

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 292

(Docket No. RM06-10-000)

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

(Issued January 19, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to amend its regulations governing small power production and cogeneration in response to section 1253 of the Energy Policy Act of 2005 (EPAAct 2005), which added section 210(m) to the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission seeks public comment on the amended regulations proposed herein.

DATES: Comments are due [**insert date thirty days after publication in the FEDERAL REGISTER**] Reply Comments are due [**insert thirty days after comment date**].

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. Commenters unable to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, N.E., Washington,

D.C., 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

FOR FURTHER INFORMATION CONTACT:

Deborah Wyrick (Technical Information)  
Office of Energy Markets and Reliability  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426  
(202) 502-6113

Marka Shaw (Technical Information)  
Office of Energy Markets and Reliability  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426  
(202) 502-8641

Samuel Higginbottom (Legal Information)  
Office of the General Counsel  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426  
(202) 502-8561

Giuseppe Fina (Legal Information)  
Office of the General Counsel  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426  
(202) 502-8696

SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

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

NOTICE OF PROPOSED RULEMAKING

(Issued January 19, 2006)

**I. Introduction**

1. On August 8, 2005, the Energy Policy Act of 2005 (EPAct 2005)<sup>1</sup> was signed into law. Section 1253(a) of EPAct 2005 adds a new section 210(m) to the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>2</sup> which provides for termination of an electric utility's obligation to purchase energy and capacity from qualifying cogeneration facilities and qualifying small power production facilities (QFs), if the Federal Energy Regulatory Commission (Commission) finds that certain conditions are met. Section 210(m)<sup>3</sup>: (1) provides a procedure for an electric utility to file an application for relief

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<sup>1</sup> Pub. L. No. 109-58, § 1253, 119 Stat. 594 (2005).

<sup>2</sup> 16 U.S.C. 824a-3 (2000).

<sup>3</sup> We note that the Commission has issued a notice of proposed rulemaking regarding added section 210(n) in Docket No. RM05-36-000. That section makes clear that no new qualifying cogeneration facility can enter into a contract with an electric utility unless the cogeneration facility satisfies criteria for new qualifying cogeneration facilities that will be established by the Commission. Revised Regulations Governing

(continued)

from the mandatory purchase obligation on a service territory-wide basis; (2) provides a procedure for any affected entity or person to apply to the Commission for an order reinstating the electric utility's obligation to purchase energy; (3) provides for termination of an electric utility's obligation to sell to QFs energy and capacity if the Commission finds that certain conditions are met; (4) protects existing rights and remedies under any contract or obligation in effect or pending approval involving the purchase of energy or capacity or sale of energy or capacity to a QF; and (5) allows the Commission to issue and enforce regulations to ensure that an electric utility recovers all prudently incurred costs associated with the purchase of energy from a QF.

2. The Commission proposes to amend its regulations, specifically 18 CFR § 292.303, to implement the requirements in section 210(m).<sup>4</sup> The Commission seeks public comment on the regulations proposed herein.

## **II. Background**

3. When Congress enacted section 210 of PURPA, it required the Commission to prescribe rules as the Commission determined necessary to encourage cogeneration and small power production, including rules requiring electric utilities to offer to purchase

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Small Power Production and Cogeneration Facilities, Notice of Proposed Rulemaking, 70 FR 60,456 (Oct. 18, 2005), FERC Stats. & Regs. ¶ 32,590 (2005).

<sup>4</sup> We will generally refer to EPAct 2005's added section 210(m) of PURPA as "amended section 210." All other references to PURPA section 210 are as it currently exists.

electric power from and sell electric power to QFs. Additionally, section 210 of PURPA authorized the Commission to exempt QFs from certain federal and state laws and regulations.

4. Under section 201 of PURPA, cogeneration facilities and small power production facilities which meet certain standards and which are not owned by persons primarily engaged in the generation or sale of electric power<sup>5</sup> can become QFs, and thus become eligible for the rates and exemptions pursuant to section 210 of PURPA and found in our regulations.<sup>6</sup>

5. A cogeneration facility is defined in the Federal Power Act (FPA)<sup>7</sup> as a facility which produces electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes.<sup>8</sup> Thus, cogeneration facilities simultaneously produce two forms of useful energy, namely electric power and heat. Cogeneration facilities can use significantly less fuel to produce electricity and

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<sup>5</sup> The ownership requirement was codified in sections 3(17)(A) and 3(18)(A) of the FPA. Section 1253(b) of EPAct 2005 removed the ownership requirement from sections 3(17)(A) and 3(18)(A) of the FPA, and the Commission has proposed to remove the ownership requirement from its regulations in Docket No. RM05-36-000. Revised Regulations Governing Small Power Production and Cogeneration Facilities, Notice of Proposed Rulemaking, 70 FR 60456 (Oct.18, 2005), FERC Stats. & Regs. ¶ 32,590 (2005).

<sup>6</sup> 18 CFR Part 292 (2005).

<sup>7</sup> 16 U.S.C. 824 et seq. (2000).

<sup>8</sup> 16 U.S.C. 796(18) (2000).

steam (or other forms of energy) than would be needed to produce the two separately.

6. Small power production facilities as defined in the FPA use biomass, waste, or renewable resources, including wind, solar energy and water, to produce electric power and have a power production capacity which, together with any other facilities located at the same site, are not greater than 80 megawatts.<sup>9</sup> Reliance on these sources of energy can reduce the need to consume fossil fuels to generate electric power.

7. Prior to the enactment of PURPA, a cogenerator or small power producer seeking to establish interconnected operation with a utility faced three major obstacles. First, utilities were not generally willing to purchase this electric output or were not willing to pay an appropriate rate for that output. Second, utilities generally charged discriminatorily high rates for back-up service to cogenerators and small power producers. Third, a cogenerator or small power producer which provided electricity to a utility's grid ran the risk of being considered a public utility and thus being subjected to extensive state and federal regulation.

