

135 FERC ¶ 61,234
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Pacific Gas and Electric Company
San Diego Gas & Electric Company
Southern California Edison Company

Docket No. QM11-2-000

ORDER GRANTING APPLICATION TO TERMINATE PURCHASE OBLIGATION

(Issued June 16, 2011)

1. On March 18, 2011, Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (SoCal Edison) (collectively Joint Applicants) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA).¹ Each of the Joint Applicants seeks to terminate the requirement that, under section 292.303(a) of the Commission's regulations,² it enter into new obligations or contracts to purchase electric energy and capacity from qualifying cogeneration and small power production facilities (QF) with net capacity in excess of 20 MW on a service territory-wide basis.
2. In this order, the Commission grants the request of Joint Applicants to terminate the mandatory purchase obligations of PG&E, SDG&E and SoCal Edison pursuant to section 210(m)(1)(C) of PURPA³ for QFs with a net capacity in excess of 20 MW.

¹ 16 U.S.C. § 824a-3(m) (2006).

² 18 C.F.R. § 292.303(a) (2011).

³ 16 U.S.C. § 824a-3(m)(1)(C) (2006).

I. Background

3. On October 20, 2006, the Commission issued Order No. 688,⁴ revising its regulations governing utilities' obligations to purchase electric energy produced by QFs and implementing section 210(m) of PURPA.⁵ Sections 292.309(a)(1), (2), and (3) of the Commission's regulations⁶ codify sections 210(m)(1)(A), (B), and (C) of PURPA.

4. Section 292.309 of the regulations states:

(a) After August 8, 2005, an electric utility shall not be required, under this part, 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 production 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;

(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, and 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 exists, the Commission shall consider, among other factors, evidence of transactions with the relevant market; or

⁴ *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006), *order on reh'g*, Order No. 688-A, FERC Stats & Regs. ¶ 31,250 (2007), *aff'd sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

⁵ Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005. *See* Pub. L. No. 109-58 § 1253, 199 Stat. 594, 967-69 (2005).

⁶ 18 C.F.R. §§ 292.309(a)(1), (2), (3) (2011).

(3) Wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described above in paragraphs (a)(1) and (a)(2) of this section.

II. QF/CHP Settlement Agreement

5. Joint Applicants state that the impact of social, political and economic market developments within California has resulted in numerous disputes between QFs and Joint Applicants over new Power Purchase Agreements (PPA) with QFs. In an effort to resolve these disputes, the Joint Applicants, cogeneration and combined heat and power qualifying facility representatives (CHP QF Parties)⁷ and statewide consumer groups⁸ negotiated for over a year, facilitated by the California Public Utilities Commission (CPUC), and entered into a Qualifying Facility and Combined Heat and Power Program Settlement Agreement (QF/CHP Settlement Agreement) approved by the CPUC in December 2010.⁹ The QF/CHP Settlement Agreement resolves outstanding QF-related disputes before the CPUC and the courts, establishes a new QF/CHP Program in California, makes available additional PPA options for QFs under the QF/CHP Program, including a PURPA program for new PPAs for QFs 20 MW and smaller, and establishes a framework for the Joint Applicants to seek termination of the mandatory purchase obligation for QFs with greater than 20 MW net output.

III. Joint Applicants' Section 210(m) Application

6. The application to terminate the mandatory purchase obligation for PG&E, SDG&E and SoCal Edison was made in compliance with the QF/CHP Settlement Agreement. Joint Applicants state that this is the first time an application for relief from the mandatory purchase obligation has been filed with the Commission under section 210(m)(1)(C) of PURPA, instead of sections 210 (m)(1)(A) or (B).¹⁰ Joint Applicants

⁷ The CHP QF Parties include the California Cogeneration Council (CCC), the Independent Energy Producers Association (IEP), the Cogeneration Association of California (CAC), and the Energy Producers and Users Coalition (EPUC).

⁸ The statewide consumer groups were the Division of Ratepayer Advocates and The Utility Reform Network.

⁹ *Decision Adopting Proposed Settlement*, D.10-12-035 (CPUC Dec. 21, 2010).

¹⁰ We note that sections 210(m)(1)(A), (B), and (C) describe different types of markets and provide for different analyses for the different types of markets. *See infra* P 25, 27-28.

further state that they meet the conditions for relief set forth in section 292.309(a)(3) of the Commission's regulations, which implements section 210(m)(1)(C) of PURPA.

7. Joint Applicants assert that four components of the California markets, when taken together as a whole, demonstrate "wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as the markets described in section 292.309(a)(1) and (a)(2) of the regulations" and therefore satisfy the requirements of section 210(m)(1)(C) of PURPA. The four components are: (1) California's Combined Heat and Power (CHP) Program; (2) California's Renewable Portfolio Standard (RPS) Program; (3) California's Resource Adequacy (RA) requirements; and (4) the California Independent System Operator Corporation's (CAISO) implementation of the Market Redesign and Technology Upgrade (MRTU) day-ahead market.

