119 FERC ¶ 61,305
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 292

(Docket No. RM06-10-001; Order No. 688-A)

New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities

(Issued June 22, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on Rehearing.

SUMMARY: In this order on rehearing, the Federal Energy Regulatory Commission (Commission) denies rehearing on most major issues decided in Order No. 688, which amended its regulations governing small power production and cogeneration in response to section 1253 of the Energy Policy Act of 2005 (EPAct 2005), which added section 210(m) to the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission also clarifies certain aspects of the rule and adopts some additional filing requirements.

EFFECTIVE DATE: The revisions to our regulations in this order on rehearing will become effective [insert date_30_days after publication in the **FEDERAL REGISTER**].

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

New PURPA 210(m) Regulations Applicable To Small Power Production and Cogeneration Facilities — Docket No. RM06-10-001

ORDER ON REHEARING AND CLARIFICATION

(Issued June 22, 2007)

I. Introduction

1. On October 20, 2006, the Federal Energy Regulatory Commission (Commission) issued Order No. 688,[1] in which the Commission revised its regulations governing the purchase requirement for electric energy produced by qualifying cogeneration and small power production facilities (QFs). This rulemaking proceeding was initiated to implement section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA),[2] which mandates termination of the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from QFs[3] if the

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[1] New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, Order No. 688, 71 FR 64342 (Nov. 1, 2006), FERC Stats. & Regs. ¶ 31,233 (2006) (Final Rule).

[2] Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005 (EPAct 2005). See Pub. L. 109-58, 1253, 119 Stat. 594, 967 (2005).

[3] The requirement that an electric utility enter into a new contract or obligation to purchase electric energy from QFs is referred to herein as either the mandatory purchase obligation or, more simply, the purchase requirement.

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Commission finds that the QF has nondiscriminatory access to one of three categories of markets defined in section 210(m)(1)(A), (B), or (C) of PURPA, as amended.

2. As relevant here, section 210(m) provides for the following:

(i) Termination of the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from a QF after certain specified findings are made by the Commission;

(ii) Reinstatement of the purchase requirement upon a showing that the conditions for terminating the requirement are no longer met;

(iii) Termination of the requirement that an electric utility enter into new contracts to sell electric energy to QFs after certain specified findings are made by the Commission;

(iv) Reinstatement of the sale requirement upon a showing that the conditions for terminating the requirement are no longer met; and,

(v) Preservation of existing contracts and obligations to purchase electric energy or capacity from, or to sell electric energy or capacity to, a QF.

The Final Rule amended Part 292 of the Commission's regulations, pertaining to electric utilities' obligation to purchase electric energy from or sell electric energy to a QF, to address these provisions of section 210(m) and also to provide a process for applying for the reinstatement of the requirements to purchase electric energy from or to sell electric energy to QFs upon a showing that the conditions for the removal of those requirements are no longer met.

3. New § 292.309 of the Commission's regulations describes the findings that the Commission must make to justify relieving an electric utility's obligation to enter into new QF purchase contracts. If the Commission finds that the QF has nondiscriminatory access to one of three types of wholesale markets described in subparagraphs (A), (B),

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and (C) of section 210(m)(1), the requirement that the electric utility enter into new contracts or obligations is terminated. In the Final Rule, the Commission concluded that the four existing "Day 2" markets[4] satisfy the requirements of subparagraph (A). The Commission found that the "Day 1" markets[5] satisfy some, but not all, of the requirements of subparagraph (B). Finally, the Commission found that the markets operated by the Electric Reliability Council of Texas (ERCOT) satisfy the requirements of subparagraph (C). All of these markets are administered by regional transmission organizations (RTOs) or independent system operators (ISOs).

4. With regard to analyzing whether a QF has nondiscriminatory access to one of these markets, the Commission adopted three rebuttable presumptions. First, the Final Rule concluded that the existence of an open access transmission tariff (OATT), or a reciprocity tariff filed by a non-public utility pursuant to the Commission's open access regulations,[6] justified a rebuttable presumption that QFs have nondiscriminatory access to the markets in the transmission provider's service territory. Second, the Commission adopted a rebuttable presumption that QFs located within one of the four existing "Day 2" markets also have nondiscriminatory access to those markets. Third, the Commission

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[4] The four existing "Day 2" markets are those auction based day-ahead and real-time markets operated by the Midwest Independent Transmission System Operator Corp. (MISO), PJM Interconnection, LLC (PJM), New York Independent System Operator, Inc. (NYISO), and ISO New England, Inc. (ISO-NE).

[5] The existing "Day 1" markets are those real-time markets operated by the California Independent System Operator Corporation (CAISO) and the Southwest Power Pool (SPP).

[6] 18 CFR 35.28(e). An OATT provides interconnection as well as transmission services on a nondiscriminatory basis.

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concluded that QFs with a net capacity no greater than 20 MW may not have nondiscriminatory access to any market, notwithstanding the availability of service under an OATT or their location within a "Day 2" market. The Commission therefore adopted a rebuttable presumption that such small QFs do not have nondiscriminatory access to any market.

5. Requests for rehearing and/or clarification of these rulings, and the procedure implementing them, were received from the American Forest and Paper Association (American Forest & Paper) and California Cogeneration Council (CCC), Central Vermont Public Service Corporation (Central Vermont), Cogeneration Association of California and the Energy Producers and Users Coalition (Cogeneration Association of California), the Council of Industrial Boiler Owners (CIBO), Deere & Company (Deere), Edison Electric Institute (EEI), Oklahoma Gas and Electric Company (OG&E), jointly from the Electricity Consumers Resource Council (ELCON), the American Iron and Steel Institute, the American Chemistry Council, and the Council of Industrial Boiler Owners (Industrial Parties), National Rural Electric Cooperative Association, (NRECA), Occidental Chemical Corporation (Occidental), PacifiCorp, and Public Interest Organizations (PIOs). Southern California Edison (SCE) and PJM Interconnection, Inc. (PJM) filed answers to the requests for rehearing. ELCON and Cogeneration Association of California filed answers those answers.[7]

[7] Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 CFR 383.713(d), provides that the Commission will not permit answers to requests for

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6. As discussed below, the Commission generally denies the requests for rehearing of the Final Rule. The Commission continues to believe that the Final Rule appropriately implements section 210(m) by identifying what type of markets satisfy the requirements of sections 210(m)(1)(A), (B), and (C) and the criteria that will be used to determine whether a QF has nondiscriminatory access to one of those markets. We therefore do not disturb the basic implementation structure established in that order. We do, however, grant clarification regarding certain specific matters. The Commission addresses each of these issues in turn.

II. Discussion

A. Three Types of Markets

7. Section 210(m)(1) identifies three types of markets, nondiscriminatory access to which will satisfy the findings the Commission must make to terminate an electric utility's purchase requirement. As the Commission explained in the Final Rule, the statutory language of sections 210(m)(1)(A), (B), and (C) requires us to differentiate among distinct types of markets when analyzing whether an electric utility will be relieved of its purchase obligation. The Commission must terminate the mandatory purchase obligation if we find that a QF has nondiscriminatory access to:

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rehearing. We will, accordingly, reject SCE and PJM's answers to the requests for rehearing. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 CFR 385.213(a)(2), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers of ELCON and Cogeneration Association of California and will, therefore, reject them. The alternative motions to reject of ELCON and Cogeneration Association of California are rejected as moot.

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

(B) "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 "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 [QF] is interconnected";[8] 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)."

8. In the Final Rule, the Commission considered the specific criteria set forth in these statutory provisions and concluded that certain markets in the United States satisfied some or all of the requirements of each. The Commission rejected proposals to adopt a single standard for relief, which in effect would interpret sections 210(m)(1)(A), (B), and (C) as collectively defining a single type of market, access to which would require termination of the purchase requirement. The Commission found that the most reasonable interpretation of section 210(m)(1) is that Congress, in separately describing three different types of markets, was requiring the Commission to differentiate among each type of market when determining whether to terminate the purchase requirement.

[8] In determining whether a meaningful opportunity to sell exists, section 210(m)(1)(B) directs the Commission to consider, among other factors, evidence of transactions within the relevant market.

1. Section 210(m)(1)(A)

9. Section 210(m)(1)(A) of PURPA requires the Commission to terminate an electric utility's obligation to purchase from a QF if the QF has nondiscriminatory access to (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. In the Final Rule, the Commission found that the four existing "Day 2" markets, MISO, PJM, ISO-NE and NYISO, satisfy the first prong of section 210(m)(1)(A) because the markets administered by these RTO/ISOs are, as required by the statute, independently administered, auction-based day ahead and real time wholesale markets for electricity.[9] The Commission further found that the existence of bilateral long-term contracts for long-term sales of capacity and energy in these markets satisfies the second prong of section 210(m)(1)(A). Since both of these requirements are satisfied, the Commission concluded that a showing of nondiscriminatory access to any of these "Day 2" markets would terminate the purchase requirement.

Requests for Rehearing

10. No petitioner challenges the Commission's determination that the existing "Day 2" RTO/ISO markets satisfy the requirements of the first prong of section 210(m)(1)(A), i.e., that they are independently administered, auction-based day ahead and real time

[9] The Commission stated that any future determinations of whether a new "Day 2" market satisfies the requirements of section 210(m)(1)(A) would be considered on a case-by-case basis, either in response to an application for termination of the mandatory purchase obligation or a petition for declaratory order.

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wholesale electricity markets. Requests for rehearing instead focus on the second prong, regarding whether a wholesale market for long-term sales of capacity and electric energy also exists in these regions. PIOs argue that the mere existence of some bilateral long-term contracts does not demonstrate the existence of a competitive wholesale market for long-term sales or actual "meaningful opportunities" for QFs to sell energy or capacity long-term to multiple buyers. PIOs therefore contend that the Commission erred in finding that the "Day 2" markets satisfy the requirements of section 210(m)(1)(A). Cogeneration Association of California agrees that the existence of a "Day 2" market does not equate to a long-term market, arguing that access to a long-term market is essential to provide the assurance of long-term revenue necessary to provide incentives for construction of new resources.

11. American Forest & Paper and CCC argue that there has never been a time in the history of the power industry when some bilateral contracts did not exist. They contend that there is no evidentiary basis that shows such contracts are available to QFs on a nondiscriminatory basis or that there is a market for such contracts. They argue that the word "market" presumes more than an occasional, isolated transaction. American Forest & Paper and CCC argue that in the Final Rule the Commission not only fails to explain why the existence of bilateral contracts constitutes a meaningful competitive market, but also fails to establish any standard for what constitutes a "long term sale," examine any of the bilateral contracts it believes exist to determine if they meet any such standard, or consider whether bilateral contracts are in fact available to QFs in any meaningful sense.

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12. Cogeneration Association of California adds that the insufficiency of the bilateral markets is also demonstrated by the lack of meaningful participation in utility requests for offers. Cogeneration Association of California argues that the current practice of bilateral contracting is not indicative of a competitive market, nor is it proof that QFs have a meaningful opportunity to participate in whatever markets are there. It argues that there is significant discrimination against QFs when they attempt to enter into bilateral contracts.

13. American Forest & Paper and CCC also argue that the Final Rule errs as a matter of law by determining generically that "Day 2" markets satisfy section 210(m)(1)(A) rather than requiring utilities to demonstrate, on a case-by-case basis, the factual basis upon which relief is requested, which they argue is required by section 210(m)(3). American Forest & Paper and CCC contend that the Commission simply presumed adequate wholesale markets existed in the "Day 2" markets, rendering the language of section 210(m)(1)(A)(ii) of the statute a nullity by not requiring applicants to set forth the factual basis on which relief is requested. American Forest & Paper and CCC complain that QFs have been denied the opportunity to challenge the specific findings after sufficient notice of the factual claims being made.

14. American Forest & Paper and CCC cite Alliant Energy Corporate Services Inc.[10] as support for its belief that section 210(m)(3) requires notice to each affected QF prior to

[10] 113 FERC ¶ 61,024 (2005).

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the Commission making a determination under section 210(m)(1). American Forest & Paper and CCC compare the Commission's generic treatment of "Day 2" markets with its case-by-case procedures for the reinstatement of the obligation, despite the almost identical statutory language in sections 210(m)(3) and 210(m)(4). American Forest & Paper argues that "regulations cannot alter the statutory scheme,"[11] stating that the procedural requirements have been inappropriately interpreted away in the Final Rule.

15. In American Forest & Paper and CCC's view, Congressional intent to encourage QF development supports interpreting section 210(m)(1)(A)(ii) as requiring the Commission to find, based on specific evidence, that there is a meaningfully competitive market prior to terminating the mandatory purchase obligation. American Forest & Paper and CCC note, for example, that EPAct 2005 did not repeal PURPA and provided for termination of the purchase requirement only if a very particular demonstration is made.

16. Industrial Parties similarly argue that the Commission erred in categorically finding that "Day 2" markets provide QFs with access to long-term wholesale markets. Industrial Parties contend that the Commission has ignored evidence that establishes that these markets are in their infancy. While acknowledging that suppliers will offer QFs a bilateral contract in the organized markets, Industrial Parties argue that the rates and terms and conditions of such contracts typically are not truly long-term and are discriminatory. Industrial Parties state that the long-term markets that exist are

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[11] American Forest & Paper Request for Rehearing at 13 (citing P. Gioso & Sons, Inc. v. Occupational Safety and Health Review Commission, 115 F.3d 100, 105 (1st Cir. 1997)).

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predominantly for resale – generators selling to load serving entities that in many cases have divested generation – and that these contracts are typically for a period of 6 to 18 months.

17. Industrial Parties also argue that the Commission incorrectly assumed that access to short-term "Day 2" markets is equivalent to a finding of access to long-term markets under section 210(m)(1)(A)(ii). Industrial Parties contend that the Commission must address the definition of "long-term," arguing that the Commission appears to view a market in excess of one year as long-term. Industrial Parties contend that a long-term market is a market of several years' duration or at least the timeframe for planning a new generator, which they state is three to five years for a gas-fired combined cycle unit. Industrial Parties ask that the Commission require utility applicants to 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 such markets.