8. Section 210 of PURPA was designed to remove these obstacles. Each electric utility is required under section 210 to offer to purchase available electric energy from cogeneration and small power production facilities which obtain qualifying status. The rates for such purchases from QFs must be just and reasonable to the ratepayers of the utility, in the public interest, and must not discriminate against cogenerators or small

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<sup>9</sup> 16 U.S.C. 796(17)(A)(i)-(ii) (2000).

power producers. Rates also must not exceed the incremental cost to the electric utility of alternative electric energy (also known as the electric utility's "avoided costs"). Section 210 also requires electric utilities to provide electric service to QFs at rates which are just and reasonable, in the public interest, and which do not discriminate against cogenerators and small power producers.

9. Since Congress enacted PURPA, electric utilities have complained that their obligation to purchase from and sell to QFs, as implemented by the Commission in 18 CFR 292.303(a)-(b), was not economically beneficial and that they were purchasing energy they did not need and selling energy they did not want to sell. In 1995, the Commission clarified that in determining the avoided cost rate, the electric utility must take into account all alternative sources including third-party suppliers and does not have to buy power it does not need.<sup>10</sup> In the past decade, with the development of exempt wholesale generators (EWGs) introduced by the Energy Policy Act of 1992,<sup>11</sup> and increasing competition in wholesale electric markets as well as some retail electric markets, Congress has debated whether to repeal PURPA altogether, or to revise it. The

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<sup>10</sup> Southern California Edison Company and San Diego Gas & Electric Company, 70 FERC ¶ 61,215 at 61,677-78, reconsideration denied, 71 FERC ¶ 61,269 at 62,078 (1995) (finding that the determination of avoided cost must take into account "all sources").

<sup>11</sup> Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, (1993) (EPAAct 1992). EPAAct 1992 added a new section 32 to the Public Utility Holding Company Act of 1935 (PUHCA) to permit a category of sellers called EWGs to be exempt from PUHCA.

result is new section 210(m), which is the subject of this rulemaking, and new section 210(n), which is being addressed in Docket No. RM05-36-000. New section 210(m) requires the Commission to lift the mandatory purchase obligation if it finds, in effect, that there is a sufficiently competitive market for the QF to sell its power. While the provision permits electric utilities to file applications for relief from the mandatory purchase obligation, and requires the Commission to act on such applications within 90 days, the Commission has determined that it can more appropriately address this issue through rulemaking.

### **III. Proposed Revisions To Regulations**

#### **A. Obligation to Purchase**

10. Section 292.303(a) of the Commission's regulations, 18 CFR 292.303(a), states that:

Obligation to purchase from qualifying facilities. Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility:

- (1) Directly to the electric utility; or
- (2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

11. The new PURPA section 210(m)(1) amends the obligation to purchase and states that:

. . . no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to –

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

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

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

Section 210(m)(1) thus relieves an electric utility of its obligation to enter into a new contract or obligation to purchase QF power upon a Commission finding that certain market conditions exist.

12. As discussed below, the Commission will: (1) discuss its interpretation of the criteria for electric utility relief from the purchase obligation; (2) make a preliminary finding that QFs interconnected with utilities that are members of Midwest Independent Transmission System Operator, Inc. (Midwest ISO), PJM Interconnection, L.L.C. (PJM), ISO New England, Inc. (ISO-NE), and New York Independent System Operator (NYISO) have nondiscriminatory access to those markets and that those markets satisfy the section 210(m)(1)(A) criteria for removing the obligation of those electric utilities to

enter into new contracts or obligations with QFs; and (3) provide guidance on the definition of “nondiscriminatory access,” and “new contract or obligation.”

**1. Meaning of section 210(m)(1)**

13. Section 210(m)(1) states that no utility shall be obligated to enter into a new contract or obligation if the Commission finds that QFs have nondiscriminatory access to one of the three market circumstances described in section 210(m)(1)(A), (B), and (C). In effect, Congress has required the Commission to remove the mandatory purchase obligation if it finds that there is access to a sufficiently competitive market for QFs to sell their power. Based on this statutory language, in this section, we discuss our interpretation of what type of markets are required by section 210(m)(1) of PURPA to relieve a utility of the mandatory purchase obligation.

14. Subparagraph (A) waives the purchase obligation if QFs have 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. We conclude that the most reasonable interpretation of subsection (A) is that it was crafted to apply in regions in which Independent System Operators (ISO) and Regional Transmission Organizations (RTO) administer day-ahead and real-time markets, and bilateral long-term contracts for the sale of capacity and electric energy are available to participants/QFs in these markets.

15. We note that the second prong of subparagraph (A) does not require auction-based long-term capacity or energy markets and such an interpretation would not be consistent

with the statutory text. First, subparagraph (A)(ii) does not use the terms “organized,” “independently administered,” or “competitive” when describing the long term markets. As evidenced by subparagraph (B)(ii), discussed below, Congress could have imposed such requirements for the long-term wholesale markets, but did not. Therefore, we conclude that no such requirement was intended for the long-term markets of section 210(m)(1)(A)(ii). Second, unlike subparagraph (B)(ii), subparagraph (A)(ii) does not require the Commission to consider “evidence of transactions within the relevant market” when determining whether QFs have meaningful opportunities to sell into wholesale markets outside the host utility. This suggests that Congress presumed there was a meaningful opportunity to sell for QFs that have “nondiscriminatory access to” ISO and RTO regions with day-ahead and real-time markets.