8. Joint Applicants request that the termination of the mandatory purchase obligation not take effect on the date of filing of the application as established in Order No. 688-A, but instead be delayed until the CPUC decision approving the QF/CHP Settlement Agreement is final and non-appealable, and the Commission's approval of the Joint Applicants' section 210(m) application is final and non-appealable.

IV. Notice and Responsive Pleadings

9. Notice of the Joint Applicant's application was published in the *Federal Register*, 76 Fed. Reg. 17,408 (2011), with protests and interventions due on or before April 15, 2011. The Commission served notice of the application on the potentially-affected QFs identified by Joint Applicants' application by letters dated March 22, 2011.

10. BP Wind Energy North America Inc.; Covanta Energy Corporation; Modesto Irrigation District; City of Santa Clara, California and M-S-R Public Power Agency; EIF California QF Affiliates;¹¹ and Kumeyaay Wind LLC and Buena Vista Wind LLC (Infigen Entities) filed motions to intervene. The CPUC and CAISO filed motions to intervene and comments. The QF/CHP Parties filed a late motion to intervene and comments in support of the application. Alliance for Retail Energy Markets, Marin Energy Authority and Direct Access Customer Coalition (collectively, Protesting Parties), and the City and County of San Francisco (City) filed motions to intervene and protests. Gayle Grove filed a protest that reads, in full, "I feel that the California utilities named in this docket should not have relief from the mandatory purchase obligation." The Castelanelli Brothers, the owners of a QF, filed comments that appear to claim that

¹¹ The EIF California QF Affiliates include: Burney Forest, Kiefer Landfill, EIF Mojave, EIF Haypress, and EOF Northbrook II.

the petition does not apply to the Castelanelli Brothers' QF because of its very small size. Joint Applicants filed an answer on May 2, 2011.

11. The CPUC asserts that the CHP Program, the existing RPS, the RA program and properly functioning energy spot markets "are essential to the viability of suspending" the mandatory purchase obligation. Moreover, the CPUC states that termination of the mandatory purchase obligation aligns with California energy and environmental policies.¹² The CPUC requests that, if any QF/CHP files to reinstate the mandatory purchase obligation, the Commission should allow the CPUC to first attempt to correct any potential flaws in the state programs.

12. In its supporting comments, CAISO states that its day-ahead wholesale energy market, which it has been operating for more than two years, along with its new forward energy market, ancillary services and other markets, and the opportunity to enter into bilateral power sales agreements provide QF/CHPs an ability to sell their power even if the Commission relieves Joint Applicants of their PURPA mandatory purchase obligation.¹³

13. The QF/CHP Parties support granting the application pursuant to section 210(m)(1)(C) of PURPA. The QF/CHP Parties state that collectively the associations that constitute the QF/CHP Parties represent the substantial majority of QF and CHP facilities in California. The QF/CHP Parties ask the Commission to find that the four components, taken as a whole, are sufficient to establish that wholesale markets exist comparable to those in section 210(m)(1)(A) and (B) of PURPA.

14. Both Protesting Parties and City contend that the four market components, even taken together, fail to satisfy the PURPA section 210(m)(1)(C) requirement that wholesale markets for capacity and energy are "at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B)." They argue that the four market components fail to ensure meaningful opportunities for QFs to sell "to buyers other than the utility to which the qualifying facility is interconnected."¹⁴ Protesting Parties and City state that the CHP, RPS, and RA programs provide opportunities only for the three Joint Applicants to enter into contracts with the QF/CHPs, while limiting the ability of others to compete for wholesale purchases of QF

¹² CPUC at 2-3.

¹³ CAISO at 2-3.

¹⁴ Protesting Parties at 8, 9, 11; City at 7, 9, both quoting in part PURPA section 210(m)(1)(B)(ii) and 18 C.F.R. §§ 292.309(a)(2)(ii), 292.310(d)(6).

products.¹⁵ Protesting Parties argue that the Joint Applicants must demonstrate that buyers other than the three utilities will have meaningful opportunity to purchase from the QF/CHPs.¹⁶

15. Protesting Parties and City also argue that the CHP Program is anti-competitive because it obligates them and other non-utility energy service providers, including community choice aggregators, and retail direct access customers to pay the utilities to purchase QF products on their behalf.¹⁷ They also argue that such purchases by the utilities on behalf of others can inflate the wholesale cost of QF/CHP products by discouraging multiple buyers, including themselves, from competing for QF resources. As a result, Protesting Parties and City state they will not be able to offer their customers the benefits of competitively-priced wholesale purchases of QF/CHP net capacity.¹⁸