18. Finally, American Forest & Paper and CCC argue that the Commission's interpretation of section 210(m)(1)(A)(ii) violates rules of statutory construction. Because subparagraph (C) specifically refers to markets for the sale of capacity under both subparagraphs (A) and (B), defining a third type of market that is "similar" to subparagraphs (A) and (B), American Forest & Paper and CCC argue it is nonsensical to conclude that the markets for capacity referenced in subparagraphs (A)(ii) and (B)(ii) are not similar as between themselves. American Forest & Paper and CCC therefore argue

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that the Commission erred by not interpreting subparagraph (A)(ii) as imposing qualitative requirements comparable to those imposed under subparagraph (B)(ii). In American Forest & Paper and CCC's view, otherwise the inclusion of a requirement that the Commission review specific "evidence of transactions" in subparagraph (B)(ii) would require the Commission to ignore evidence of transactions when applying subparagraph (A)(ii), which the Commission did not do in the Final Rule.

Commission Determination

19. The Commission denies rehearing of the determination that the four existing "Day 2" markets (MISO, PJM, NYISO, and ISO-NE) satisfy the requirements of the second prong of section 210(m)(1)(A). Petitioners on rehearing essentially argue that the Commission should have imposed a standard higher than what the statutory language literally requires, i.e., nondiscriminatory access to "wholesale markets for long-term sales of capacity and electric energy." The Commission declined to do so in the Final Rule and we affirm that determination here.

20. The Commission did not simply assume the existence of long-term markets in the "Day 2" markets, as some petitioners argue. Rather, the Commission found that the existence of bilateral long-term contracts for long-term sales of capacity and energy is a sufficient indication of a market. The Commission continued that it is reasonable to conclude that the subparagraph (A)(ii) requirement for long-term markets is met because bilateral long-term contracts are available to participants in the footprints of the MISO, PJM, ISO-NE, and NYISO. The Commission noted that long-term contracts were to be

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expected in these markets because of the nature of these markets. In this regard, the transmission access offered by RTOs allows suppliers (including QFs) the opportunity to enter into long-term bilateral contracts. RTOs have no incentive to favor one set of suppliers over others in providing transmission access. By eliminating pancaked rates, eliminating problems with internal loop flows, and improving the reliability of transmission operations over a broad multi-utility region, an RTO offers regional transmission service which facilitates longer-term contracting practices. This is because an RTO's footprint encompasses many different wholesale buyers, providing significant opportunity for a seller to reach many potential wholesale buyers.

21. In addition, organized markets operated by an RTO facilitate long-term bilateral contracts between sellers (including QFs) and wholesale buyers by reducing the costs to sellers of making long-term bilateral supply commitments. In the event a seller is unable to produce the energy required under a bilateral contract (for example, because of an outage), the seller can easily acquire replacement energy from the organized market at a transparent and competitive price. Even when the seller is physically capable of producing its contractually-required energy, the seller can acquire the energy from the RTO's market whenever it is cheaper to do so. Both of these factors reduce the cost to a seller of entering into a long-term bilateral contract.[12]

[12] Final Rule at P 120.

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22. With respect to bilateral long-term markets in these RTO/ISOs, the Commission noted that no commenters argued that long-term contracts do not exist in these markets or that QFs are precluded from entering into them with willing buyers[13] The Commission also pointed out that electronic quarterly report (EQR) filings indicate that there are in fact contracts for long-term sales of capacity and energy in each of the "Day 2" markets. The Commission concluded that the existence of these long-term contracts is a sufficient indication that long-term wholesale markets exist in those regions. It is telling that no petitioner on rehearing challenges (indeed, several petitioners concede) that long-term contracts exist in the "Day 2" markets. Instead, petitioners argue that existence of such contracts does not necessarily indicate that an adequate market for long-term energy and capacity exists. Yet the very fact that buyers and sellers of long-term energy and capacity have found each other, evidenced by the contracts they have entered into, demonstrates that a market for such products does in fact exist, which is all that the statute requires.

23. The thrust of many of the arguments on rehearing is that the Commission should have considered whether these long-term markets were competitive or as robust as QFs would like. That is not the standard set forth by Congress in section 210(m)(1)(A)(ii), which requires only that a long-term market is present, not that it be competitive or that it meet the subjective preferences of all QFs. As the Commission noted in the Final Rule, Congress knew how to impose a more specific level of review regarding the quality of

[13] Final Rule at P 117-20.

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the relevant long-term market since, in contrast to the language it used in section 210(m)(1)(A)(ii), it expressly used prescriptive language in section 210(m)(1)(B)(ii).

24. Section 210(m)(1)(A)(ii) requires only that we find access to "wholesale markets for long-term sales of capacity and electric energy." The term "market" is not defined with respect to any particular number of purchasers or sellers or the quality of the contracts available. One definition is "the action or business of buying and selling; an instance of this, a commercial transaction; a (good or bad) bargain."[14] Another definition is "a meeting together of people for the purpose of trade by private purchase and sales and usually not by auction."[15] These standard definitions support the Commission's finding that the ability of QF sellers to reach purchasers and the existence of long-term contracts for capacity and energy are sufficient to determine that "markets" exist for purposes of section 210(m)(1)(A)(ii). In contrast to section 210(m)(1)(A)(ii), section 210(m)(1)(B)(ii) requires us to find access to "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." Under this statutory directive, the Commission must not only find that markets exist, but it must assess the quality of the markets and find that they are "competitive." Congress chose not to require a finding of "competitive" long-term markets as a condition of invoking

[14] The New Oxford English Dictionary Vol. 1 A-M (1993 ed.).

[15] Webster's New Collegiate Dictionary (1979 ed.).

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section 210(m)(1)(A)(ii) and we have given reasonable meaning to this difference in language.[16]

25. Congress's decision to establish different standards in subparagraphs (A) and (B) makes sense in light of the ultimate question of whether a QF has nondiscriminatory access to potential purchasers other than the host utility, sufficient to justify terminating the purchase requirement, which is the overarching theme of section 210(m)(1). In the "Day 2" markets, which were in existence when EPAct 2005 was enacted and of which Congress was aware when it was considering PURPA reform, energy sold under bilateral long-term contracts as well as in the competitive day-ahead and real-time energy markets is simply scheduled as a delivery to the RTO and ISO grid. These market conditions make it possible for parties to enter into long-term contracts with confidence that electric energy sold pursuant to these contracts will be delivered. It is reasonable to conclude, therefore, that Congress considered the criteria specified for long-term contracts in section 210(m)(1)(B) unnecessary for section 210(m)(1)(A). This explains the distinctions embedded in the standards set forth in sections 210(m)(1)(A) and 210(m)(1)(B).

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[16] Some petitioners argue that the Commission's reliance on EQR reports to find the existence of a long-term market in "Day 2" regions is contradicted by Congress' reference to "evidence of transactions" in section 210(m)(1)(B), but not in section 210(m)(1)(A). The requirement in subparagraph (B) for evidence of transactions does not bar the use of such evidence in subparagraph (A), but merely indicates that such evidence is not required under subparagraph (A).

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26. It is true, as petitioners point out, that in some "Day 2" markets there is no formalized market for long-term sales of energy and capacity. It may also be true that such long-term markets are nascent and that the sales that do occur are predominantly to load serving entities for resale. All that is required by section 210(m)(1)(A)(ii), however, is that there be a market, not that it has particular market attributes desired by petitioners. Petitioners have offered no reasonable alternative to our interpretation of section 210(m)(1).

27. Petitioners are correct to point out that the Commission did not expressly define what length of contract it considered "long-term" within the meaning of section 210(m)(1)(A)(ii). The Commission explained, however, that it was relying on EQR data to find that long-term contracts existed in the "Day 2" markets. Long-term contracts are defined for EQR purposes as having a term of one year or more and, thus, the Commission's findings regarding long-term contracts in the Final Rule incorporated that definition. While some petitioners argue that a longer-term should have been used, we continue to believe that contracts of a year or more are sufficiently long-term to meet the statutory requirement that there be "wholesale markets for long-term sales of capacity and energy" within the meaning of section 210(m)(1)(A)(ii).[17]

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[17] Although the statute contrasts real-time, day-ahead, and long-term wholesale sales, it provides no definition of those categories of transactions. Nevertheless, the terms real-time and day-ahead markets were well known with respect to ISOs and RTOs at the time EPAct 2005 was enacted and definitions of these markets were well understood, i.e., Congress knew the meaning the terms as used with respect to ISOs and RTOs existing at the time of enactment of EPAct 2005. Additionally, the Commission at

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28. We note that the Commission has initiated a proceeding to explore ways to improve the operation of wholesale organized electric markets administered by RTOs and ISOs, including actions the Commission might take to further improve opportunities for long-term contracting in RTO and ISO regions.[18] While we disagree with petitioners who argue that QFs above 20 MW do not have access to long-term contracting opportunities in organized markets, or that section 210(m)(1)(A) requires us to find "competitive" or "robust" contracting opportunities, we are taking steps to facilitate additional opportunities for long-term contracting.

29. The Commission also rejects arguments that it may not make generic findings in this rulemaking as to the "Day 2" markets satisfying the requirements of section 210(m)(1)(A). The Commission has broad discretion to adopt generic policy or make generic findings through the rulemaking process rather than case-by-case adjudications.[19] Establishing generic findings in this rulemaking provides all parties, including electric

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the time of enactment of EPAct 2005 had for years defined long-term contracts under the OATT as one year or longer. Similarly, the Commission has treated power sales with a contract term of greater than one year to be "long-term" for reporting purposes. See, e.g., Revised Public Utility Filing Requirements, Order No. 2001, 67 FR 31043, FERC Stats. & Regs. ¶ 31,127 (2002), Order No. 2001-A, 100 FERC ¶ 61,074, reconsideration and clarification denied, Order No. 2001-B, 100 FERC ¶ 61,342 (2002). We thus believe it is reasonable to use the convention of treating contracts of a year or more as "long-term" consistent with our longstanding practice.

[18] Wholesale Competition in Regions with Organized Electric Markets, 119 FERC ¶ 61,306.

[19] Securities and Exchange Comm'n v. Chenery, 332 U.S. 194, 202-03, reh'g denied, 332 U.S. 747 (1947).

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utilities and QFs alike, a reasonable chance to be heard on common issues that arise in various market structures and involving classes of QFs. Indeed, no party has sought rehearing of the Commission's conclusion that the "Day 2" markets satisfy the first prong of section 210(m)(1)(A). It is just as appropriate for the Commission to find generically, in this rulemaking, that long-term markets exist in the "Day 2" RTO/ISOs as it is to find that those RTO/ISOs operate independently administered, auction-based day ahead and real time wholesale markets within the meaning of section 210(m)(1)(A)(i).

30. These generic findings do not violate the requirements of section 210(m)(3), as some petitioners argue. Under section 210(m)(1), the Commission must terminate the purchase requirement if it makes certain findings regarding nondiscriminatory access to specified markets. That provision of the statute does not specify the particular procedural mechanism the Commission must use in making those findings and, thus, the Commission has discretion to act through a rulemaking, case-by-case determinations, or some combination thereof. Section 210(m)(3) does not, as the petitioners appear to assume, require the Commission to await an application from an electric utility in order to make any of the particular findings specified in section 210(m)(1). While the Commission made certain generic findings in the Final Rule, it also required electric utilities (including those in the "Day 2" markets) that seek relief from the obligation to enter into new contracts or obligations with QFs to file an application pursuant to

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regulations implementing section 210(m)(3).[20] Thus, the Commission has incorporated the application process into its implementing regulations, combining the application procedures with generic findings and rebuttable presumptions to streamline the Commission's review. The resulting structure is fully consistent with the requirements of both sections 210(m)(1) and 210(m)(3).[21]

2. Section 210(m)(1)(B)

31. Section 210(m)(1)(B) requires termination of the purchase obligation if a QF has nondiscriminatory access to (i) transmission and interconnection services provided by a Commission-approved regional transmission entity pursuant to an open access tariff and (ii) competitive wholesale markets providing a meaningful opportunity to sell long-term and short-term capacity and electricity to buyers other than the interconnecting electric utility. The Commission concluded in the Final Rule that the CAISO and SPP are regional transmission entities within the meaning of the first prong of section 210(m)(1)(B), but made no findings as to the second prong for any market, including those operated by CAISO and SPP. The Commission also stated that any future determinations of what transmission providers qualify as a regional transmission entity within the meaning of the first prong will be made on a case-by-case basis. The

[20] Final Rule at P 102.

[21] The comparative structures of sections 210(m)(3) and 210(m)(4) do not support a different outcome. Section 210(m)(4) specifies the procedural requirements for reinstating the purchase requirement after the Commission has entered an order terminating that requirement and, thus, does not govern the Commission's initial procedures for acting to terminate the requirement.

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Commission provided examples of factors it may consider in making that determination, such as sufficient regional scope or configuration of the multiple discrete transmission systems the regional transmission entity controls.

Requests for Rehearing

32. Occidental argues that the Commission erred in reserving the discretion to deem an entity a "Commission-approved regional transmission entity" in the context of a section 210(m) proceeding. Because section 210(m)(1)(B)(i) refers to a "Commission-approved" entity, Occidental argues that a transmission provider must have been deemed by the Commission to be a "regional transmission entity" prior to the filing of an application for relief from the purchase requirement.

33. PacifiCorp argues that evidence of robust bilateral markets or actual sales by a QF to wholesale non-PURPA purchasers should be considered when the Commission determines whether QFs have the requisite "meaningful opportunity" to sell capacity and energy to other buyers within the meaning of section 210(m)(1)(B)(ii). PacifiCorp offers factual examples of QF plans to participate in wholesale markets, depending on market prices, although it acknowledges that the examples it used are extreme and did not materialize. PacifiCorp asks the Commission to establish a rebuttable presumption that evidence of a robust bilateral market featuring liquid trading points, or actual sales by QFs, should be adopted for purposes of implementing section 210(m)(1)(B)(ii). Alternatively, PacifiCorp asks the Commission to provide further guidance as to how the standards of that section will be applied.

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34. With regard to the SPP market, OG&E argues that the Commission erred in declining to find that utilities operating in SPP also satisfy the second prong of section 210(m)(1)(B) or to provide guidance with respect to the information required for utilities to make such a showing. OG&E argues that its comments on the NOPR adequately demonstrated that QFs have nondiscriminatory access to competitive markets within SPP. If the evidence it submitted was insufficient, OG&E claims the Commission erred by failing to provide guidance as to what type of information would satisfy the Commission's requirements. OG&E contends that such guidance would reduce the costs and burdens associated with preparing an application under section 210(m).

