

State of California

Public Utilities Commission
San Francisco

MEMORANDUM

Date : **March 9, 2006**

To : **The Commission**
(Meeting of March 15, 2006)

From : **Lisa-Marie Salvacion, Legal Division**
Wade McCartney, Energy Division

Subject : **Staff Seeks Authority to File Reply Comments in Response to New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities - - FERC Docket No. RM06-10-000**

On January 19, 2006, the Federal Energy Regulatory Commission (“FERC”) issued a Notice of Proposed Rulemaking (“NOPR”) to amend its regulations governing small power production and cogeneration. The proposed regulations in this NOPR regarding these qualifying facilities (“QFs”) will implement Section 1253 of the Energy Policy Act of 2005 (“EPAAct 2005”), which added U.S. Code Section 210(m) to the Public Utility Regulatory Policies Act of 1978 (“PURPA”).¹

The NOPR sought comment on the criteria exempting utilities from their obligation to purchase from qualifying facilities (“QFs”). The CPUC filed a notice of intervention on February 6, 2006.

Staff seeks the Commission’s authorization to submit reply comments in this docket, addressing the opening comments of Pacific Gas & Electric Company (“PG&E”), Southern California Edison Corporation (“SCE”), and the California Independent System Operator Corporation (“CAISO”). The deadline to file reply comments with FERC is March 29, 2006. Staff requests authority to draft and file reply comments along the lines of the discussion below.

¹ FERC “generally refers to the addition of U.S. Code Section 210(m) of PURPA in EPAAct 2005 as ‘amended Section 210,’ whereas all other references to PURPA Section 210 are as it currently exists” (NOPR, p.2, fn.4).

BACKGROUND AND DISCUSSION: Under PURPA Section 201(m),² FERC will exempt a utility from entering into *new* contracts or obligations if it finds QFs have non-discriminatory access to one of three market conditions:

(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 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 and short term 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).³

NOPR, at 36, emphasis added; *See also*, 18 CFR § 292.309.

After such a finding, when a contract terminates by its own accord, an electric utility is not compelled to enter into a new successor contract with the QF if FERC has found that the QF has nondiscriminatory access to the markets described above. NOPR, ¶ 32.

The NOPR suggests a pre-determination that utilities in the Midwest ISO, PJM, ISO-NE and the NY-ISO qualify for relief under the first test, and will be relieved of their obligation to purchase from QFs after a “ministerial” filing. The NOPR notes the CAISO is a FERC-approved ISO, but does not satisfy the requirements of the first test because it lacks a day-ahead market. (NOPR, ¶ 22 at fn. 15.) Consequently, FERC indicates any utility within CAISO may file an application to seek relief from the mandatory purchase obligation under the second or third test, on a case-by-case basis.

² Proposed 18 CFR § 292.309

³ The new rules will allow a QF, state agency, or affected person to file an application to reinstate the purchase obligation if there is a material change in conditions.

The reply comments should support PG&E and SCE, on the issue of FERC's pre-determination that utilities under CAISO must seek relief under a case-by-case basis. Both PG&E and SCE contend that CAISO's recent Market Redesign and Technology Upgrade ("MRTU") Tariff creates a day-ahead market, in addition to the real-time market that already exists. PG&E and SCE suggest FERC make a generic finding that CAISO will meet the requirements of Section 210(m)(1)(A), once the MRTU Tariff becomes operational as planned in November 2007. Therefore, as soon as late next year, utilities under CAISO would be able to seek relief from the purchase obligation by submitting a compliance filing that is essentially ministerial.

The reply comments also will raise an issue regarding FERC's proposal to protect contracts and obligations in effect or pending approval after August 8, 2005, the date of enactment of PURPA Section 210(m). NOPR, ¶ 49; PURPA § 210(m)(6).⁴ Both PG&E and SCE argue FERC should facilitate a rule that post-dated contracts are terminable upon a date a Section 210(m)(1) finding is made. It is not anticipated that the comments will take a substantive position at this time, but the comments will ask FERC to clarify that whatever rule it adopts in this regard apply only to standard offer contracts. Also, the comments will ask FERC to affirm that state commissions retain oversight of such terminable contracts, should it adopt the utilities' proposal.

Lastly, the comments will address the issue of small QFs, and their inability to access the type of real-time or day-ahead markets described in Section 210(m). On whether the purchase obligation should remain in effect for these generators, both PG&E and SCE oppose a generic nationwide exemption for QFs below a certain size. The comments will recommend FERC issue a finding retaining the purchase obligation for small QFs, and suggest FERC define "small QF" as having a dependable capacity of less than 1 MW.

ACTION REQUESTED:

Legal Division and Energy Division request authorization to draft reply comments in Docket RM06-10-000, along the lines discussed herein. Staff will work with the President of the Commission or his designate in drafting and filing reply comments

Assigned Staff: Lisa-Marie Salvacion (LMS, 3-2069); Wade McCartney (WSM, (916) 324-9010).

LMS:abh

⁴ Proposed 18 CFR § 292.314