16. Furthermore, Protesting Parties contend that, under the terms of the QF/CHP Settlement Agreement, the Joint Applicants are obligated to enter into obligations or contracts to purchase from existing QFs (with PPAs expiring prior to 2015) that choose to elect new contracts that will remain in effect until January 1, 2015, and they are also obligated to purchase a total of 3,000 MW from existing and new QF/CHPs, most, if not all of which, Protesting Parties assert, would otherwise have qualified under PURPA, albeit with different pricing provisions.¹⁹ Protesting Parties assert the PURPA mandatory purchase obligation thus will effectively be replaced by a different mandatory purchase obligation.²⁰ According to Protesting Parties, this is anti-competitive and discriminates against Protesting Parties and other load-serving entities (LSE) unable to offer the QF/CHPs “the same regulatory protection from risk” as ratepayer-supported vertically-integrated utilities.²¹ Protesting Parties maintain that contracts based on the CHP Program’s pro forma agreements also require that RA requirements associated with the QF/CHP resources be committed to the contracting Joint Applicant. This, according to the Protesting Parties, ensures that the only buyers of the 3,000 MW mandatory purchase

¹⁵ Protesting Parties at 5, 8-12, 14-18; City at 9.

¹⁶ Protesting Parties at 5.

¹⁷ Protesting Parties at 12; City at 5.

¹⁸ City at 4, 7, 8-9; Protesting Parties at 5, 8, 10, 12, 13.

¹⁹ Protesting Parties at 8-9.

²⁰ *Id.* at 9.

²¹ *Id.* at 9-10.

obligation will be the Joint Applicants.²² Moreover, Protesting Parties claim the QF/CHP Settlement Agreement also allows the utilities to build their own QF/CHP facilities that are paid for under traditional rate regulation.²³

17. Protesting Parties argue that California's RPS Program, feed-in tariffs, solar photo-voltaic (PV) programs, Renewable Auction Mechanism and other programs referred to in the application fail to foster a competitive wholesale market for QF/CHPs that includes multiple buyers, because each similarly provides an advantage to the utilities who are able to recover their renewable resource purchases or self-build costs through rates.²⁴ Protesting Parties claim market prices in California do not otherwise support QF/CHP and renewable resource development.²⁵

18. Protesting Parties note that PURPA section 210(m)(1)(A)(ii) requires there be "wholesale markets for the long-term sales of capacity and electric energy," but argue that California opposes having a "robustly competitive" organized forward capacity market and that such markets do not exist.²⁶ Instead, Protesting Parties claim the CPUC relies on the Long Term Procurement Planning process and then issues the Joint Applicants procurement directives for new resources deemed necessary.²⁷ Additionally, the CAISO backstop procurement authority cited by the Joint Applicants as a further opportunity for QF/CHPs to sell capacity will not, according to the Protesting Parties, support development of a defined and transparent capacity market. The Protesting Parties also point out that the Commission has provided for a technical conference to investigate whether CAISO's compensation for its backstop procurement is just and reasonable.²⁸

19. Finally, Protesting Parties contend that the QF/CHP Settlement Agreement is still being challenged before the CPUC, and ask the Commission not to rely on the QF/CHP Settlement Agreement as a reason to "apply any different or preferential standard" in its

²² *Id.* at 17.

²³ *Id.* at 10.

²⁴ *Id.* at 14-16.

²⁵ *Id.* at 15.

²⁶ *Id.* at 17.

²⁷ *Id.*

²⁸ *Id.* at 18.

review of the Joint Applicants' application.²⁹ Both Protesting Parties and City add that they were not given sufficient opportunity to participate in or comment on the QF/CHP Settlement Agreement, whose programs they assert are anticompetitive, and discriminatory towards them.³⁰

20. The QF/CHP Parties' comments support the application, stating that they represent the substantial majority of all operating cogeneration QF and CHP facilities in California, and requesting that the Commission issue a decision granting the application based on the combination of the four components which, considered together, meet the requirements of PURPA section 210(m)(1)(C).

V. Discussion

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding, and we will grant QF/CHP Parties' late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Joint Applicants' answer and will, therefore, reject it.

23. As discussed below, we will grant the Joint Applicants' application to terminate the PURPA requirement that PG&E, SDG&E, and SoCal Edison enter into new obligations or contracts to purchase electric energy and capacity from QFs with net capacity in excess of 20 MW on a service territory-wide basis for the interconnected systems of PG&E, SDG&E, and SoCal Edison under the control of CAISO.

24. We have reviewed the four components of the California market: (1) California's CHP Program; (2) California's RPS Program; (3) California's RA requirements; and (4) CAISO's implementation of the MRTU day-ahead market. And, we find that, considering these four components together, California's market will contain competitive qualities comparable to those identified in PURPA sections 210(m)(1)(A) and (B). Therefore, we find that QFs will have non-discriminatory access to wholesale markets

²⁹ *Id.* at 6, 19.