35. With regard to the CAISO market, Cogeneration Association of California argues that the lack of new construction in California, despite a clear supply shortage, is evidence that competitive long-term markets do not exist in that region. Cogeneration Association of California also argues that competitive markets must have price transparency, including both pricing terms and non-price terms, contending that there is virtually no disclosure to any market participant of prices secured or approved for capacity or energy purchased by utilities. Industrial Parties point to other characteristics of the California market that, in their view, would preclude a finding of access to sufficiently competitive markets, such as exit fees, the lack of direct access, and the dominance of utility generation in an otherwise thinly traded market.

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Commission Determination

36. We disagree with Occidental's assertion that a transmission entity must have been deemed by the Commission to be a "regional transmission entity" prior to the filing of an application for relief from the purchase requirement. As we explained in the Final Rule, section 210 does not define regional transmission entity and, therefore, the Commission has discretion in interpreting that term. At the time of enactment of section 210(m), Congress was aware of the existence of Commission-approved RTOs and ISOs with varying degrees of regional scope (some spanning many states and some covering only large individual states), as well as the continuing voluntary development of various types of transmission organizations.[22] It is reasonable to conclude that Congress, by using the generic term "regional transmission entity" in section 210(m)(1)(B)(i), intended to leave it to the Commission's discretion to determine on a case-be-case basis whether or not an entity is regional within the meaning of the statute.[23]

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[22] Indeed Congress, in EPAct 2005 incorporated into the Federal Power Act (FPA) definitions of RTO and ISO, with the RTO definition specifically recognizing that such an entity must be of sufficient "regional" scope, whereas the ISO definition does not contain a sufficient regional scope element. Pub. L. 109-58, 1291, 119 Stat. 594, 984 (2005) (codified at 16 USC 796(27), (28)). Cf. Pub. L. 109-58, 1286, 119 Stat. 594, 981 (2005) (adding section 206(a)(2) to the FPA, allowing Commission to order refunds for certain sales in "organized" markets).

[23] Congress in section 210(m) did not use the term "regional transmission organization" and thus presumably did not intend to limit a "regional transmission entity" to the regional scope requirements of Order No. 2000. Regional Transmission Organizations, Order No. 2000, 65 FR 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089

(continued…)

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37. We also deny rehearing of the decision not to find in the context of this rulemaking that the SPP market satisfies the second prong of section 210(m)(1)(B). While OG&E claims to have provided in its initial comments evidence demonstrating the quality of the SPP market,[24] what OG&E provided was little more than cursory comments and a description of bidding procedures that are being adopted in Oklahoma. Section 210(m)(1)(B)(ii) requires a showing of "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." This provision also provides that "[i]n determining whether a meaningful opportunity to sell exists the Commission shall consider, among other factors, evidence of transactions within the relevant market." We do not find OG&E's cursory submission sufficient to meet the statutory requirements. Moreover OG&E did not include any evidence of transactions in the SPP market. There was, and continues to be, an insufficient record in this proceeding to find that the SPP market satisfies the second prong of section 210(m)(1)(B).

38. With regard to OG&E's and PacifiCorp's requests for further guidance, we believe that the statutory language requiring that a QF have a meaningful opportunity to sell capacity and energy to buyers other than the interconnected utility means an actual, and

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(1999), order on reh'g, Order No. 2000-A, 65 FR 12088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), dismissed sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

[24] OG&E Comments at 4-6.

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not just theoretical, opportunity. Concrete evidence of transactions would further that finding, as the statutory language implies. To the extent such evidence is not available, we would expect at a minimum a petitioning electric utility to explain any lack of evidence of transactions and to provide a reasoned explanation of how the Commission could find that a meaningful opportunity to sell to buyers other than the interconnected utility exists in the absence of a history of transactions.[25] PacifiCorp's evidence of QF proposals that never reached fruition does not provide an adequate basis for the Commission to make any presumptions regarding whether particular markets satisfy the requirements of section 210(m)(1)(B)(ii). We continue to believe that it is best to address on a case-by-case basis whether non-RTO/ISOs and RTO/ISOs that do not have both auction-based real-time and day-ahead markets satisfy those statutory requirements.[26]

39. The claims of Cogeneration Association of California and the Industrial Parties regarding the lack of a sufficiently competitive market in California can be addressed in any individual cases concerning California. We note that the CAISO has been found only to satisfy section 210(m)(1)(B)(i) and that a separate finding of "competitive wholesale markets" is required under section 210(m)(1)(B)(ii). Thus, if a California utility makes a filing pursuant to section 210(m)(3) and § 292.310 of the Commission's

[25] The Commission is aware that certain types of evidence of transactions may contain information that an electric utility considers to be confidential. If information is considered confidential by the electric utility, procedures exist to maintain its confidentiality.

[26] Final Rule at P 145.

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regulations, and claims that it satisfies the section 210(m)(1)(B) criteria for relief from the purchase obligation, the issue of whether "competitive wholesale markets" exist will be an issue in that proceeding and the burden will be on the applicant to make the required demonstration.[27]

3. A Single Standard of Relief

40. As explained above, the Commission concluded in the Final Rule that the most reasonable interpretation of section 210(m)(1) is that Congress, in setting forth three discrete tests for three different types of markets, was directing the Commission to differentiate among three different markets, access to which would require termination of the purchase requirement provided such access is available on a nondiscriminatory basis. A number of petitioners had advocated a different interpretation of section 210(m)(1), arguing that subparagraphs (A), (B), and (C), when read together, establish a single standard for relief from the purchase requirement. In their view, these separate provisions together require electric utilities to demonstrate that a QF would remain economically viable or would otherwise have access to the technical equivalent of the purchase requirement in order to terminate the purchase requirement. The Commission rejected that view by interpreting section 210(m)(1) as establishing different standards for each of the three types of markets identified in subparagraphs (A), (B), and (C).

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[27] The Commission also left open the option of California utilities seeking a determination that the California market satisfies section 210(m)(1)(A) by filing requests for declaratory orders, after there is a functioning "Day 2" RTO/ISO in California. Final Rule at P 157.

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Requests for Rehearing

41. American Forest & Paper and CCC again challenge the Commission's determination that the three standards of relief described in section 210(m)(1) were intended to be different in terms of the organization and competitiveness of the relevant market or the evidentiary showings required for each. They argue that EPAct 2005 did not repeal PURPA or the Commission's obligation to encourage QF development and, therefore, the Commission's interpretation of section 210(m)(1) is unreasonable. American Forest & Paper and CCC suggest that section 210(m)(1)(C) clearly requires markets under subparagraphs (A), (B) and (C) to be of similar competitive quality since markets that satisfy subparagraph (C) must be "similar" to those described in subparagraphs (A) and (B). American Forest & Paper and CCC conclude that the Commission has adopted an unreasonable statutory construction by interpreting section 210(m)(1) as referring to three distinct types of markets.

Commission Determination

42. The Commission denies requests for rehearing of the determination not to adopt a single test to evaluate whether the requirements of section 210(m)(1) are met. We continue to believe, as we found in the Final Rule, that the most reasonable interpretation of section 210(m)(1) is that Congress, in setting forth discrete tests for three different types of markets, was requiring the Commission to differentiate among these markets and the differing circumstances they present in determining whether a utility is relieved of the purchase requirement. As discussed above, this interpretation is supported by the

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different language Congress used in subparagraphs (A) and (B) and the consequent need to make meaningful distinctions in the explicit statutory language Congress used. Otherwise, subparagraphs (A) and (B) presumably would have been collapsed by Congress into one test.

43. We agree the reference in section 210(m)(1)(C) to markets that are of "comparable competitive quality as markets described in subparagraphs (A) and (B)" indicates Congress' belief that those two types of markets share a certain set of competitive qualities. It does not follow, however, that the Commission should disregard the specific statutory tests in each of those subparagraphs when applying section 210(m)(1). The structure of section 210(m)(1), which separately describes different types of markets, makes clear that Congress was establishing a particular set of tests for the Commission to apply. In the Final Rule, the Commission adopted the most reasonable interpretation of subparagraph (C) – that Congress believed the two types of markets identified in subparagraphs (A) and (B), while distinct between themselves, contain certain competitive qualities that justify termination of the purchase requirement for any QF with nondiscriminatory access to those markets. Subparagraph (C) directs the Commission to consider these competitive qualities when analyzing whether there are other markets that, while not meeting the specific requirements of subparagraphs (A) and (B), are sufficiently competitive to justify termination of the purchase requirement.

44. The fact that the markets identified in subparagraphs (A) and (B) contain certain competitive qualities does not mean that they are the same type of market, or that a single

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test must be adopted for determining whether a particular market satisfies the requirements of a particular subparagraph. Such an interpretation would undermine Congress's decision to separately identify the two types of markets that it believes are sufficiently competitive to justify termination of the purchase requirement. It would also conflict with the particular determinations to be made under each of the subparagraphs. Subparagraph (A) explicitly refers to both "day ahead and real time" (i.e., "Day 2") organized markets. RTO/ISO day-ahead and real time markets are operated pursuant to Commission tariffs containing market rules and market mitigation aimed at preventing exercises of market power. It is reasonable to conclude that Congress assumed these markets to be sufficiently competitive, in combination with markets for long-term contracts, to justify termination of the mandatory purchase obligation.

45. As we noted in the Final Rule, "Day 2" markets are generally recognized as providing greater opportunities for QFs and other independent generators to make sales to a large number of buyers than other markets because the existence of day-ahead and real-time energy markets allows all competing generators to submit bids to participate on a nondiscriminatory basis in a market from which many buyers over a large area make purchases. While the "Day 1" markets also provide opportunities for independent generators to compete, the markets are more limited. It is therefore not surprising that the factual showing required under section 210(m)(1)(B) is more difficult relative to section 210(m)(1)(A), which enjoys the benefit of the "Day 2" market structures. These different standards support, rather than undermine, the Commission's interpretation that

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subparagraphs (A) and (B) separately identify the particular markets that Congress has deemed sufficiently competitive to justify termination of the purchase requirement.

46. The Commission's task under section 210(m)(1)(C) is, therefore, to determine the set of competitive qualities that are shared by markets satisfying the requirements of subparagraphs (A) and (B). Recognizing this task, the Commission declined in the Final Rule to adopt any bright line tests when applying subparagraph (C). Simply put, the common objective of subparagraphs (A) and (B), and therefore subparagraph (C), is the identification of a wholesale marketplace where QFs have alternatives to their local utility to sell their electric energy. We believe the three-tiered structure of section 210(m)(1) indicates a finding by Congress that two particular market designs provide those alternatives, while directing the Commission to consider whether other market designs might as well.

47. Congress could have stated a broad, general finding to be made by the Commission such as "workably competitive markets." Instead, Congress tailored subparagraphs (A) and (B) to establish criteria specific to each market design that, in its view, provide sufficient sales alternatives for QFs. Under these circumstances, we believe it appropriate to use the market designs identified in subparagraphs (A) and (B) as guides when analyzing whether an alternative market design satisfies the requirements of subparagraph (C). For example, the Commission found in the Final Rule that the markets in ERCOT satisfy the statutory requirements of subparagraph (C) because they are of

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comparable quality to those described in subparagraph (A). We continue to believe that finding is appropriate and note that no petitioner challenges it on rehearing.

48. Finally, while it is true that EPAct 2005 did not repeal PURPA or the Commission's obligation to encourage QF development, enactment of section 210(m) of PURPA clearly changed the rights of QFs under PURPA. The Commission has no discretion other than to terminate the purchase requirement if it finds that a QF has nondiscriminatory access to any of the markets described in section 210(m)(1)(A), (B) or (C). It would be inappropriate for the Commission to ignore this mandate by implementing section 210(m)(1) in a way that undermines the specific standards of relief Congress chose to establish in the statute.

B. Nondiscriminatory Access to a Market

49. The Commission also must determine that a QF has nondiscriminatory access to a PURPA section 210(m)(1) market in order to terminate the purchase requirement. In the Final Rule, the Commission adopted several presumptions to be used in determining whether access to a particular market is available on a nondiscriminatory basis in order to streamline processing of applications for termination of the purchase requirement.

50. First, the Final Rule found that a QF's eligibility for service under an OATT, or a reciprocity tariff filed by a non-public utility, creates a rebuttable presumption that the QF has nondiscriminatory access to the relevant market. Second, the Commission adopted a rebuttable presumption that QFs interconnected with electric utility members of a "Day 2" RTO/ISO have nondiscriminatory access to the "Day 2" market. Finally,

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regardless of available transfer capability (ATC) under an OATT or location within a "Day 2" market, the Final Rule establishes an additional rebuttable presumption that QFs with a net capacity no greater than 20 MW do not have nondiscriminatory access to wholesale markets.

51. These rebuttable presumptions were designed to work together to facilitate prompt Commission review of requests to terminate the purchase requirement within the 90-day time frame mandated in the statute. Various petitioners challenge the adoption of these presumptions on rehearing, which we address below.

1. The OATT

52. The Commission first established a rebuttable presumption that a QF has nondiscriminatory access to a market if it is eligible for service under a Commission-approved OATT, or Commission-filed reciprocity tariff, and Commission-approved interconnection rules.[28] If the Commission determines that a particular market meets the criteria of section 210(m)(1)(A), (B), or (C), and a QF in that market is eligible for service under an OATT or reciprocity tariff, a QF may seek to rebut the presumption of access to the market by providing specific and credible evidence that the QF does not have nondiscriminatory access due to operational characteristics or transmission constraints. If the QF is unable to make this demonstration, the purchase requirement will be terminated.

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[28] Transmission providers are required to provide interconnection as well as transmission services on a nondiscriminatory basis under their OATTs.

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53. In the Final Rule, the Commission determined that only issues other than issues related to the provision of open access transmission under the OATT would be considered when analyzing whether the presumption of nondiscriminatory access to markets has been rebutted. The Commission rejected requests to allow a QF to litigate open access implementation issues in the context of these 90-day applications, concluding that complaint proceedings are the appropriate forum for such disputes. The Commission also rejected arguments that it is unreasonable to rely on a presumption that a Commission-approved OATT provides nondiscriminatory access to markets in light of the then-pending NOPR in the OATT reform rulemaking, Docket Nos. RM05-17, et al., in which reforms to the pro forma OATT had been proposed.

Requests for Rehearing

54. Occidental challenges the Commission's reliance on an OATT to create a rebuttable presumption that QFs have nondiscriminatory access to the relevant wholesale markets. Occidental argues that the Commission's actions in the OATT reform rulemaking have demonstrated that, notwithstanding the existence of an OATT, there remain continuing opportunities for undue discrimination by transmission entities. Occidental contends that the Commission's statement in the Final Rule that it had not found actual discrimination in the OATT reform rulemaking is inconsistent with findings in the OATT reform NOPR that deficiencies in the OATT needed to be addressed. In Occidental's view, the Commission's determination in the OATT reform NOPR that there are remaining opportunities for undue discrimination bear directly on the finding

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that the Commission must make under section 210(m) that a utility is administering its OATT in a nondiscriminatory manner.

