter into new QF purchase contracts. FERC will not apply the rebuttable presumption to QFs below 20 megawatts (“MWs”). As to QFs above 20 MWs, FERC adopted some factors that QFs can invoke in the 90 day proceedings when relief from mandatory purchase obligations will be adjudicated.

I. Criteria For Relief From Mandatory Purchase Obligations

A. *Presumptions Applicable to All Categories of Wholesale Markets*

If FERC finds that the QF has nondiscriminatory access to one of three wholesale markets described in Section 210(m)(1), the requirement that the electric utility enter into new contracts or obligations is terminated. These three wholesale markets are:

(A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

(B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

The final rule establishes two rebuttable presumptions applicable to all three categories of wholesale markets.

First, with the exception of the 20 MW presumption discussed next, the final rule finds that the existence of an open access transmission tariff (“OATT”), or a reciprocity tariff filed by a non-jurisdictional utility, pursuant to FERC’s open access regulations, 18 CFR § 35.28(e), creates a rebuttable presumption under Section 210(m)(1) 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 CFR § 292.310.

Second, the final rule establishes a rebuttable presumption that QFs with a net capacity no greater than 20 MW, 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 FERC, a small QF would be eligible to require the electric utility to purchase its electric energy.

B. The Four Organized Markets

The final rule finds that PJM, Midwest ISO, NYISO, and ISO-NE all meet the criteria of 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 the four RTOs filing for relief from the mandatory purchase obligation will need to refer to this rebuttable presumption as part of its application. The application also must include 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. The electric utility would have to make additional showings if it wished to rebut the presumption that small QFs do not have nondiscriminatory access to its region’s “Day 2” wholesale markets. A QF above 20 MWs net capacity may rebut the presumption of nondiscriminatory access by showing that it in fact lacks access.

C. CAISO and SPP

FERC states that it would be premature to find now that 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 CAISO and SPP meet the Section 210(m)(1)(B)(i) criteria 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.

D. ERCOT

The final rule finds that ERCOT meets the criteria of Section 210(m)(1)(C).

E. Factors Available to QFs in Overcoming FERC's Rebuttable Presumptions

Factors that may be sufficient to rebut the presumption include:

(A) 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.

(B) 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.

(C) 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, FERC 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.

II. 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. This provision, implemented in new 18 CFR § 292.314, defines the term “obligations” broadly to encompass any legally enforceable obligation established through a state’s implementation of PURPA.

III. 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. After notice, including notice to the affected utilities, and comment, FERC will issue an order within 90 days of the application. This process is set forth in new 18 CFR § 292.311. A QF’s request may be specific (and limited) to itself alone, generic for the entire service territory of an electric utility, or regional in scope. FERC will address the merits of each request as warranted by the circumstances presented in each case.

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

The final rule provides for utility applications to remove the requirement to enter into new contracts to sell electric energy to QFs. This implements Section 210(m)’s provision

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.

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

Finally, 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. After notice and comment, FERC will issue an order within 90 days if the required showing is made. Applications for reinstatement are addressed in new 18 CRR § 292.313.

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