16. A reasonable interpretation of subparagraph (B) is that it is intended to apply in non-auction-based markets because it waives the mandatory purchase requirement so long as there is (i) a Commission-approved regional transmission entity providing nondiscriminatory transmission and interconnection services; and (ii) “competitive wholesale markets” for short- and long-term energy and capacity sales and real-time energy sales. To meet subparagraph (B)(i), QFs must have nondiscriminatory access to transmission and interconnection service that is nondiscriminatory, which we interpret to mean access pursuant to a Commission-approved open access transmission tariff (OATT) and interconnection rules and provided by an entity that is regional in scope. Amended section 210 does not contain any express definition, and, therefore, the Commission has

discretion in this context to deem an entity to be “regional” based on factors such as sufficient regional scope or configuration or the multiple discrete transmission systems it controls.

17. As to the second prong, subparagraph (B)(ii) requires that QFs have access to "competitive wholesale markets that provide a meaningful opportunity" to sell capacity and energy on both a short- and long-term basis and energy on a real-time basis (emphasis added). "Meaningful opportunity" is to be determined by the Commission after considering, among other factors, "evidence of transactions within the relevant market." Taken together, the terms “competitive,” “meaningful opportunity” and “evidence of transactions” suggest that Congress intended that waiver occur in a non-auction-based market only if it could be established that QFs had opportunities to sell their output into competitive wholesale markets.

18. Subparagraph (C) removes the purchase obligation in 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). Although this provision is not clear on its face, its reference to subparagraphs (A) and (B) requires the Commission to be mindful, in interpreting the provision, of the two types of requirements that are embodied in those sections, i.e., (1) nondiscriminatory access to transmission and interconnection services, and (2) competitive short-term and long-term markets. These provisions appear to require a case-by-case approach, but we seek comments on whether the Commission can make generic findings on these provisions.

19. The Commission's existing OATT, adopted in Order No. 888,<sup>12</sup> and interconnection rules, adopted in Order Nos. 2003<sup>13</sup> and 2006,<sup>14</sup> are designed to eliminate undue discrimination in the provision of transmission and interconnection services. Although the Commission recently issued a Notice Of Inquiry regarding changes to the OATT, the OATT has been considered sufficient to provide non-discriminatory access to transmission until such time as modified. Accordingly, we conclude that QFs have non-discriminatory access to transmission and interconnection if they have access to utilities providing service under an Order No. 888 OATT (or to utilities providing service under a Commission-accepted reciprocity tariff) and

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<sup>12</sup> Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

<sup>13</sup> Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), order on reh'g, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), order on reh'g, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), order on reh'g, Order No. 2003-C, 70 Fed. Reg. 37,661 (June 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005).

<sup>14</sup> Standardization of Small Generator Interconnection Agreements and Procedures, Order No. 2006, 70 Fed. Reg. 34,100 (Jun. 13, 2005), FERC Stats. & Regs. ¶ 31,180 at 31,406-31,551 (2005), order on reh'g, Order No. 2006-A, 70 Fed. Reg. 71,760 (Nov. 30, 2005), FERC Stats. & Regs. ¶ 31,196 (2005).

interconnection services pursuant to the Commission's interconnection rules. However, we seek comment on whether there are any circumstances in which an OATT should be considered insufficient for purposes of section 210(m). We also seek comment on whether a Commission-accepted reciprocity tariff filed by a nonjurisdictional electric utility has the same effect as an OATT for purposes of meeting section 210(m)(1)(C). We also seek comment on whether nonjurisdictional utilities provide nondiscriminatory interconnection services for purposes of section 210(m)(1)(C) of PURPA.

20. We also recognize that small QFs may be in a unique situation with respect to nondiscriminatory access because they interconnect with the host utility at a distribution level. For instance, Granite State has recently filed a petition in Docket No. EL06-26-000 asking the Commission to initiate a rulemaking implementing section 210(m) of PURPA and as part of that rulemaking, issue rules retaining the mandatory purchase obligation for small QFs (those with a nameplate capacity of 5 MW or less) and creating a rebuttable presumption in favor of retaining the mandatory purchase obligation for small power production facilities with a capacity over 5 MW and up to 20 MW. Granite State suggests that small hydro QFs do not have nondiscriminatory access to RTO/ISO markets. Therefore, we seek comment on whether the purchase obligation should be retained for small renewable projects and, if so, how to define "small," e.g., 5 MWs or below, 20 MWs or below as proposed by Granite State. In addition, we seek comment on whether there may be other categories of QFs that lack nondiscriminatory

access to RTO/ISO short-term or long-term wholesale markets for which we should retain the obligation to purchase.

21. With respect to whether the second prong of section 210(m)(B)(ii) is met in non-ISO/non-RTO markets, i.e., whether QFs in non-ISO/non-RTO markets have access to wholesale markets for long-term sales of capacity and electric energy, would that prong be satisfied if there is a demonstration that an organized power procurement process exists in which QFs can participate (albeit not an auction-based process)? We seek comments on ways the prong may be satisfied.

**2. Implementation of section 210(m)(1)**

**(a) Subparagraph A**

22. As we discussed above, the Commission interprets section 210(m)(1)(A) to apply in regions in which ISOs and RTOs administer day-ahead and real-time markets, and bilateral long-term contracts for the sale of capacity and electric energy are available to participants/QFs in these markets. The Commission proposes to find that the Midwest ISO, PJM, ISO-NE, and NYISO satisfy the requirements of section 210(m)(1)(A).<sup>15</sup>

These entities are Commission approved ISO or RTOs that provide non-discriminatory

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<sup>15</sup> While Southwest Power Pool, Inc. (SPP) and the California Independent System Operator Corporation (Cal ISO), respectively are a Commission-approved RTO and ISO, they do not satisfy the requirements of section 210(m)(1)(A) because neither has day-ahead markets. However, any utility within SPP and Cal ISO may file an application with the Commission to seek relief from the mandatory purchase obligation under sections 210(m)(1)(B) or (C), on a case-by-case basis.

open access transmission services and independently administer auction-based wholesale markets for day-ahead and real-time energy sales. Additionally, with respect to (A)(ii), the existence of bilateral long-term contracts for long-term sales of capacity and energy is an indication of a market. It is reasonable to conclude that the second prong of subparagraph (A) is met because bilateral long-term contracts are available to participants in the footprints of the Midwest ISO, PJM, ISO-NE, and NYISO. Therefore, we propose to find that electric utilities that are members of the Midwest ISO, PJM, ISO-NE, and NYISO would meet the requirements for relief from the mandatory purchase obligation. We describe these markets in more detail below.