55. Occidental argues that the Commission's determination that only issues not related to the provision of open access transmission under the OATT may be raised to rebut the presumption of nondiscriminatory access is inconsistent with the statutory language of section 210(m) and is a violation of due process. Industrial Parties assert that the Commission must consider evidence of discrimination when analyzing whether the presumption has been rebutted. Failure to do so would, in their view, violate the Commission's statutory obligation to eradicate discrimination.

56. Occidental further argues that the Commission should clarify that QFs under section 210(m)(1)(B) and (C) have the same opportunity to rebut the presumption of nondiscriminatory access as QFs under section 210(m)(1)(A). Occidental notes that the Commission lists several factors in the Final Rule as a possible rebuttal to a finding of nondiscriminatory access to the markets set forth in subparagraph (A), but that it is not clear if the factors are also relevant to the question of whether the purchase obligation should be terminated under subparagraphs (B) and (C). If the Commission does not grant clarification, Occidental requests rehearing on this issue.

57. Cogeneration Association of California argues that existence of an OATT is insufficient to guarantee nondiscriminatory access since it may not provide physical transmission rights. Because QFs generate electricity as a necessary by-product of their service to their thermal hosts, Cogeneration Association of California contends that a

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cogenerator must have a physical location to deliver the electricity. Cogeneration Association of California argues that this requires physical transmission rights that recognize the operating requirements of cogeneration operations. In its view, the lack of physical delivery rights places a cogeneration QF in the untenable situation of either ceasing operation or violating ISO tariff and scheduling protocols, thereby incurring penalties or sanctions. Cogeneration Association of California goes on to illustrate its concern using the California market redesign effort as an example. Because the congestion revenue rights are allocated first to load-serving entities, and the remainder are auctioned to other market participants, Cogeneration Association of California fears that existing QFs would be unable to hedge congestion and that new projects would be unable to obtain long-term rights necessary to support long-term contacts, a prerequisite for financing.

58. Occidental adds that, if the Commission does not reject the OATT presumption on rehearing, it should require applicants to submit at a minimum additional information such as clear and specific definitions and descriptions of each real-time, short- and long-term market the utility claims in its section 210(m) application that the QF is able to access on a nondiscriminatory basis.

59. Multiple petitioners argue that the Commission erred by establishing any form of rebuttable presumption. Industrial Parties contend that the Administrative Procedure Act requires that the applicant for relief – in this case an electric utility – has the burden of

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proof.[29] Industrial Parties argue that an agency may not use a presumption to shift the burden of proof if the result is not in keeping with the statutory purpose and, in their view, it runs counter to section 210(m) to impose on QFs the burden to prove a lack of nondiscriminatory access to markets since the relevant information concerning transmission and access to markets is most likely in the possession of the utility rather than the QF.

60. PIOs argues that creating rebuttable presumptions that electric utilities meet section 210(m) requirements is contrary to the plain language of section 210(m)(3). PIOs argues that, when a utility seeks relief from the mandatory purchase obligation, the Commission is required by section 210(m)(3) to consider evidence of the assertion that the required access and markets are actually available to QFs in the utility's service territory, including a utility in an RTO. In PIOs' view, the Commission is not authorized to permit utilities to escape the obligation to set forth facts that demonstrate that the conditions provided in section 210(m)(1)(A), (B) or (C) have been met for the QFs in its territory.

61. American Forest & Paper and CCC agree, citing NICOR Exploration Co. v. FERC[30] for the proposition that the Commission incorrectly shifts the burden of proof away from electric utilities through adoption of rebuttable presumptions. American

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[29] Industrial Parties Request for Rehearing at 7 (citing Hi-Tech Furnace Sys. v. FCC, 224 F. 3d 781 (D.C. Cir. 2000); Pub. Serv. Comm'n of New York v. FERC, 866 F.2d 487 (D.C. Cir. 1989)).

[30] NICOR Exploration Co. v. FERC, 50 F.3d 1341 (5th Cir. 1995) (NICOR).

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Forest & Paper and CCC state that NICOR found that the Commission erred by shifting the burden for a natural gas producer to prove that an area rate clause authorized incentive based rates.[31] American Forest & Paper and CCC argue that that situation is directly analogous to the issue in this proceeding, where the Commission has relieved electric utilities of proving that QFs have non-discriminatory access to wholesale markets and, instead, forced QFs to prove the absence of such access.

Commission Determination

62. The Commission denies rehearing of the adoption of a rebuttable presumption that eligibility for service under a Commission-approved OATT, or Commission-filed reciprocity tariff, provides nondiscriminatory access to the market. We first address arguments against the use of any form of rebuttable presumption and then turn to arguments against relying on the OATT in particular.

63. The Commission denies rehearing regarding the use of rebuttable presumptions in processing requests to terminate the purchase requirement. As discussed in paragraph 30 above, under the plain language of section 210(m)(1), it is the Commission's responsibility to find that there is nondiscriminatory access to certain specified markets prior to terminating the purchase requirement. The use of rebuttable presumptions serves to identify, in advance, the Commission's preliminary analysis, subject to future evidentiary submissions, thereby streamlining the application review process. The Commission believes this will facilitate prompt processing of applications under section

[31] American Forest & Paper and CCC Request for Rehearing at 25.

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210(m), which is required by section 210(m)(3), and ultimately benefit QFs and electric utilities alike by providing advance notice of how the Commission will consider certain issues. Abandoning the use of rebuttable presumptions, as some petitioners advocate, would unduly complicate the application process and impair the Commission's ability to act within the 90-day timeframe required by section 210(m)(3). Moreover, these rebuttable presumptions were not created in a vacuum. They are based on the Commission's experience in implementing non-discriminatory open access transmission over the past 11 years, its experience with QF issues (including interconnection issues) over the past 29 years, and its experience with RTO/ISO markets over almost 10 years.

64. The cases cited by petitioners, which taken together stand for the proposition that the proponent of a rate change bears the burden of proving that change satisfies the relevant statutory or regulatory requirements, are therefore inapposite.[32] The rebuttable presumptions do not relieve the Commission of its ultimate responsibility to make findings under section 210(m)(1) prior to relieving an electric utility of the purchase requirement. Instead, they simply provide advance notice of how the Commission will carry out that responsibility.

65. The rebuttable presumptions are also consistent with the requirements of section 210(m)(3), which establishes the procedures to be followed when an electric utility requests that the Commission make the finding of nondiscriminatory access to a market

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[32] See Hi-Tech Furnace Sys. V. FCC, 224 F. 3d 781 (D.C. Cir. 2000); Pub. Serv. Comm'n of New York v. FERC, 866 F.2d 487 (D.C. Cir. 1989); NICOR Exploration Co. v. FERC, 50 F.3d 1341 (5th Cir. 1995).

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identified in section 210(m)(1)(A), (B), or (C). As required in section 210(m)(3), the regulations promulgated in the Final Rule clearly require a petitioning electric utility to state the factual basis on which it relies and describe why the conditions set forth in subparagraphs (A), (B), or (C) are met.[33] That factual basis could include the factual determinations made in the Final Rule regarding certain markets satisfying the criteria of those subparagraphs, the presumptions adopted in the Final Rule regarding nondiscriminatory access, or any other factor the electric utility considers relevant to the determination the Commission must make under section 210(m)(1). There is no conflict between the use of rebuttable presumptions and the procedural requirements of section 210(m)(3).

66. We reiterate that the rebuttable presumptions adopted in the Final Rule – some of which are presumptions in favor of the electric utility and some of which are in favor of the QF -- are not final determinations. Each of these presumptions is expressly rebuttable. Electric utilities and QFs alike will have the opportunity to present case-specific evidence in support of or against application of the presumption on review of a request to terminate the purchase requirement. For example, regarding the OATT presumption in particular, there may be circumstances unique to a particular QF that interfere with that QF's nondiscriminatory access notwithstanding its eligibility for service under an OATT. The QF might have operational characteristics that effectively prevent its participation in a market. The QF might lack access to a mechanism to

[33] See 18 CFR 292.310.

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schedule transmission service or make advance sales on a consistent basis. Each QF will be in the best position to have knowledge of the particular circumstances that interfere with its ability to access the market through the OATT and, thus, requiring the QF to submit evidence of its lack of nondiscriminatory access is entirely reasonable. The Commission clarifies that the ability to rebut the presumption of nondiscriminatory access applies regardless of the market in which the QF is located.

67. The Commission was nonetheless sensitive to the QFs' potential need for information relevant to rebutting the presumption of nondiscriminatory access. The Commission therefore required petitioning electric utilities to submit information regarding transmission constraints, levels of congestion, and interconnections in order to give potentially affected QFs data that may be relevant to rebutting the presumption that they have access to the market. With these informational safeguards in place, we believe that reliance on a rebuttable presumption regarding nondiscriminatory access to the market is reasonable.

68. We also reject arguments on rehearing that the Commission failed to justify reliance on the OATT in particular when formulating its rebuttable presumptions. Since issuance of the Final Rule, the Commission has issued Order No. 890, adopting reforms to the OATT to ensure that transmission customers continue to have nondiscriminatory

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access to transmission service.[34] The Commission's findings in Order No. 890 do not, however, conflict with the rebuttable presumption adopted in this proceeding, as petitioners claim. The Commission did not find in Order No. 890 that any transmission provider actually discriminated against a particular customer and, instead, found that there remained opportunities for such discrimination that needed to be remedied.[35] The fact that opportunities remained for discrimination in the provision of transmission service (which, we add, we have now addressed) would conflict with an irrebuttable presumption of nondiscriminatory access, not a rebuttable presumption. The rebuttable nature of the presumption acknowledges that a QF may not actually have nondiscriminatory access and leaves that determination for case-by-case review by the Commission.

69. At the same time, the underlying structure of the OATT, even before the reforms adopted in Order No. 890 are implemented, and certainly after, counsels in favor of the rebuttable presumption that eligibility for service under an OATT provides nondiscriminatory access to markets. Under the OATT, transmission providers must make transmission capacity available to all customers on a nondiscriminatory basis, thereby ensuring a level playing field for all market participants attempting to access supplies. That requirement by definition satisfies the nondiscriminatory access criteria of

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[34] Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 FR 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 at P 443 (2007).

[35] Id. at P 42.

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section 210(m). To the extent a QF believes that it in fact is not receiving nondiscriminatory access to the market, however, it can make that demonstration in response to an electric utility's application to terminate the purchase requirement.

70. In response to arguments by Cogeneration Association of California that the existence of an OATT is insufficient to guarantee nondiscriminatory access because it may not provide physical rights, we note that in organized markets which offer financial transmission rights, these financial rights are in addition to, not in place of, physical rights. In essence, the Cogeneration Association of California is arguing that the Commission should provide a QF with transmission services superior to those available to other generators in the organized markets. However, section 210(m)(1) requires that a QF have nondiscriminatory access to one of the markets specified in section 210(m)(1)(A), (B), or (C); it does not guarantee a QF preferential access to transmission service. To the extent that Cogeneration Association of California also argues that a QF that has contractual obligations to thermal hosts does not have the flexibility to participate in markets where the access is provided by financial, rather than physical, transmission rights, the Commission in its regulations has provided each QF the opportunity to argue that its operational characteristics prevent the qualifying facility's participation in a market. Thus any QF that believes it does not have nondiscriminatory access to the market (regardless of whether access is provided by physical or financial rights) has the right to rebut the OATT presumption of access in response to an electric utility filing seeking termination of the mandatory purchase obligation.

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71. The Commission also declines to adopt Occidental's recommendation to require additional information from electric utilities relying on the OATT presumption. The filing requirements of § 292.310 of the Commission's regulations, as modified below, are sufficient to provide the Commission with the information necessary to promptly process applications for termination of the purchase requirement.

72. Finally, the Commission grants clarification of its determination in the Final Rule that only issues other than issues related to the provision of open access transmission under the OATT will be considered when analyzing whether the presumption of nondiscriminatory access to markets has been rebutted. The Commission continues to believe that complaint proceedings are the appropriate forum for such disputes. However, where there are pending complaints raising credible issues concerning a transmission provider's implementation or administration of its OATT, the Commission will also consider that fact, as appropriate, when evaluating whether a QF does in fact have nondiscriminatory access to the market.

2. "Day 2" Markets

73. The Final Rule provided for a second rebuttable presumption specific to QFs operating in a "Day 2" market. Because members of the "Day 2" RTO/ISOs have turned over the operation of their transmission facilities to an independent entity that has no stake in the marketplace and that ensures all users of the transmission system are treated on a nondiscriminatory basis and are provided access to their markets, the Commission established a rebuttable presumption that QFs interconnected with electric utility

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members of a "Day 2" RTO/ISO have nondiscriminatory access to that "Day 2" market. Since the Commission found that the existing "Day 2" markets satisfied the requirements of section 210(m)(1)(A), this creates a rebuttable presumption that electric utility members of the existing "Day 2" RTO/ISOs are relieved of the purchase requirement.

74. The Commission declined to apply this presumption of nondiscriminatory access to entities that are not members of the "Day 2" RTO/ISOs. In order for such entities to obtain relief of the purchase requirement, the Commission stated that they must file an application pursuant to either section 210(m)(1)(B) or (C), to be reviewed on a case-by-case basis by the Commission.

Requests for Rehearing

75. Industrial Parties argue that the Commission does not have sufficient experience to impose a presumption of access in the "Day 2" markets. In their view, these markets are nascent and the Commission does not have the ability to determine whether QFs have sufficient access to competitive alternatives to justify relieving electric utilities within those markets of the mandatory purchase obligation.