(1) **Midwest ISO**

23. On December 20, 2001, the Commission found that the Midwest ISO satisfied the requirements, including independence from market participants, of Order No. 2000, and thus granted the Midwest ISO RTO status.<sup>16</sup> Thus, we believe that the Midwest ISO “independently administers” auction-based real-time markets. With respect to subparagraph (1)(A)(i), the Commission approved the Midwest ISO’s proposed Transmission and Energy Markets Tariff (TEMT), which allowed the Midwest ISO to initiate Day 2 operations in its 15-state region.<sup>17</sup> The Midwest ISO’s Day 2 operations

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<sup>16</sup> See Midwest Independent Transmission System Operator, Inc., 97 FERC ¶ 61,326 (2001) order on reh’g, 103 FERC ¶ 61,169 (2003).

<sup>17</sup> See Midwest Independent Transmission System Operator, Inc., 108 FERC ¶ 61,163 (Midwest ISO, FERC Electric Tariff, Third Revised Volume No. 1, Module C),  
(continued)

include, among other things, day-ahead and real-time energy markets and a Financial Transmission Rights (FTR) market for transmission capacity. The Midwest ISO began Day 2 operations on April 1, 2005. Since market participants have access to the Midwest ISO's day-ahead and real-time energy markets to sell their electric energy, a QF that has "non-discriminatory access" would have the same opportunity. Also, bilateral contracts exist in the Midwest ISO for the long-term sales of capacity and energy. Accordingly, we would expect that such long-term sales would be available to all participants in the Midwest ISO's footprint. Based on the foregoing, we propose to find that the Midwest ISO meets the conditions of subparagraph (A).

(2) **PJM**

24. PJM received Commission approval as an independent regional transmission organization on July 12, 2001.<sup>18</sup> Since independence from market participants is one of four characteristics that PJM had shown for Commission approval to operate as an RTO, PJM satisfies the "independently administered" condition. Second, since 1997, PJM has operated auction-based, day-ahead and real-time wholesale energy markets pursuant to its

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order on reh'g, 109 FERC ¶ 61,157 (2004), order on reh'g, 111 FERC ¶ 61,043 (2005).

<sup>18</sup> PJM Interconnection, L.L.C., 96 FERC ¶ 61,061 (2001). On December 20, 2002, in PJM Interconnection, L.L.C., 101 FERC ¶ 61,345 (2002), PJM was granted full, rather than provisional, RTO status. Independence was one of the matters considered in the 2002 Order.

OATT and Operating Agreement.<sup>19</sup> Because PJM's market participants have access to auction-based day ahead and real time wholesale energy markets, a QF would have the same opportunity as other generators to sell energy in that market. Also, there are bilateral contracts in PJM for the long-term sales of capacity and energy. Accordingly, we would expect that such long-term sales would be available to all participants in PJM's footprint. Therefore, we propose to find that PJM meets the conditions of subparagraph (A).

**(3) ISO-NE**

25. ISO-NE received Commission approval as an independent regional transmission operator on March 24, 2004, by having satisfied the Commission's criterion of independence from market participants.<sup>20</sup> Due to ISO-NE's status as an RTO, we believe that the ISO-NE satisfies the "independently administered" condition of subparagraph (A)(i). With respect to the second condition of subparagraph (A)(i), ISO-NE, pursuant to Market Rule 1 of its OATT, commenced operation of its auction-based energy markets on March 1, 2003. Since ISO-NE's market participants have access to auction-based day ahead and real time wholesale energy markets, a QF would have the same opportunity. Also, there are bilateral contracts in ISO-NE for the long-term sales of capacity and

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<sup>19</sup> PJM Interconnection, L.L.C., FERC Electric Tariff, Sixth Revised Volume No. 1.

<sup>20</sup> ISO New England, Inc., 106 FERC 61,280 (2004).

energy. Accordingly, we would expect that such long-term sales would be available to all participants in ISO-NE's footprint. Therefore we propose to find that ISO-NE meets the conditions of subparagraph (A).

(4) **NYISO**

26. The NYISO received Commission authorization to operate as an independent transmission operator on June 30, 1998 after showing that it is independent of market participants.<sup>21</sup> On November 18, 1999, the NYISO commenced operation of its auction-based energy markets. Under the ISO Market Administration and Control Area Services Tariff, NYISO's market participants have access to auction-based day ahead and real time wholesale energy markets,<sup>22</sup> and a QF would have the same opportunity as other generators within NYISO to sell energy into NYISO's auction-based day ahead and real time wholesale energy markets. Also, there are bilateral contracts in NYISO for the long-term sales of capacity and energy. Accordingly, we would expect that such long-term sales would be available to all participants in NYISO's footprint. Therefore we propose to find that NYISO meets the conditions of subparagraph (A).

(5) **Conclusion**

27. The Commission thus proposes to find in this rulemaking proceeding that QFs

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<sup>21</sup> Central Hudson Gas & Electric Co., 83 FERC ¶ 61,352 (1998), order on reh'g, 87 FERC ¶ 61,135 (1999).

<sup>22</sup> New York Independent System Operator, Inc., FERC Electric Tariff Original Volume No. 2.

interconnected with electric utilities that are members of Midwest ISO, PJM, ISO-NE, and NYISO have nondiscriminatory access to those markets and those markets meet the section 210(m)(1)(A) criteria for removing the obligation of those electric utilities to enter into new contracts or obligations with the QFs. We seek comments, including specific evidence, which either support or refute this preliminary finding. Finally, as noted previously, we seek comment on whether the obligation to purchase should be retained in these markets for “small” QFs.

28. Under our proposed regulations, to claim relief from the purchase obligation, electric utilities that are members of Midwest ISO, PJM, ISO-NE, and NYISO will need to make compliance filings pursuant to section 210(m)(3). This compliance filing is discussed in more detail in our discussion of section 210(m)(3).

**(b) Subparagraphs B and C**

29. The Commission proposes to determine on a case-by-case basis<sup>23</sup> whether a utility has met the requirements of sections 210(m)(1)(B) and 210(m)(1)(C) for relief from its purchase obligation. An electric utility filing an application claiming to meet the requirements of section 210(m)(1)(B) or section 210(m)(1)(C) of PURPA must demonstrate the “factual basis upon which relief is requested.” Applicants should

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<sup>23</sup> We will allow joint applications to be filed by a number of utilities in a region if the applications for relief from the purchase obligation present common issues of law and fact. We would expect common issues of law and fact to exist where one or more utilities operate within the same market.

provide, among other evidence, actual sales data for (1) long-term and short-term capacity and (2) long-term, short-term, and real-time electric energy as well as evidence that the utility operates in a competitive wholesale market. Accordingly, to be relieved of their mandatory purchase obligations, electric utilities that are not members of Midwest ISO, PJM, ISO-NE, and NYISO would be required to file such applications with the Commission pursuant to section 210(m)(3) of PURPA.

30. We propose that other markets, i.e., both non-auction-based markets and non-RTO markets, as well as new auction-based markets, and utility-specific markets would be addressed on a case-by-case basis, pursuant to section 210(m)(3) discussed below. In addition, subsequent changes to market conditions in all markets would be handled on a case-by-case basis, pursuant to section 210(m)(4) discussed below.

### **3. Other Issues**

31. Section 210(m)(1) states that no electric utility shall be obligated to purchase from a QF if the Commission finds that the QF has nondiscriminatory access to the market conditions identified in each subparagraph. We propose that there be a rebuttable presumption that a utility provides nondiscriminatory access if it has an open access transmission tariff in compliance with our pro forma OATT (or a Commission-approved reciprocity tariff).<sup>24</sup> We also propose that QFs or any other affected party should be

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<sup>24</sup> In Docket No. RM05-25-000, the Commission is currently reviewing the adequacy and sufficiency of the pro forma OATT to ensure that it prevents undue discrimination in the provision of transmission service.

allowed to rebut that presumption, for example, by providing specific and credible evidence that the QF does not have non-discriminatory access to wholesale markets. However, the presumption cannot be rebutted by an argument that the utility has not properly implemented or administered its OATT. Improper implementation of an OATT is more properly the subject of a complaint and the Commission will take appropriate steps in response to a complaint to ensure that the OATT is properly implemented.

32. Section 210(m)(1) also states that no electric utility “shall be required to enter into a new contract or obligation” to purchase electric energy from a QF if the Commission makes the required finding. The Commission proposes to find that when a contract terminates by its own accord, an electric utility is not compelled to enter into a new, successor contract with the QF if the Commission has found that the QF has nondiscriminatory access to markets that satisfy the criteria of section 210(m)(1). Some have alleged that the grant of QF status means that electric utilities have an “obligation” to purchase from that QF in perpetuity. We disagree. That a facility has QF status does not mean that an electric utility has an “obligation” to purchase from the QF in perpetuity, or, conversely, that the QF has the right to demand that the utility purchase at avoided-cost rates in perpetuity. The Commission proposes to find that if a contract is entered into after August 8, 2005, the date of enactment, but before the Commission has determined that an electric utility is entitled to relief from the obligation to purchase from a QF, the contract already entered into will be treated as though it was in effect on August 8, 2005 for purposes of section 210(m)(1).

**B. Purchase and Sale Obligations for New Cogeneration Facilities**

33. Section 210(m)(2)(A) of PURPA reads:

REVISED PURCHASE AND SALE OBLIGATIONS FOR NEW FACILITIES – (A) After the date of enactment of this subsection, no electric utility shall be required pursuant to this section to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying cogeneration facility unless the facility meets the criteria for qualifying cogeneration facilities established by the Commission pursuant to the rulemaking required by subsection (n).

34. This provision reinforces the requirement that new qualifying cogeneration facilities must satisfy the section 210(n) criteria for new qualifying cogeneration facilities, which the Commission is implementing in pending Docket No. RM05-36-000. The Commission proposes to make this clarification in section 292.309(d) of its regulations.

35. Section 210(m)(2)(B) defines the term “existing qualifying cogeneration facility” to mean a facility that: (i) was a qualifying cogeneration facility on the date of enactment of subsection (m), or (ii) had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by subsection 210(n). The Commission proposes to adopt this definition in new section 292.309(b)(1) of its regulations.

**C. Application for Relief**

36. Section 210(m)(3) of PURPA states:

COMMISSION REVIEW- Any 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. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) of this subsection have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) have been met.