76. NRECA, on the other hand, argues that it is arbitrary and capricious to deny to non-member utilities within or adjacent to the footprint of a "Day 2" RTO/ISO the same presumption accorded to RTO/ISO members. NRECA contends that there is no basis for denying non-RTO member utilities adjacent to an RTO the same presumption where the non-RTO member utilities have a Commission-approved OATT or reciprocity tariff. NRECA also argues that the Final Rule appears inconsistent as to which standard a non-

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RTO member within a "Day 2" RTO footprint must satisfy in order to obtain a waiver from the purchase requirement. Although the Final Rule provides that non-RTO members, if they are located within or adjacent to the footprint of a "Day 2" RTO, must satisfy the section 210(m)(1)(B) or (C) standards in order to remove the purchase obligation, NRECA notes that the Final Rule also states that any electric utility may file an application for relief from the purchase requirement by showing nondiscriminatory access to any of the section 210(m)(1)(A), (B) or (C) markets.[36]

77. NRECA also argues the Final Rule effectively allows QFs interconnected to an RTO member that has had its purchase requirement terminated to have the option of participating in that RTO market or requesting wheeling service to whichever non-member utility within or adjacent to the RTO's footprint has the highest avoided cost. NRECA expresses concern that the QF in this circumstance could seek to consummate a mandatory purchase agreement with a distant utility, notwithstanding termination of the purchase obligation for its interconnected utility. NRECA therefore asks the Commission to address this unintended consequence on rehearing.

78. Even if Congress assumed that QFs in RTO regions have access to nondiscriminatory transmission services, as well as meaningful opportunities to sell long-term capacity/energy in competitive markets, PIOs argues that it does not follow that Congress intended to permit utilities in those regions to bypass section 210(m)(3) requirements or to authorize the Commission not to consider evidence of actual QF

[36] NRECA Request for Rehearing at 8 (citing Final Rule at P 125, 151).

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access to required services and markets when utilities in those regions seek to end their PURPA obligations.

Commission Determination

79. The Commission denies rehearing of its decision to adopt a rebuttable presumption that QFs interconnected with electric utility members of a "Day 2" market have nondiscriminatory access to that "Day 2" market. Arguments that the "Day 2" markets do not provide QFs sufficient competitive alternatives are rejected above.[37] The Commission has sufficient experience with the four "Day 2" markets to determine that QFs have nondiscriminatory access to those markets. Industrial Cogenerators offers no reason to depart from the statutory language and impose a more rigorous standard.

80. The Commission also denies rehearing of its decision to limit application of the "Day 2" presumption only to member utilities of the particular "Day 2" RTO/ISO. Member utilities have turned over control of their transmission to the regional organization. As a result, QFs interconnected with a member utility may offer their energy into the RTO/ISO day ahead and real time energy markets without any additional concerns about securing transmission capacity. These QFs face few, if any, barriers to be able to sell energy and capacity to any willing purchaser within the RTO/ISO region, subject to the purchaser's willingness to pay any relevant congestion charges.

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[37] See supra P 19-30, 41-48.

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81. In contrast, non-member utilities have retained control over their transmission facilities and, thus, control the only access interconnected QFs have to the market. While an OATT or reciprocity tariff will provide a QF interconnected with a non-member utility with access to the market within that particular utility's subregion, the QF must compete with the non-member utility to secure transmission service in order to access the nearby regional market. Issues may arise concerning ATC and a range of other open access, commercial, and coordination (with the RTO or ISO) matters that are more appropriately examined on a case-specific basis.[38] Accordingly, it is reasonable for the Commission to limit application of the rebuttable presumption that the four RTO/ISOs meet the statutory standards under PURPA 210(m)(1)(A) only to member utilities of those regional organizations. Non-member utilities remain free, though, to seek termination of the obligation to purchase from QFs in individual cases.

82. NRECA is correct that any electric utility may file an application for relief of the purchase obligation under any subparagraph of section 210(m)(1). We clarify that the Commission's conclusion not to apply a presumption of nondiscriminatory access to non-member utilities of a "Day 2" RTO/ISOs does not preclude such utilities from seeking to

[38] For example, QFs interconnected with member utilities would not experience rate pancaking for transmission service to access the market, additional risks and costs of possible curtailment outside of the locational marginal price (LMP) managed market, or increased scheduling burdens associated with taking service over an intervening transmission system under the OATT (in comparison to directly scheduling energy deliveries in the day-ahead and real-time LMP markets).

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satisfy the requirements of subparagraphs (A), (B), or (C), as the regulations in Part 292 of the Commission's regulations expressly provide.

83. In response to NRECA's concern that a QF interconnected with a member utility of a "Day 2" market will seek PURPA contracts with adjacent utilities, using QF wheeling rights, we do not interpret section 210(m) to permit this. Section 210(m)(1) provides that "no electric utility" shall be subject to the purchase requirement if the Commission finds that the QF has nondiscriminatory access to one of the specified markets. Thus, once the Commission makes a finding that a particular QF has nondiscriminatory access to one of the specified markets, no electric utility shall be required to enter into a new contract or obligation with that QF. The QF would therefore no longer be able to impose the purchase requirement on any electric utility. If a QF that has been found to have nondiscriminatory access to one of the specified markets pursuant to the request of a particular electric utility seeks to enforce the purchase obligation against another electric utility, the second electric utility may file an application to terminate its purchase obligation with respect to that QF, and the Commission would consider its findings in the first proceeding to be determinative, absent a showing by the QF that circumstances, either nondiscriminatory access or the state of the markets, have changed.

3. Small Size

84. Notwithstanding the presumption of nondiscriminatory access afforded by the OATT or the structure of the "Day 2" markets, the Commission concluded in the Final

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Rule that certain QFs may nonetheless have difficulty accessing the market due to their small size. The Commission, therefore, adopted an additional rebuttable presumption that small QFs do not have nondiscriminatory access to the market, regardless of whether the QF is an eligible customer under an OATT or interconnected with a member utility of a "Day 2" RTO/ISO. Although the Commission did not specify in the Final Rule what evidence would be sufficient to rebut this presumption, it did note that relevant evidence could include the extent to which the small QF has been participating in the market or is owned by, or is an affiliate of, an entity that has been participating in the relevant market. The Commission also found that a reasonable and administratively workable definition of "small" is 20 MW net capacity or smaller.

Requests for Rehearing

85. On rehearing, petitioners raise several issues regarding the rebuttable presumption for small QFs. Some utilities argue that there should be no special treatment of small QFs and that the rebuttable presumption is an impermissible waiver of section 210(m). Some QFs, however, argue that small QFs should be completely exempt from termination of the mandatory purchase obligation. Various petitioners argue that the Commission should set the threshold for "small" lower or higher.

86. Central Vermont argues that making exceptions for certain QFs because of their small size goes against the plain language of the statute, contending that the statute says nothing about allowing the Commission to consider whether it is practical or economical for the QF to reach the wholesale market in question. Central Vermont argues that the

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Commission's findings with respect to QFs interconnected with member utilities of the "Day 2" RTO/ISO should apply equally to all QFs regardless of size. NRECA similarly argues that Congress did not establish exceptions for size, characterizing the Commission's standards for overcoming this presumption as insurmountable and, therefore, arbitrary and capricious.

87. Deere argues, however, that the purchase requirement for small QFs should be retained in full in any market in which that obligation is otherwise lifted for large generators. Otherwise, Deere contends, the rebuttable presumption will be an invitation for expensive litigation. Deere argues that the Commission should treat small QFs in a manner that prevents the costs of defending the rebuttable presumption from becoming a discouragement to the development of small renewable projects.

88. CIBO argues that the Commission should expand the size presumption to apply to QFs with a net capacity of 80 MW or less. CIBO contends such treatment would be consistent with the Commission's obligation under EPAct 2005 to issue a rule that ensures continuing progress in the development of efficient electric energy generating technology. CIBO argues that Congress defined "small" in PURPA as 80 MW for small biomass, waste, renewable resources and geothermal resource power generation and, therefore, the Commission's defining of small QFs at 20 MW contravenes Congress's longstanding support of QFs, creates obstacles for some but not all small QFs and upsets capital investment. CIBO argues that the Commission makes no attempt to explain how

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20 MW QFs differ from 80 MW QFs and that any differentiation for purposes of unequal statutory treatment must have a rational basis.

89. CIBO further argues that the orders cited by the Commission in favor of a 20 MW threshold, such as Order No. 671[39] and Order No. 2006,[40] do not address the operational limits or difficulties that larger QFs have in accessing "Day 2" markets, such as widely fluctuating steam-host demand, siting issues and transmission versus distribution interconnection access issues. Without guaranteed access to markets, CIBO contends that many QFs in the 20-80 MW range will simply stop cogenerating and new industrial cogeneration will not be developed.

90. Finally, CIBO argues that increasing the threshold to 80 MW adds a very small number of QFs and would add little to the amount of capacity compared to total nationwide capacity. In CIBO's view, the Final Rule already requires utilities to purchase power from QFs that are less than 20 MW and, thus, there would not be any material increase in administrative burden for electric utilities to use an 80 MW threshold.

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[39] Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order No. 671, 71 FR 7852 (Feb. 15, 2006), FERC Stats. & Regs. ¶ 31,203 (2006), order on reh'g, Order No. 671-A, 71 FR 30585 (May 30, 2006), FERC Stats. & Regs. ¶ 31,219 (2006).

[40] Standardization of Small Generator Interconnection Agreements and Procedures, Order No. 2006, 70 FR 34189 (June 13, 2005), FERC Stats. & Regs. ¶ 31,180 (2005), order on reh'g, Order No. 2006-A, 70 FR 71760 (Nov. 30, 2005), FERC Stats. & Regs. ¶ 31,196 (2005).

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91. Industrial Parties argue that the Commission should expand the small size presumption to include any QF that is unable to sell power in 50 MW blocks, regardless of the particular capacity of the facility. Industrial Parties contend that certain over the counter bilateral contracts stipulate a minimum lot increment of 50 MW, which can be a problem for larger QFs (i.e., above the 20 MW threshold) because their intermittent production of surplus power cannot always or easily be packaged in 50 MW x 16 hour increments. Industrial Parties state that QFs that cannot sell 50 MW blocks have only very limited access to financial markets, at disadvantageous terms.

92. NRECA argues that the Commission's 20 MW threshold is too generous. NRECA states there is evidence in the record that RTOs are capable of transacting with generators with capacities as small as one or two MW depending on the RTO. NRECA contends that no party has demonstrated that the existing RTO processes for utilities between one and 20 MW are ineffective, unduly complicated or overly burdensome. NRECA also suggests that the Commission's earlier decision to simplify interconnection for generators with capacities of less than 20 MW is unrelated to the question of whether QFs have access to markets or, if related, demonstrates that they have such access.

93. With regard to how the Commission measures the size of a QF for purposes of applying the rebuttable presumption, the Cogeneration Association of California requests the Commission to clarify it is by reference to capacity delivered to the grid. The Cogeneration Association of California state that cogenerators often supply electricity to on-site load and only supply a portion of their maximum electrical output to the grid. In

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its view, electricity used to supply on-site load should not be counted for purposes of applying the size presumption.

Commission Determination

94. The Commission denies the requests for rehearing regarding the rebuttable presumption that small QFs do not have nondiscriminatory access to the market. We continue to believe it is appropriate to adopt a rebuttable presumption that certain QFs do not have nondiscriminatory access to markets because of their small size. The purchase requirement will therefore remain in effect, in all markets, for all QFs with a net capacity of 20 MW or smaller, although electric utilities will have the opportunity to rebut the presumption by showing that a small QF does in fact have nondiscriminatory access to the relevant market.

95. We share CIBO's goal of continuing progress in the development of efficient electric generating technology, but disagree with CIBO and other petitioners that we have unreasonably differentiated "small" from "large" QFs. There is no perfect bright line that can be drawn and we have reasonably exercised our discretion in adopting a 20 MW or below demarcation for purposes of determining which QFs are unlikely to have nondiscriminatory access to markets. Moreover, any QF above 20 MW is permitted to demonstrate an inability to access the markets, and any electric utility is permitted to demonstrate that a QF 20 MW or smaller is able to access the markets. The Commission's development of rebuttable presumptions is based on its experience with QFs, transmission interconnections and related market issues, and is designed to provide

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a reasoned and fair approach for processing applications within the 90-day time frame dictated by the statute.

96. While the Final Rule does not make a generic finding that QFs interconnected at a distribution level lack nondiscriminatory access to markets, we believe that it is reasonable to conclude that some, perhaps most, small QFs at or below the 20 MW level can be distinguished from larger QFs by the type of delivery facilities to which they typically interconnect. Most QFs larger than 20 MW are interconnected to higher voltage lines, typically considered to be transmission lines, while smaller QFs tend to be interconnected to lower voltage radial lines, frequently considered to be distribution.[41] Many lower voltage facilities are radial systems designed to carry power from the high-voltage grid downstream to loads, and there may be technical enhancements required to move power injected into such facilities upstream to the transmission grid to access the broader wholesale market. Smaller QFs are also more likely to have to overcome other obstacles, such as jurisdictional differences, pancaked delivery rates, and perhaps

[41] See, e.g., Standardization of Small Generator Interconnection Agreements and Procedures, Order No. 2006-A, 70 FR 71760 (Nov. 30, 2005), FERC Stats. & Regs. ¶ 31,196 at P 105 (2005), ("We expect the vast majority of small generator interconnections will be with state interconnection programs."); Id. at P 102 ("a QF selling at retail is not eligible to interconnect under either Order No. 2003 or Order No. 2006. Under the Public Utility Regulatory Policies Act of 1978, such interconnections are governed by state law.") (citations omitted).

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additional administrative procedures, to obtain access to distant buyers.[42] Taken together, these factors support a rebuttable presumption that smaller QFs have substantially less ability to access wholesale markets than do larger QFs.

97. Although there is no unique and distinct megawatt size that uniquely determines if a generator is small, in other contexts the Commission has used 20 MW, based on similar considerations to those presented here, to determine the applicability of its rules and policies. Indicative of this is the Commission's reliance in the Final Rule on its findings in Order No. 671, where the Commission retained exemptions for QFs that are 20 MW or smaller from sections 205 and 206 of the FPA, and Order Nos. 2006 and 2006-A, where the Commission recognized that generators 20 MW or smaller should have different standards for interconnection than large generators. We continue to believe that 20 MW is the appropriate level at which to apply this rebuttable presumption.

98. We disagree with CIBO that the Commission's small QF threshold of 20 MW contradicts Congress's 80 MW definition of small power producers in PURPA section 210(a).[43] The 80 MW threshold in section 210(a) of PURPA defines the qualification of small power producers eligible for the rights, privileges and protections of QFs. The use of 20 MW in the Commission's implementation of section 210(m) of PURPA serves a fundamentally different purpose. The Commission is distinguishing between small and

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[42] See, e.g., Standardization of Small Generator Interconnection Agreements and Procedures, Notice of Proposed Rulemaking, 68 FR 49974 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 32,572 (2003) at P 23-25.

[43] 16 U.S.C. 796(17)(A)(ii).