37. The Commission proposes to include in new section 292.310 the language of section 210(m)(3) of PURPA. Since the enactment of EAct 2005, two applications for relief from the mandatory purchase obligation have been filed with the Commission.<sup>25</sup> In Alliant, the Commission explained that, in order to meet the express statutory requirement of “notice,” including “sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities,” contained in section 210(m)(3) of PURPA, it would require that an applicant identify all potentially affected QFs in any application for relief filed pursuant to section 210(m)(3).<sup>26</sup> The Commission then described which facilities constitute “all potentially affected QFs.”<sup>27</sup>

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<sup>25</sup> See Alliant Energy Corporate Services, Inc., 113 FERC ¶ 61,024 (2005) (Alliant); Montana-Dakota Utilities Co., 113 FERC ¶ 61,045 (2005) (Montana-Dakota). In both instances, the Commission dismissed petitions for declaratory orders pursuant to section 210(m)(3) of PURPA requesting relief from the mandatory purchase obligation on the grounds of insufficient notice.

<sup>26</sup> Alliant, 113 FERC ¶ 61,024 at P 18.

<sup>27</sup> Id. at P 19-20.

38. Consistent with Alliant and Montana-Dakota, before the Commission will consider an application filed pursuant to section 210(m)(3) of PURPA, an applicant must first identify in the application all potentially affected QFs (with their names and current addresses) – including: (1) those QFs that have existing power purchase contracts with the applicant; (2) other QFs that sell their output to the applicant or that have pending requests for the applicant to purchase their output; (3) any developer of generating facilities with whom the applicant has agreed to enter into power purchase contracts or is discussing power purchase contracts; (4) the developers of facilities that have pending state avoided cost proceedings; and (5) any other QFs that the applicant reasonably believes to be affected by its petition. This will ensure that the statutory obligation is met to provide notice and an opportunity to comment to all potentially affected QFs. The Commission proposes to incorporate this interpretation of “sufficient notice” and “all potentially affected QFs” in new section 292.310(b) and (c).

39. We point out that under section 210(m)(3) the Commission must make a finding regarding an application for relief of the purchase obligation and that the finding must be made within 90 days of the date of such application. The Commission, accordingly, will expect an application for relief to be fully supported by documentation upon which the required finding can be made, i.e., a case in chief. For those not in one of the Commission-certified markets, such documentation should include, but is not limited to: (1) prepared testimony; (2) affidavits; (3) exhibits; and (4) any other evidence. Given the

statutory 90-day time limit for finding, we stress that the burden will be on the applicant to provide a fully-supported application in the first instance.

40. With regard to applications filed by electric utilities that are members of Midwest ISO, PJM, NYISO, or ISO-NE, an electric utility need only submit a compliance filing showing that: (1) it is a member of one of these RTOs/ISOs; (2) the Commission has made a final finding that the RTO/ISO that it is a member of provides QFs with nondiscriminatory access;<sup>28</sup> (3) a list of all potentially affected QFs; and (4) the QFs have the right to request service under an OATT or OATTs (or reciprocity tariffs) on file. Once a final rule issues and the Commission has acted on rehearing of the final rule, the Commission will not reevaluate its decision on specific markets made in the instant proceeding, absent changed circumstances. The Commission seeks comments on whether there are any QFs within the service territories of members of the Midwest ISO, PJM, ISO-NE, and NYISO that, although they have access to an OATT or OATTs (or reciprocal tariffs), nonetheless do not have nondiscriminatory access to those markets.

41. We anticipate that the compliance filings of the electric utilities that are members of the Midwest ISO, PJM, NYISO, or ISO-NE and seeking relief from the purchase obligation will be essentially ministerial; we do not expect the findings made in this

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<sup>28</sup> The final rule in this proceeding must have become effective before an electric utility may rely upon it. As a result, any electric utilities that file early and seek to rely on the preliminary findings with respect to Midwest ISO, PJM, NYISO or ISO-NE in this NOPR will not be permitted to do so.

rulemaking to be re-litigated in the compliance filing proceeding. In this regard, we conclude that the existence of a filed OATT ( or reciprocity tariff) will be construed to provide nondiscriminatory access. If a QF believes that the administration or implementation of the OATT denies it access to markets, it is not an issue for the compliance filing proceeding; instead the QF may file a complaint challenging the implementation or administration of an OATT.

**D. Reinstatement of Obligation to Purchase**

42. Section 210(m)(4) provides:

REINSTATEMENT OF OBLIGATION TO PURCHASE. At any time after the Commission makes a finding under paragraph (3) relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) of this subsection are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) which relieved the obligation to purchase, are no longer met.

43. The Commission views this section as an opportunity for a QF, a state agency, or any affected person to seek to reinstate the purchase obligation should there be a material change in the circumstances under which the Commission granted relief. We note that the applicant bears the burden to “set forth the factual basis” upon which the application is based. The requirement for a “factual basis” indicates that allegations of a change in

the conditions upon which relief was granted must be supported with evidence. The Commission proposes to consider these applications on a case-by-case basis.

44. Consistent with our interpretation of “notice” under section 210(m)(3), the Commission will require an applicant to identify all potentially affected utilities in the application so that the Commission will be able to meet its statutory requirement to provide sufficient notice and an opportunity for comment.

**E. Obligation to Sell**

45. Section 292.303(b) of the Commission’s regulations, 18 CFR 292.303(b), states that: “Each electric utility shall sell to any qualifying facility, in accordance with § 292.305, any energy and capacity requested by the qualifying facility.” Under new section 210(m)(5), this mandatory obligation to sell can be terminated 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.”

46. The Commission proposes to incorporate the language of section 210(m)(5) of PURPA in new section 292.312 of the Commission’s regulations. The Commission proposes to interpret the phrase “new contract or obligation” contained in section

210(m)(3) consistently with its interpretation of the same words contained in section 210(m)(1) of PURPA.<sup>29</sup>

47. The Commission is also proposing to include a provision, section 292.313, allowing a QF, State agency, or any other affected person to apply to the Commission for an order reinstating the electric utility's obligation to sell electric energy if the factual predicate for the determination that the obligation to purchase should be terminated no longer exists.