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large facilities to reflect the ability of particular QFs to access markets. Categorically applying the presumption to all small power production facilities, through adoption of a 80 MW threshold, would not appropriately take into account the different considerations that affect a QF's ability to access markets.

99. We also disagree that use of a 20 MW threshold defeats Congressional intent to foster small power production. The purchase requirement remains in place for small power producers that do not have nondiscriminatory access to one of the markets identified in section 210(m)(1)(A), (B), or (C). The purchase requirement can be terminated only if the Commission finds nondiscriminatory access to such markets, which in turn means the small power producers will have the ability to sell their energy and capacity into the wholesale marketplace.

100. We reject the request that the Commission expand the small size presumption to include any QF that is unable to sell power in 50 MW blocks, regardless of the particular capacity of the facility. While it may be true that certain over-the-counter bilateral contracts stipulate a minimum lot increment of 50 MW, and while also it may be true that such a contractual requirement may be a problem for some QFs that are larger than 20 MW because of their intermittent production of surplus power, the Commission has provided these larger QFs the opportunity to rebut the presumption of access to the "Day 2" market by showing, among other things, operational characteristics that effectively prevent the QF's participation in a market or that the QF has no access to a mechanism to schedule transmission service or make sales in advance on a consistent basis because of

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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 [44] The effect of needing to sell in 50 MW blocks may therefore be presented to the Commission in the context of a particular request to terminate the purchase requirement. Expansion of the small size rebuttable presumption to reflect this concern, which may not be relevant in all cases, is thus neither necessary nor appropriate.

101. The Commission rejects requests to apply the small size presumption only to much smaller QFs, such as those with a net capacity of one or two MW. We set the rebuttable presumption at an appropriate level, reflecting our understanding of the general nature of QFs' interconnection practices and the relative capabilities of small entities. However, we again stress that the presumption is rebuttable. Electric utilities are free to argue that smaller entities have nondiscriminatory access to qualifying markets. We believe that the best place to consider such arguments is in the individual cases that electric utilities bring to the Commission.

102. Petitioners arguing that the Commission has inappropriately waived the effects of section 210(m) for small QFs mischaracterize the Final Rule. The Commission made clear in the Final Rule that no class of QFs had been shown to uniformly lack nondiscriminatory access based on a single factor and, as such, no justification existed for exempting any category of QFs from any future orders which may terminate a utility's

[44] Final Rule at P 82-84; 18 CFR 292.309(e)(1).

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purchase requirement. The Commission did, however, create a rebuttable presumption that small QFs may not have nondiscriminatory access to markets because of their small size. As we explain above, the use of such rebuttable presumptions is fully consistent with the Commission's obligation under section 210(m) and the Commission's need to identify ways to expedite processing of applications.

103. To be clear, the use of a rebuttable presumption does not prevent a utility from seeking to terminate the obligation to purchase power from small QFs, as would be the case if the Commission implemented a waiver. Instead, the use of the rebuttable presumption simply leaves the burden on the utility to show that these smaller entities indeed have nondiscriminatory access. This approach recognizes that, more often than not, a small QF will have greater difficulty obtaining nondiscriminatory access to markets due to the tendency for small QFs to be interconnected to lower voltage radial lines, and the consequent need to overcome other potential obstacles to nondiscriminatory access, such as local distribution access rules that are not within the Commission's jurisdiction, pancaked delivery rates and additional administrative burdens to obtain access to buyers other than the interconnected utility. It is therefore appropriate in the first instance to place on the electric utility the burden of demonstrating that a small QF does in fact have nondiscriminatory access to the types of markets identified in sections 210(m)(1)(A), (B) or (C). Similarly, the rebuttable presumption that QFs above 20 MWs do have nondiscriminatory access to markets does not prevent a QF from providing evidence to the contrary.

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104. With regard to the request to clarify how the 20 MW threshold will be measured, the Commission explained in the Final Rule that a QF is required to state its size in terms of "net capacity" when certifying its status as a QF.[45] Net capacity is the maximum amount of power that the facility is able to produce (gross capacity) less any auxiliary load for devices that are necessary and integral to the power production process (station power). Any power consumed by on-site load at the location of the QF for purposes unrelated to the power production process should not be subtracted from gross capacity for purposes of reporting net capacity. Whether the facility is a Commission-certified facility or a self-certified facility, both are certified at net capacity. Therefore, a QF's Commission-certified (or self-certified) net capacity would determine whether the QF qualifies for the "small size" rebuttable presumption.

C. Filing Requirements

105. In the Final Rule, the Commission found that a utility electing to file for relief from the purchase requirement must submit an application with the Commission providing certain information, including 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"

[45] Final Rule at P 72, n.41.

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markets.[46] The filing requirements are contained in new § 292.310(d) of the Commission's regulations.

Requests for Rehearing

106. Industrial Parties contend that the Commission is not sufficiently prescriptive as to the level of detail on transmission availability that utilities should provide in their applications. Industrial Parties argue that the Commission should require the same information on transmission access as in UniSource Energy Corporation.[47] Industrial Parties also argue that to enable effective input by QFs and other interested parties, any information provided to support an electric utility's application to terminate its purchase obligation must be provided to all affected QFs at the time of filing. Industrial Parties continue that if a QF later seeks to reinstate the purchase obligation, the electric utility needs to provide current data, and not rely on the data it used to justify termination of the purchase obligation.

107. EEI, however, believes the filing requirements in § 292.310(d)(3) of the Commission's regulations are unduly broad and potentially burdensome. EEI urges the Commission to exempt utilities operating within the footprint of Commission-approved RTO/ISOs that have financial, rather than physical, transmission rights models and

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[46] Final Rule at P 102.

[47] UniSource Energy Corporation, 109 FERC ¶ 61,047 (2004) (UniSource) (reviewing a market monitoring plan submitted in support of a request for Commission authorization of the disposition of jurisdictional facilities for purposes of identifying anticompetitive conduct).

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ERCOT (which likewise operates under a financial transmission rights model) from the information submission requirements in § 292.310(d)(3). Since a QF has the right to interconnect to transmission within an RTO/ISO that operates under a financial transmission rights model, EEI contends that the QF has access to that market regardless of whether a physical path exists for electric sales. As a result, EEI argues that interconnection and other transmission constraint and congestion studies are of little relevance in determining whether a QF has nondiscriminatory access to transmission in any market with a financial rights transmission model.

108. EEI argues that even in markets without financial transmission rights, all new QFs have nondiscriminatory access if they are willing to fund on an up-front basis the transmission upgrades necessary to receive network resource status, i.e., if they are willing to comply with Order Nos. 2003 and 2006. Despite the fact that any upgrade costs for firm transmission service are typically rolled into rates, EEI contends that the Commission's transmission pricing policy could require that existing QFs bear the incremental cost of upgrades if firm transmission service is not available and the costs of the upgrades exceed the rolled-in rate. As a result, EEI argues that the only grounds for rebuttal of the presumption of nondiscriminatory access when OATT service is available should be related to unique operational characteristics of the specific QF or in the rare circumstance in which there is not a sufficient opportunity to relieve a transmission constraint because of unique factors, such as the inability to secure regulatory approval for upgrades or otherwise to remedy physical system limitations. EEI therefore asks the

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Commission to limit the informational filing requirements to those particular circumstances.

109. In addition, EEI requests the Commission to clarify what is intended by "[r]elevant system impact studies for the generation interconnections, already completed" for both non-RTO/ISO and RTO/ISO regions. EEI states that it is unclear what studies, and what time frames, are contemplated by this requirement and whether this language is intended to refer to the interconnection studies for existing QFs or for all generator interconnections. EEI requests clarification that "relevant" studies will be limited to studies that are the most recent regarding the QF's impact on the system or the most recent generic studies of the applicable control area. EEI states that, for the last several decades, interconnection studies for QFs not selling to the market have been performed under state oversight. EEI requests that the Commission clarify whether the equivalent of system impact studies performed for QFs pursuant to state regulation should be provided.

110. Lastly, if the Commission chooses to maintain the requirements in § 292.310(d)(3) of the Commission's regulations, EEI requests that the requirements identified in paragraph (iii) of § 292.310(d)(3), regarding system impact studies for generator interconnections, be clarified to require all Commission-approved RTO/ISOs to identify and make available to their member transmission owners confidential and public versions of each interconnection study it performs for submission to the Commission. They argue that it is not clear how electric utilities that have transferred operational control of their transmission to RTO/ISOs could fulfill the requirement to provide "relevant system

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impact studies" without imposing certain requirements on the RTO/ISO. EEI urges the Commission to clarify that submitting studies conducted by the RTO/ISO will be sufficient to meet the informational requirements.

Commission Determination

111. In order to ensure that a potentially affected QF has an adequate opportunity to evaluate potential obstacles to nondiscriminatory access, despite the existence of an OATT or the QF's location in a "Day 2" market, the Commission will maintain the requirement for applicants to submit transmission-related information relevant to a QF's evaluation of this question. Information about the applicant's long-term transmission plan, the location of transmission constraints, levels of congestion, system impact studies, and links to applicant's Open Access Same Time Information System (OASIS) for ATC information will allow a potentially affected QF to detect whether it might be located on a portion of a utility's system where limited transfer capability may constrain its ability to transfer power into the wholesale market. In response to Industrial Parties' concerns that QFs be provided any information used to support an electric utility's application, our rules currently provide that an electric utility must identify with names and addresses all potentially affected QFs.[48] Electric utilities serve potentially affected QFs with a copy of the application. In addition, the Commission by letter provides notice of the application to the potentially affected QFs and explains comment procedures and how the QFs can

[48] 18 CFR 292.310.

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access the electric utility's filings.[49] An interested potentially affected QF should intervene in the proceeding and would then receive any subsequent information provided by an electric utility.

112. We disagree with EEI that the filing requirements are unduly broad or burdensome. It is reasonable to place those obligations on the petitioning electric utility, the party requesting the Commission to make the findings required by section 210(m)(1) of PURPA. These filing requirements will facilitate timely processing of the application by the Commission, while also providing QFs with the information necessary for their own evaluation of nondiscriminatory access to wholesale markets. We find that EEI's claim of burden is overstated, since we do not require anything which has not already been developed. It is our experience that most of this documentation is in electronic format and available through online resources.[50] We clarify, moreover, that an applicant can provide a hyperlink to the relevant studies, if available, rather than submitting

[49] In the unlikely event a potentially affected QF is intentionally or unintentionally omitted by the electric utility and not served notice of an application, the Commission will take remedial steps as appropriate.

[50] We note that the following public and non-public sources contain transmission information: RTO websites for links to publicly available regional transmission plans; OASIS websites for system impact studies including various transmission service requests, available through confidentiality agreements; OASIS websites for posted ATC values, available through an OASIS certificate; and, FERC Form 715 for the Annual Transmission Planning and Evaluation Report submitted to the Commission, available on the FERC website through the Critical Energy Infrastructure Information (CEII) process.

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complete studies and reports.[51] We therefore believe that the burden on a utility of providing existing information is minimal and that the benefits to the QFs and the Commission of providing this information readily in one filing will outweigh any such minimal burdens.

113. We deny EEI's request to exempt utilities operating within the footprint of a Commission-approved RTO/ISOs from submitting the information to the extent it is otherwise available from or provided by the RTO or ISO. The fact that electric utilities in RTO/ISO regions may be able to access information required in those filings on an equal basis as other parties, i.e., through the RTO/ISO website or databases, does not eliminate the Commission's underlying need for the information to process the application in a timely manner. Furthermore, we emphasize that § 202.310(d)(3) of the Commission's regulations requires the submission of non-publicly available information to the extent it is the only relevant available resource responsive to this requirement. Any need to maintain confidentiality can be addressed in the context of the particular application.

114. We also disagree that the information required in § 292.310(d)(3) is not necessary in RTO/ISO markets with financial transmission rights models. This information is relevant even in the context of financial RTO markets as it will help potentially affected

[51] The filing should identify the relevance of the material in the hyperlink. And to the extent that the filing discusses particular portions of such studies and reports, the electric utility should clearly identify those portions by page, paragraph, or similar reference.

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QFs understand the transmission market circumstances they would face if the Commission approves the utility's application. The filing requirements will, in this regard, therefore not be changed for any electric utility seeking termination of the purchase requirement.

115. As to the argument that transmission-related information is unnecessary since new QFs have nondiscriminatory access if they fund transmission upgrades necessary to receive network resource status, we disagree. Information about transmission system constraints will allow a potentially affected QF to evaluate the impact of a utility's request on the QF. Transmission constraints also provide valuable information about the scope and geographic reach of the market a potentially affected QF may reach as an alternative to selling to the local utility.

116. With regard to EEI's request to explain the phrase "[r]elevant system impact studies for the generation interconnections, already completed," we clarify that the studies we consider relevant are the most recent system impact studies, already completed, that analyze the generation interconnection to the applicant's transmission substation that is "electrically close" to the QF's substation.[52] With respect to EEI's question whether the equivalent of system impact studies performed for QFs pursuant to

[52] By "electrically close" we mean any interconnection to the same substation where the QF is connected or to any adjacent substation or interconnection point where power injection to the transmission system has the same or similar impact on the transmission facilities' loadings, as the QF's power injection.

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state regulation should be provided, we clarify that these studies must be submitted if they provide responsive information relevant to the filing requirements.

117. We also clarify, as requested by EEI, that submitting studies conducted by an RTO/ISO will be sufficient to meet the informational requirements, provided the submission is complete, i.e., the applicant submits every study required (or hyperlinks to the relevant studies) and all related information listed in § 292.310(d). However, we deny EEI's request that the Commission require RTO/ISOs to identify and make available confidential and public versions of each interconnection study it performs. We believe this request is unnecessary. It is our understanding that the current practice within the RTO/ISOs is that the electric utility receives the confidential version of the study from the RTO/ISO, and likely has participated at least in an advisory role in the performance of the study. Therefore, we expect that these studies would already be in the applicant's possession or could be made available to them without placing any extra requirements or burdens on the RTO/ISOs. It is the utility who is filing an application seeking relief from the purchase requirement and, therefore, we believe it is their responsibility to gather and submit the information to the Commission. Additionally, while the publicly available reports are available through the OASIS websites, an applicant still needs to identify those studies that are relevant, and provide them (either physically or by hyperlink) with the filing.[53]

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[53] See supra note 51.

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118. In response to the Industrial Parties' argument that the Commission is not sufficiently prescriptive as to the level of detail regarding transmission availability required under the Commission's regulations, we deny rehearing in part. As a general matter, we believe the information identified in § 292.310(d)(3) is sufficient to give potentially affected QFs information relevant to evaluate whether there is adequate transmission available for new selling arrangements, subsequent to termination of the utility's purchase requirement.[54] In addition, the information on processes to be followed to access the markets, identified in § 292.310(d)(4) and (5), is sufficient to give affected QFs information relevant to evaluating nondiscriminatory access to the markets described in section 210(m)(1) of PURPA. The relevant transmission information referred to by Industrial Parties in the UniSource proceeding is thus embedded in the studies we require to be filed. We do not agree that the other elements offered by UniSource in the market monitoring plan for its proposed merger are either relevant or necessary to evaluating nondiscriminatory access in this context.

119. We do, however, believe that § 292.310 of the Commission's regulations lacks certain information that will facilitate the Commission's processing of section 210(m)

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[54] However, we note, in order for a QF to evaluate potential ATC on an applicant's OASIS, the QF will need to determine the type, firmness and duration of transmission service that the affected QF will need for the power it intends to sell on a prospective basis. While this information will provide a potentially affected QF with information about current ATC, it is no guarantee that service from a particular source to a particular load can be provided on a firm basis. Only submission of a request and subsequent reservation of transmission service can provide that level of certainty to any prospective customer.

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applications. The Commission has processed applications in Docket Nos. QM07-2-000 and QM07-4-000 and as a result of its experience in those dockets finds that additional information from electric utilities would help avoid the need to issue "deficiency" letters or send additional information requests, ultimately slowing down the processing of requests for relief. The Commission therefore amends its regulations to require that the following additional information be submitted: the docket number assigned to each potentially affected QF if it filed for self-certification of QF status or an application for Commission-certification of QF status; the net capacity of each potentially affected QF; the location of each potentially affected QF depicted by state and county and the name and location of the substation where each potentially affected QF is interconnected; the interconnection status of each potentially affected QF including whether the QF is interconnected as an energy or a network resource; and the expiration date of the energy and/or capacity agreement between the applicant utility and each potentially affected QF. The introductory paragraph of § 292.310(c) is thus amended to read as follows:

> (c) An electric utility must submit with its application for each potentially affected qualifying facility: the docket number assigned if a qualifying facility filed for self-certification or an application for Commission certification of qualifying facility status; the net capacity of the qualifying facility; the location of the qualifying facility depicted by state and county, and the name and location of the substation where each qualifying facility is interconnected; the interconnection status of each potentially affected qualifying facility including whether the qualifying facility is interconnected as an energy or a network resource; and, the expiration date of the energy and/or capacity agreement between the applicant utility and each potentially affected qualifying facility. All potentially affected qualifying facilities shall include:

* * * * *

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120. Additionally, in reviewing the regulations adopted in the Final Rule, we have discovered a mistake in § 292.310(d)(3) that we will correct here. The applicant's "long-term transmission plan" referred to in § 292.310(d)(3) was intended to be information required to be filed with an application. Therefore the applicant's "long-term transmission plan" is redesignated as § 292.310(d)(3)(i). Also, in § 292.310(d)(3)(vi), the term "available transmission capacity (ATC)" will be corrected to state "available transfer capability (ATC)." The new § 292.310(d)(3) is amended to read as follows:

> (3) Transmission Studies and related information, including:
>
> (i) The applicant's long-term transmission plan, conducted by applicant, or the RTO, ISO or other relevant entity;
>
> (ii) Transmission constraints by path, element or other level of comparable detail that have occurred and/or are known and expected to occur, and any proposed mitigation including transmission construction plans;
>
> (iii) Levels of congestion, if available;
>
> (iv) Relevant system impact studies for the generation interconnections, already completed;
>
> (v) Other information pertinent to showing whether transfer capability is available; and
>
> (vi) The appropriate link to applicant's OASIS, if any, from which a qualifying facility may obtain applicant's available transfer capability (ATC) information.

121. Finally, Industrial Parties asks us to clarify that if a QF later seeks to reinstate the purchase obligation pursuant to § 292.311, the electric utility, if it chooses to answer the QF's petition to reinstate, needs to provide current data, and not rely on the data it used to originally justify termination of the mandatory purchase obligation. We decline to make a generic determination here on this matter. If an electric utility answers the

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QF's petition, it is free to decide what information to file so as to present its best arguments, based on the content of the QF's filing, the amount of time since the prior proceeding and any indications of changed circumstances in the interim. Our decision on whether to reinstate the purchase obligation will be based on all of the information presented.

D. Obligation to Sell

122. Section 210(m)(5) of PURPA removes the requirement that an electric utility sell electric energy to any QF if the Commission finds that: "competing retail electric suppliers are willing and able to sell and deliver electric energy to the qualifying cogeneration 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."

123. In the Final Rule, the Commission clarified that lifting the obligation from a particular utility to purchase electric energy from a QF did not relieve such utility of its obligation to sell supplemental, backup, standby and maintenance power to the QF. The Commission explained that any finding under section 210(m)(5) would be made under a separate standard and in a separate proceeding pursuant to § 292.312 of the Commission's regulations. The Commission emphasized that it would strictly interpret the statutory language in such proceedings, noting in particular the reference to "competing retail electric providers" in section 210(m)(5). The Commission concluded that the reference required a finding that the QF has available at least two competing suppliers who are not affiliated with the interconnecting utility.

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Requests for Rehearing

124. Industrial Parties request that the Commission condition releasing electric suppliers from their obligation to sell standby and backup power on a finding that a competitive market for power exists. Although utilities in the organized markets may assert that there are multiple retail providers, Industrial Parties contend that in many cases the providers have little capacity to serve the QF profile or would attach a large premium to the price given their interest in serving a stable load. They argue that some utility or other supplier being 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 under the FPA to ensure that rates are just and reasonable rates. Industrial Parties also assert one or two suppliers do not make a competitive market and that rates paid by QFs cannot be just and reasonable unless the Commission finds that market power cannot be exercised by those suppliers.[55]

Commission Determination

125. We deny Industrial Parties' request to condition termination of the sales obligation on the existence of a competitive market for replacement power. We continue to believe a strict interpretation of section 210(m)(5) is appropriate in response to requests to terminate the obligation to sell standby and backup power to QFs. All the statute requires is a finding that "competing retail electric suppliers are willing and able to sell and

[55] Industrial Parties at P 19-20.

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deliver electric energy to" the QF. Competing retail electric suppliers implies two or more sellers, and the word competing suggests some level of competition between them. The requirement that the suppliers be willing and able to deliver also appears to require sufficient capacity to actually make sales.

126. In proceedings on applications requesting termination of the sales obligation under § 292.312 of the Commission's regulations, QFs opposing termination of an electric utility's obligation to sell may certainly argue that current practices in a particular market may provide a basis for the Commission to find that there are no "competing retail electric suppliers" in some instances. We will decline to rule generically on such issues in this rulemaking.

127. We also reject the Industrial Parties' request to condition relief under section 210(m)(5) on a finding that rates for replacement power are reasonable. We affirm our decision in the Final Rule that the rates for retail service are beyond the Commission's jurisdiction. The Industrial Parties are simply wrong to imply that the Commission must first find a competitive retail market before terminating an electric utility's obligation to sell power to a QF. That argument is based on the same false premise that this Commission is responsible for setting retail rates. Section 210(m) does not shift responsibility for setting or maintaining appropriate retail rates from the States to this Commission. Rather, section 210(m)(5) requires the Commission, before it terminates an electric utility's obligation to sell electric energy to a QF, to find that "competing retail electric suppliers are willing and able to sell and deliver electric energy to the" QF, and

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that "the electric utility is not required by State law to sell electric energy in its service territory." Section 210(m)(5) does not require this Commission to pass judgment on State-approved retail rates.

E. Existing Rights and Remedies

Background

128. Section 210(m)(6) of PURPA protects the rights and remedies under a contract or obligation in effect or pending approval before a state regulatory authority. In the Final Rule, the Commission interpreted the term "obligation" as a "legally enforceable obligation," which is established through a state's implementation of PURPA. The Commission stated that a QF that had initiated, prior to date of enactment of section 210(m) (i.e., August 8, 2005), a state PURPA proceeding that may result in a contract or legally enforceable obligation would be considered to have triggered an "obligation" with an electric utility regarding section 210(m)(6).

129. The Commission found that, when a QF contract terminates by its own accord, an electric utility would not be compelled to enter into a new, successor contract with the QF if the purchase requirement has been terminated for the QF. As long as there is mutual agreement between a QF and the electric utility to terminate a contract, the electric utility is not compelled to enter into another contract with the QF. The Commission stated that nothing in the Final Rule was intended to abrogate existing contracts. The Commission noted, however, that there may be contracts containing provisions that provide that legislation such as EPAct 2005, or a Final Rule such as this one, trigger termination of

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the contract. To the extent the parties to a contract cannot agree whether a termination clause has been triggered, the Commission determined that the issue would be best determined in an individual case-specific proceeding in which the particulars of the contract can be examined.

Requests for Rehearing

130. Deere argues that clarification is required to preserve state law processes as creating legally enforceable obligations in the context of section 210(m)(1). Deere contends that language in paragraph 213 of the Final Rule indicates that an obligation is triggered prior to the utility applying for relief of the PURPA purchase requirement if a QF "has initiated a state's PURPA proceeding that may result in a contract or legally enforceable contract or obligation." Deere argues that the phrase "state's PURPA proceeding" is too narrow and should be broadened because it does not recognize that a "legally enforceable obligation" can be created under state law processes which do not involve a docketed state proceeding, such as issuance of regulations.

131. Deere also notes that some states have adopted PURPA implementation approaches that require QFs to first start construction, if not complete it, before an obligation is created in connection with section 210(m). Deere argues that the Commission should therefore clarify that a QF located in a "build first" state triggers a legally enforceable obligation if, prior to the time of the utility PURPA relief application, it has already begun construction. Deere argues that otherwise, QFs that are nearly

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complete in the construction will be unfairly penalized and the significant capital resources they have committed will be impaired.

132. OG&E asks the Commission to clarify that it is not prejudging when – or if – a QF's state PURPA application gives rise to a legally enforceable obligation under PURPA. OG&E contends that the Commission has consistently held that it is for the states, not the Commission, to determine "the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under state law."[56] OG&E states that presuming that a section 210(m)(1) "obligation" exists as of the date a QF files a state application that "may" lead to a legally enforceable obligation is inconsistent with how many states address this issue. OG&E adds that the Commission should also clarify that it is not dictating what factors the states can consider when evaluating whether a QF has established a legally enforceable obligation.

133. OG&E asks that the Commission clarify that a utility has the opportunity to respond to a purported legally enforceable obligation by making a section 210(m) filing particularly if the state legally enforceable obligation filing was made between August 8, 2005 and the effective date of the Final Rule, as may be revised on rehearing. OG&E contends that the utility should be able to respond by filing a section 210(m)(1) application with the Commission.

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[56] OG&E Request for Rehearing at 5 (citing Metropolitan Edison Co., 72 FERC ¶ 61,015 at 61,050 (1995)).

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134. OG&E also asks that the Commission establish a formal process that allows section 210(m)(1) issues to be evaluated in response to a state PURPA "obligation" filing. It argues that a QF attempting to establish a legally enforceable obligation should be required to provide the utility with formal notice of such a filing, and that within sixty days of such notice, the utility must file the necessary application to satisfy the market criteria. OG&E argues that this opportunity to rebut an obligation is essential where a QF seeks to establish a state-mandated obligation between January 19, 2006 and the effective date of the Final Rule. OG&E states that the Commission made clear in the NOPR that a utility would not be able to submit a section 210(m) application until after a final rule in this rulemaking. OG&E contends that it is therefore unreasonable for the Commission to require utilities to delay submitting section 210(m)(1) applications, and then hold that it is too late to avoid obligations purportedly incurred during the Commission-mandated delay.

135. With regard to termination of contracts with a QF, Industrial Parties note that many utility contracts have a change-in-law clause that allows them to terminate current contracts. To the extent that the parties to a contract cannot agree whether a termination clause has been triggered, the Industrial Parties agree that the issue will be best determined in an individual case-specific proceeding in which the particulars of the contract can be examined. Industrial Parties argue, however, that the Commission should clarify that utilities may not use such clauses to terminate their purchase obligation

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without obtaining a Commission determination pursuant to the processes set out in the Final Rule.

Commission Determination

136. Section 210(m)(6) provides:

> NO EFFECT ON EXISTING RIGHTS AND REMEDIES.—
> Nothing in this subpart affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on the date of enactment of this subsection, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility under this Act (including the right to recover costs of purchasing electric energy or capacity).

In the Final Rule, the Commission adopted the statutory language into its regulations[57] and pointed out that it had previously addressed the meaning of section 210(m)(6) in Midwest Renewable Energy Projects, LLC.[58] In Midwest Renewable, we rejected the notion that "contract" and "obligation" are synonymous terms. When a utility refuses to enter into a contract with a QF, and the QF seeks state regulatory authority assistance to enforce its PURPA regulations, a non-contractual but still legally enforceable obligation may be created pursuant to the state's implementation of PURPA. The Commission explained in the Final Rule that such obligations do not necessarily involve a single writing containing all material terms and that how QFs may initiate the process varies from state to state. As a result, narrowly defining an "obligation" to encompass only a

[57] Final Rule at P 210-11.

[58] Midwest Renewable Energy Projects, LLC, 116 FERC ¶ 61,017 (2006) (Midwest Renewable).

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specific legal arrangement with all the relevant and material rates, terms and conditions established could be at odds with a state's implementation of PURPA. The Commission therefore concluded in the Final Rule that the term "obligation" means a "legally enforceable obligation" which is established through a state's implementation of PURPA.[59] We affirm the Commission's determination in the Final Rule that a QF that initiated, prior to August 8, 2005, a state PURPA proceeding that may result in a contract or legally enforceable obligation would be considered to have triggered an "obligation" with the electric utility subject to section 210(m)(6) pending the state's determination of whether an enforceable obligation exists. If the state determines that no enforceable obligation exists, then relief from the utility's purchase obligation with respect to that QF may be granted.

137. The Commission clarifies that the date when an "obligation" under PURPA is established is the date such obligation is established by each state regulatory authority or nonregulated utility. In the Final Rule, the Commission noted that the statute grandfathered contracts and obligations entered into before the effective date of EPAct 2005 in section 210(m)(6) of PURPA, but that section 210(m)(1) of PURPA only gives the Commission authority to terminate the obligation to enter into new contracts or obligations. The Commission determined that a QF that has initiated a state PURPA proceeding that may result in a legally enforceable contract or obligation prior to the

[59] Final Rule at P 211-13.