**F. Section 210(m)(6)**

48. Section 210(m)(6) of PURPA requires that:

Nothing in this subsection 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).

49. We propose to implement section 210(m)(6) of PURPA by adopting the language of the statute in section 292.314. In addition, the Commission will clarify that the stage of the construction of a facility has no bearing on whether the protections of section 210(m)(6) are triggered. The Commission interprets section 210(m)(6) to protect the rights and remedies under a contract or obligation in effect *or* pending approval before

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<sup>29</sup> See P 29 *supra*.

the state regulatory authority, regardless of the construction stage of the facility that may be the subject of the contract or obligation. We solicit comments on whether further or different language and/or clarifications other than those proposed here should be incorporated into our regulations.

**G. Section 210(m)(7)**

50. Section 210(m)(7) of PURPA requires that:

(A) The Commission shall issue and enforce such regulations as are necessary to ensure that an electric utility that purchases electric energy or capacity from a qualifying cogeneration facility or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under this section recovers all prudently incurred costs associated with the purchase. (B) A regulation under subparagraph (A) shall be enforceable in accordance with the provisions of law applicable to enforcement of regulations under the Federal Power Act (16 U.S.C. 791a et seq.).

51. The Commission does not believe that regulations are necessary at this time; this is a matter that the Commission can address on a case-by-case basis. However, the Commission will consider a regulation under this section in the future if a need becomes apparent.

52. We solicit comments on whether there is a need for the Commission to consider a regulation, and if so what that regulation should state, to ensure that an electric utility that purchases electric energy or capacity from a cogeneration QF or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under section 210(m)(7) recovers all prudently incurred costs associated with the purchase.

**IV. Information Collection Statement**

53. The Commission is submitting the following collection of information contained in this proposed rulemaking to the Office of Management and Budget (OMB) for review under Section 3507(d) of the Paperwork Reduction Act of 1995.<sup>30</sup> The Commission identifies the information provided for under Part 292 as FERC-556. These collections of information are specifically mandated by statute.

54. The Commission solicits comments on the Commission’s need for this information, whether the information will have practical utility, the accuracy of the provided burden estimates, ways to enhance the quality and clarity of the information that the Commission will collect, and any suggested methods for minimizing the respondent’s burden, including the use of information techniques. The burden estimates for complying with this proposed rule are as follows:

Data Collection	Number of Respondents	Number of Responses	Hours Per Response	Total Annual Hours
§292.310	230	1	2	460
§292.312	230	1	2	460
§292.413	630	1	3	1,890
Totals	860	1		2,810

Total Annual Hours for the Collection: (reporting + recordkeeping if appropriate)

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<sup>30</sup> 44 U.S.C. 3507(d) (2000).

Information Collection Costs: Because of the regional differences and the various staffing levels that will be involved in preparing the documentation (legal, technical and support) the Commission is using an hourly rate of \$150 to estimate the costs for filing and other administrative processes (reviewing instructions, searching data sources, completing and transmitting the collection of information). The estimated cost is anticipated to be \$421,500.

Title: FERC-556 Small Power Production and Cogeneration Facilities

Action: Proposed Data Collections

OMB Control Nos. 1902-0075

Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number or the Commission has provided justification as to why the control number should not be displayed.

Respondents: Businesses or other for profit, state, local or tribal government.

Necessity of the Information: The Commission proposes amending its regulations to implement section 210(m) of PURPA which was enacted in section 1253 of the EPAct 2005; specifically, its regulations governing purchases of electric energy from and sales of electric energy to qualifying small power production and cogeneration facilities

These requirements conform to the Commission's plan for efficient information collection, communication, and management within the energy industry. The

Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

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](mailto:michael.miller@ferc.gov)]

55. For submitting comments concerning the collection(s) of information and the associated burden estimate(s), 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, e-mail: [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov)].

## **V. Environmental Analysis**

56. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment. The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. As explained above, this proposed rule is clarifying in nature. It interprets several amendments made to PURPA by EAct 2005, and clarifies the applicability of these amendments to electric utilities and QFs; it does not substantially change the effect of the legislation. Accordingly, no environmental consideration is necessary.

## **VI. Regulatory Flexibility Act Analysis**

57. The Regulatory Flexibility Act of 1980 (RFA)<sup>31</sup> generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities and where notice and comment rulemaking is required. Certain rules are exempt from notice and comment from the RFA requirements; exempt rules include interpretative rules, general statements of policy, or rules of agency organization procedure or practice.<sup>32</sup> Interpretative rules “generally interpret the intent expressed by Congress, where an agency does not insert its own judgments or interpretations in implementing a rule and simply regurgitates statutory language.”<sup>33</sup> The rule we are proposing in this docket is an interpretative rule. Accordingly, no regulatory flexibility analysis is required.

## **VII. Comment Procedures**

58. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due [insert date \_30\_ days after publication in the FEDERAL REGISTER]. Reply comments are due [insert date 30 days after comment date]. Comments and reply comments must refer to Docket

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<sup>31</sup> 5 U.S.C. 601-12.

<sup>32</sup> 5 U.S.C. 553(b)(A)

<sup>33</sup> “How to Comply with the Regulatory Flexibility Act: A Guide for Government Agencies”, Small Business Administration, Office of Advocacy, P.5, May 2003.

No. RM06-10-000, and must include the commenters' names, the organizations they represent, if applicable, and their address in their comments. Comments and reply comments may be filed either in electronic or paper format.

59. Comments and reply comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make paper filings. Commenters that are not able to file comments and reply comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, N.E., Washington, D.C. 20426.

60. All comments and reply comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments and reply comments on other commenters.

### **VIII. Document Availability**

61. 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 the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal

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

62. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, 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.

63. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or (202) 502-8222 (e-mail at FERCOOnlineSupport@FERC.gov), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659 (e-mail at public.referenceroom@ferc.gov ).

**List of subjects in 18 CFR Part 292**

64. Electricity, Electric power plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

By direction of the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

In consideration of the foregoing, the Commission proposes to amend 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. Section 292.303 is revised to read:

**§ 292.303 Electric utility obligations under this subpart.**

(a) Obligation to purchase from qualifying facilities. Each electric utility shall purchase, in accordance with § 292.304 of this chapter, unless exempted by § 292.309 of this chapter, any energy and capacity which is generated from a qualifying facility

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

(b) Obligation to sell to qualifying facilities. Each electric utility shall sell to any qualifying facility, in accordance with § 292.305 of this chapter, unless exempted by § 292.312 of this chapter, energy and capacity requested by the qualifying facility.

\* \* \* \* \*

3. Sections 292.309 through 292.314 are added to read as follows:

**§ 292.309** Termination of obligation to purchase from qualifying facilities.

(a) An electric utility shall no longer be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to:

(1)(i) Independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and

(ii) Wholesale markets for long-term sales of capacity and electric energy; or

(2)(i) Transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and

(ii) Competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected; in determining whether a meaningful opportunity to sell exists within the meaning of § 309(a)(2)(ii), the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(3) Wholesale markets for the sale of capacity and electric energy that are, at a

minimum, of comparable competitive quality as markets described in paragraphs (a)(1) and (a)(2) of this section.

(b) Definitions

(1) For purposes of this section, an “existing qualifying cogeneration facility” is a facility that

(i) Was a qualifying cogeneration facility before or on August 8, 2005; or

(ii) Had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under § 292.207 prior to **[insert the date the Commission issues a final rule]**.

(2) For the purposes of this section, a “new qualifying cogeneration facility” is a facility that satisfies the criteria for qualifying cogeneration facilities under § 292.205 of this chapter.

(3) For the purposes of this section, a renewal of a contract that expires by its own terms is a “new contract or obligation.”

(c) For the purposes of this section, there is a rebuttable presumption that there is “non-discriminatory access” to wholesale markets when a qualifying facility is provided transmission services pursuant to a Commission-approved open access transmission tariff or reciprocity tariff, and interconnection services pursuant to Commission-approved interconnection rules.

(d) No electric utility shall be required to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying

cogeneration facility unless the facility meets the criteria for new qualifying cogeneration facilities established by the Commission in § 292.205 of this chapter.

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

(a) Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation in § 292.303(a) of this chapter pursuant to this section on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in § 292.309(a)(1), (2) or (3) of this chapter have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in § 292.309(a)(1), (2) or (3) of this section have been met; provided, however, that if the Commission has made a determination pursuant to notice and comment rulemaking or order that a particular market meets the criteria for relief in § 292.309(a)(1), (2) or (3), an applicant may make a ministerial application under this section and the application will be treated as a compliance filing.

(b) Sufficient notice shall mean that an electric utility must identify with names and addresses all potentially affected qualifying facilities in an application filed pursuant to paragraph (a).

(c) All potentially affected qualifying facilities shall include:

(1) Those qualifying facilities that have existing power purchase contracts with the applicant;

(2) Other qualifying facilities that sell their output to the applicant or that have pending self-certification or Commission certification with the Commission for qualifying facility status whereby the applicant will be the purchaser of the qualifying facility's output;

(3) Any developer of generating facilities with whom the applicant has agreed to enter into power purchase contracts or are in discussion with regard to power purchase contacts;

(4) The developers of facilities that have pending state avoided cost proceedings;  
and

(5) Any other qualifying facilities that the applicant reasonably believes to be affected by its application filed pursuant to paragraph (a).

**§ 292.311 Reinstatement of obligation to purchase.**

At any time after the Commission makes a finding under § 292.310 of this chapter relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section, if there has been a change in the conditions upon which the Commission based its finding. Such application shall set forth the factual basis upon which the application is based and describe why the

conditions set forth in § 292.309 (a)(1), (2) or (3) of this chapter are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in § 292.309 (a)(1), (2), or (3) of this chapter which relieved the obligation to purchase, are no longer met.

**§ 292.312** Procedures for utilities requesting termination of obligation to sell to qualifying facilities.

(a) An electric utility shall not be required to enter into a new contract or obligation to sell electric energy to a qualifying small power production facility, an existing qualifying cogeneration qualifying facility, or a new qualifying cogeneration facility if the Commission has found that:

(1) 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

(2) The electric utility is not required by State law to sell electric energy in its service territory.

(b) Any electric utility may file an application with this Commission for relief from the mandatory obligation to sell under this paragraph on a service territory-wide basis or a single qualifying facility basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in paragraphs

(a)(1) and (a)(2) of this section have been met. After notice, including sufficient notice to potentially affected qualifying facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in paragraphs (a)(1) and (a)(2) of this section have been met.

**§ 292.313 Reinstatement of obligation to sell.**

At any time after the Commission makes a finding under § 292.312 of this chapter relieving an electric utility of its obligation to sell electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to sell electric energy under this section, if there has been a change in the conditions upon which the Commission based its finding. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in § 292.312 (a)(1) and (a)(2i) of this chapter are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to sell electric energy under this section if the Commission finds that the conditions set forth in § 292.312 (a)(1) and (a)(2) of this chapter are no longer met.

**§ 292.314 Existing rights and remedies**

Nothing in this §§292.303 through 292.314 of this chapter 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 or before August 8, 2005, 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 (including the right to recover costs of purchasing electric energy or capacity).