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applicable electric utility filing its petition for relief pursuant to § 292.310 of the Commission's regulations will be entitled to have any contract or obligation that may be established by state law grandfathered.[60] We see no reason to change this determination, as the grandfathering of only pre-August 8, 2005 contracts or obligations would undermine any subsequent QF investments.

138. We do note, however, that if a QF argues that any contract or obligation was "pending approval before the appropriate State regulatory authority or non-regulated electric utility," and thus argues that the utility's obligation to purchase from the QF ought not be terminated pursuant to a § 292.310 proceeding, the Commission will consider those claims in the individual proceedings as they arise. Whether a contract or obligation exists would depend on state law. What we do not expect to see is a race to make filings either to be grandfathered, or to negate a potential obligation filed after August 8, 2005, but prior to a utility's filing for relief from the obligation to enter new contracts or obligations.

139. Deere requests that we clarify that a legally enforceable obligation may be created not just by a state PURPA proceeding, but also by other means such as by a state issuing regulations or taking other action reasonably designed to give effect to the Commission's

[60] As we noted above, once the Commission has made a finding that a particular QF has nondiscriminatory access to one of the specified markets, this conclusion would be binding in proceedings involving the same QF and other electric utilities, absent a showing of changed circumstances. Accordingly, as of the date of the first electric utility's filing seeking termination of the obligation to purchase from a particular QF, any subsequent state filing that a QF makes will not result in a grandfathered obligation.

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rules. We find that the language "or pending approval" in section 210(m)(6) implies that there has been a filing before a state regulatory authority. As we stated in Midwest Renewable, "the phrase 'or pending approval' [is] quite significant, as it ensures that contracts or obligations that had not yet been entered into but were being pursued in the context of the state commission proceedings that were pending on the date of enactment of EPAct 2005 will fall within the savings clause."[61] We therefore find that, under most circumstances, there must be some sort of filing before a state regulatory authority for a QF to be "pending approval." Even under these circumstances, we emphasize, however, that in the division of responsibilities of administering PURPA between this Commission and state regulatory authorities (and non-regulated utilities), it is the state regulatory authorities (or non-regulated utilities) that determine whether and when a legally enforceable obligation is created, and the procedures for obtaining approval of such an obligation. QFs that believe that some other sort of state proceeding has created a legally enforceable obligation under state law may argue their claim before the Commission, and we will make such determinations on a case-by-case basis based on state law.

140. Accordingly, while we agree with Deere that QFs that have begun but not yet completed physical construction, and therefore that have not been able to complete the process for creating a legally enforceable obligation under a "build first" state law, may have utilized a particular state's implementation of PURPA in a way that results in a legally enforceable obligation, such a determination would need to be made on a case-

[61] Midwest Renewable at P 14 (emphasis added).

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specific basis. Whether the state regulatory authority's process for creating a legally enforceable obligation has begun, and thus there is a contract or obligation pending, depends on state law. A QF may argue that an obligation or contract is pending approval as provided by state law in any proceedings seeking termination of the purchase obligation, or pursuant to a petition for declaratory order.

141. The Commission denies OG&E's request to establish a new process by which a utility could use a section 210(m) application to nullify a state proceeding to establish a new QF purchase obligation. OG&E complains that the Commission prevented utility section 210(m) filings from January 19, 2006, when the NOPR issued, until issuance of the Final Rule, and should not now find that QFs initiating state "obligation" proceedings during that interim period, or thereafter, are grandfathered under section 210(m)(6) of PURPA. Under OG&E's proposal, a QF seeking a new state "obligation" determination would be required to notify the utility and the utility would have 60 days to file a section 210(m) application with the Commission; this application would be addressed in a final determination within 90 days. This final determination could then be taken into account by the state in deciding whether to grant the QF's application to create a new "obligation" for the local utility to purchase power from the QF.

142. We decline to create the new process requested by OG&E. We continue to believe that the Commission's determination to adopt the language of section 210(m)(6) and to look to state law to determine whether a contract or obligation is pending approval provides a sufficient balance between the rights of the electric utilities seeking relief from

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the obligation to enter into new contracts or obligations, and the rights of QFs under existing contracts or obligations.

143. We will grant clarification with regard to the termination of existing contracts. Industrial Parties' request is consistent with our other findings with regard to contract termination in the Final Rule. In the Final Rule, in response to comments by AEP, we stated that an electric utility will not be compelled to enter into a new contract as long as there is mutual agreement between a QF and the electric utility to terminate the existing contract. We made clear, however, that "a QF contract is to remain in effect until it terminates by mutual agreement or by its own terms."[62] The Commission also recognized that some contracts contain clauses stating that legislation, such as EPAct 2005, or a Commission action, such as the Final Rule in this docket, may be grounds for termination of the contract. If an electric utility and a QF disagree as to the meaning of a termination clause, either the electric utility or the QF may seek a determination regarding its rights under the termination clause in the appropriate state forum since the issue of whether a QF has a continuing right to sell is a matter of contract interpretation.

F. Implementation Procedures

144. Section 210(m)(3) of PURPA provides in part that "[a]ny electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis." The Commission essentially incorporated this language into § 292.310 of its regulations. The Commission

[62] Final Rule at P 219.

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also determined that an electric utility's mandatory purchase obligation would be suspended upon the filing of its PURPA petition. When an electric utility files its PURPA petition, that electric utility will not be obligated to enter into new contracts or obligations with QFs as of the date its PURPA petition is filed. If the Commission finds that the requirements of section 210(m)(1) of PURPA have been met, then the purchase requirement for that electric utility ends as of the date of the PURPA petition. However, if the Commission finds that the requirements of section 210(m)(1) have not been met, then the electric utility's obligation to enter into new contracts or obligations is reinstated as of the date of the Commission order.

Requests for Rehearing

145. PacifiCorp and EEI argue that the Commission should clarify the procedures for utilities requesting termination of the mandatory purchase obligation on a "service territory-wide" basis. PacifiCorp notes that the term "service territory-wide" is not defined in PURPA or in the Final Rule and could refer to a portion of a utility's electric infrastructure located in a specific state or could be understood to be synonymous with the control area operated by the applicant. PacifiCorp argues that a single entity (such as PacifiCorp) owning transmission facilities and operates multiple control areas should be able to file separate applications for each control area. PacifiCorp and EEI argue that such clarification would facilitate the processing of applications by the Commission within the time limitations established by Congress. PacifiCorp and EEI request that the Commission clarify that it will interpret "service territory" to be the particular control

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area or areas identified in the application when the applicant operates multiple control areas spanning several states.

146. If the Commission retains the small QF rebuttable presumption, Deere requests that the Commission grant rehearing of its decision to temporarily suspend a utility's PURPA obligation once a request for relief has been filed. Deere argues that the Commission should instead apply the utility's PURPA relief to small QFs only after the Commission makes the required findings with regard to the small QF issue. Deere contends that this would protect small QFs who, at the time of the utility's PURPA relief application, have already begun preliminary development work but have not yet been able to begin utilization of the applicable state law process for creating a legally enforceable obligation.

Commission Determination

147. We clarify that an electric utility may specify in its application the territory within which it seeks to have its purchase obligation terminated.

148. We grant Deere's request to distinguish between particular types of QFs for purpose of suspending the mandatory purchase obligation once an application for relief has been filed under section 210(m)(3). The rebuttable presumption that small QFs do not have access to markets will remain in effect and, thus, it is reasonable to retain the mandatory purchase obligation from small QFs pending consideration a PURPA petition. We clarify that to the extent that an electric utility seeks to be relieved of the obligation to purchase from a small QF, the electric utility must rebut the presumption that the small

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QF does not have nondiscriminatory access to the applicable market prior to the termination of the purchase requirement as applied to that QF, and that the purchase obligation remains in effect until, and if, the Commission makes the finding that the small QF does have nondiscriminatory access to markets that warrant termination of the purchase obligation.

III. Information Collection Statement

149. The regulations of the Office of Management and Budget (OMB)[63] require that OMB approve certain information requirements imposed by an agency. OMB has approved the information requirements contained in Order No. 688. Specifically, OMB approved the following information collections and assigned the corresponding OMB control numbers: Small Power Production and Cogeneration Facilities (FERC-556) (1902-0075).

150. On rehearing EEI argues that the filing requirements in § 292.310(d)(3) are unduly broad and burdensome. We have addressed those arguments elsewhere in this order.[64]

151. This order on rehearing adopts a change. Specifically, we are requiring electric utilities filing an application with the Commission for relief from the mandatory purchase requirement to provide more information about the potentially affected QFs, including the docket number assigned if the QF filed for self-certification or Commission certification of qualifying facility status, the location of the QF depicted by state and

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[63] 5 CFR 1320.12.

[64] See supra P 112-17.

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county, and by the name and location of the substation where the QF is interconnected, and whether the QF is interconnected as an energy or network resource. We do not anticipate that this new requirement to provide additional information about the potentially affected QFs will impose a significant additional burden on electric utilities; the additional information we are requiring is readily available to electric utilities. Accordingly, we will allow the original projected burden estimates expressed in Order No. 688 to stand.

Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426 [Attention: Michael Miller, Office of the Executive Director, Phone (202)502-8415, fax: (202)273-0873, e-mail: michael.miller@ferc.gov]

152. To submit comments concerning the collection of information(s) and the associated burden estimates, please send your comments to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503, Attention: Desk Officer for the Federal Energy Regulatory Commission; Phone: (202)395-4650, fax: (202)395-7285.

IV. Document Availability

153. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (http://www.ferc.gov) and in FERC's Public Reference Room during normal business

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hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

154. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

155. User assistance is available for eLibrary and the FERC's website during normal business hours from our FERC Online Support at 202-502-6652 (toll-free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371 Press 0, TTY (202)502-8659. E-Mail the Public Reference Room at public.referenceroom@ferc.gov.

V. Effective Date

156. These revisions in this order on rehearing are effective **[**insert date 30 days after publication in the **FEDERAL REGISTER]**.

By the Commission. Commissioner Kelly concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

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In consideration of the foregoing, the Commission amends part 292, Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 292 – REGULATIONS UNDER SECTIONS 201 AND 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 WITH REGARD TO SMALL POWER PRODUCTION AND COGENERATION

1. The authority citation for part 292 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

2. In § 292.310, paragraphs (c) introductory text and (d)(3) are revised to read as follows:

§ 292.310 Procedures for utilities requesting termination of obligation to purchase from qualifying facilities.

* * * * *

(c) An electric utility must submit with its application for each potentially affected qualifying facility: the docket number assigned if the qualifying facility filed for self-certification or an application for Commission certification of qualifying facility status; the net capacity of the qualifying facility; the location of the qualifying facility depicted by state and county, and the name and location of the substation where the qualifying facility is interconnected; the interconnection status of each potentially affected qualifying facility including whether the qualifying facility is interconnected as

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an energy or a network resource; and the expiration date of the energy and/or capacity agreement between the applicant utility and each potentially affected qualifying facility. All potentially affected qualifying facilities shall include:

* * * * *

(d) * * *

(3) Transmission Studies and related information, including:

(i) The applicant's long-term transmission plan, conducted by applicant, or the RTO, ISO or other relevant entity;

(ii) Transmission constraints by path, element or other level of comparable detail that have occurred and/or are known and expected to occur, and any proposed mitigation including transmission construction plans;

(iii) Levels of congestion, if available;

(iv) Relevant system impact studies for the generation interconnections, already completed;

(v) Other information pertinent to showing whether transfer capability is available; and

(vi) The appropriate link to applicant's OASIS, if any, from which a qualifying facility may obtain applicant's available transfer capability (ATC) information.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities — Docket Nos. RM06-10-001

(Issued June 22, 2007)

KELLY, Commissioner, *concurring*:

Under PURPA section 210(m)(1)(A), no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a QF under section 210(m) if the Commission finds that the QF has nondiscriminatory access to: "(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." This order affirms the finding in Order No. 688 that the four "Day 2" markets (MISO, PJM, NYISO and ISO-NE) satisfy both requirements of section 210(m)(1)(A).

By contrast to section 210(m)(1)(A)(ii), section 210(m)(1)(B)(ii) requires that a QF have nondiscriminatory access to "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." Section 210(m)(1)(B)(ii) also provides that "[i]n determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market." In Order No. 688, the Commission interpreted the use of the terms "competitive," "meaningful opportunity" and "evidence of transactions" in section 210(m)(1)(B)(ii) to mean that Congress intended for termination of the purchase requirement in a "Day 1" market, such as CAISO and SPP, only if it could be demonstrated that QFs had opportunities to make long-term and short-term sales of capacity and long-term, short-term and real-time sales of energy into competitive wholesale markets. This order clarifies that, based on the specific language contained in section 210(m)(1)(B)(ii), a petitioning electric utility located in a "Day 1" market must demonstrate an actual, not just theoretical, opportunity to meet this requirement. Accordingly, this order affirms Order No. 688 in finding that the "Day 1" markets, SPP and CAISO, have not been shown to meet the requirements of section 210(m)(1)(B)(ii).

On rehearing, petitioners dispute the Commission's finding in Order No. 688 that the four "Day 2" markets meet the second prong of section 210(m)(1)(A). They argue that the mere existence of long-term bilateral contracts for sales of capacity and energy in these markets is not sufficient to demonstrate that there is a competitive

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market for capacity and energy sales or meaningful opportunities for QFs to sell energy or capacity long-term to multiple buyers.

I sympathize with petitioners' argument, and in fact I believe that section 210(m)(1)(A)(ii) logically *should* have required a demonstration of a competitive long-term market that provides a meaningful opportunity for QFs to sell energy or capacity long-term to buyers other than the utility to which the QF is interconnected, as is required under section 210(m)(1)(B)(ii). However, the less specific language in section 210(m)(1)(A)(ii) used to describe the quality of the relevant long-term market that would satisfy this requirement indicates that either this was not Congress's intent, or that perhaps there was a drafting oversight. In any event, we must look to the plain language of the statute. Thus, in my view, the Commission has reasonably interpreted section 210(m)(1)(A)(ii) to require only that there be a "market" for long-term sales of capacity and energy with respect to electric utilities located in "Day 2" markets. Accordingly, I concur with this order.

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Suedeen G. Kelly