³⁰ Protesting Parties at 3, 20-22; City at 9-10.

comparable to those identified in PURPA sections 210(m)(1)(A) and (B), as required under PURPA section 210(m)(1)(C).

25. Moreover, the Commission notified hundreds of QFs and potential QFs of this filing and none filed a protest.³¹ Given the contentious relationship between the QF community in California and the Joint Applicants leading up to the QF/CHP Settlement Agreement, we find this lack of protest noteworthy.³² The lack of opposition from QFs, following notice to all identifiable QFs in California of Joint Applicants' application seeking termination of the mandatory purchase obligation based on PURPA section 210(m)(1)(C), that is, the existence of "wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described" in sections 210(m)(1)(A) and 210(m)(1)(B), indicates that QFs in California agree that the four components, considered together, provide comparable competitive quality wholesale markets.

26. Furthermore, we are not persuaded by the City and Protesting Parties' arguments. Their arguments are largely focused on their belief that the four market components which form the basis of Joint Applicants' application will provide insufficient opportunities for the City and Protesting Parties to purchase from QFs and may result in discrimination against them as purchasers. However, PURPA section 210(m)(1) requires the Commission, when it analyzes whether an electric utility should be relieved of the mandatory purchase obligation, to look at whether markets provide QFs an opportunity to sell capacity and electric energy and not whether they provide purchasers, other than the utility seeking to be excused from the mandatory purchase obligation, opportunities to purchase. That is, contrary to the City and Protesting Parties' arguments, the analysis the Commission must perform does not focus on the buyer's perspective, but on the seller QF's perspective. We find that, as we have explained above, Joint Applicants have sufficiently demonstrated that, based on the four market components

³¹ Castelanelli Brothers own a 300 kW net capacity small power QF which was self-recertified in Docket No. QF05-171-001; Castelanelli Brothers' QF is fueled by biogas produced from manure. Castelanelli Brothers filed comments which appear to point out that its facility is very small and thus will not be affected by the termination of Joint Applicants' purchase obligation. Gayle Grove filed a protest that reads, in full, "I feel that the California utilities named in this docket should not have relief from the mandatory purchase obligation." Gayle Grove, not named as a potentially-affected QF in the application, did not indicate whether the protest was filed on behalf of a QF, or explain why relief was not warranted.

³² See *Decision Adopting Proposed Settlement*, D.10-12-035 (CPUC Dec. 21, 2010) (summarizing relevant disputes before the CPUC and courts).

taken together as a whole, QFs will have nondiscriminatory access to comparable competitive quality wholesale markets as required by section 210(m)(1)(C) of PURPA and section 292.309(a)(3) of our regulations. That is what the statute and our regulations require, and that is all that they require.

27. The City and the Protesting Parties would also have the Commission incorporate specific components of sections 210(m)(1)(A) and (B) into section 210(m)(1)(C) for purposes of analyzing markets. Specifically, the City and the Protesting Parties would have the Commission analyze whether the four components provide “wholesale markets for long-term sales of capacity and electric energy,” which is part of the test from section 210(m)(1)(A); they would also have the Commission analyze whether the four components provide meaningful opportunities for QFs to sell “to buyers other than the utility to which the qualifying facility is interconnected,” which is part of the test from section 210(m)(1)(B). These two tests are not part of PURPA section 210(m)(1)(C). Instead, under PURPA section 210(m)(1)(C), what is required is an analysis of whether there are markets of “comparable competitive quality.”

28. In implementing PURPA section 210(m)(1), the Commission found that the statutory language of sections 210(m)(1)(A), (B), and (C) requires the Commission to differentiate among distinct types of markets when analyzing whether an electric utility will be relieved of its obligation to purchase.³³ Sections 210(m)(1)(A), (B), and (C) describe three different types of markets, and each requires a different analysis; there is not a single standard for relief.³⁴ The Commission adopted an interpretation of PURPA section 210(m)(1)(C); the Commission found that Congress believed that the two types of markets identified in sections 210(m)(1)(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. Section 210(m)(1)(C) directs the Commission to consider these competitive qualities when analyzing whether other markets, while not meeting the specific requirements of sections 210(m)(1)(A) or (B), are sufficiently competitive to justify termination of the purchase requirements.³⁵

29. We, therefore, look to the competitive qualities of the markets that the Joint Applicants rely on, rather than looking at specific tests from sections 210(m)(1)(A) or

³³ Order No. 688-A, FERC Stats & Regs. ¶ 31,250 at P 8, 40-48.

³⁴ *Id.* P 42-43.

³⁵ *Id.* P 43. On appeal, the Commission’s interpretation of section 210(m)(1)(C) was found to be reasonable and was affirmed. *American Forest and Paper Association v. FERC*, 550 F.3d 1179, 1182-83 (D.C. Cir. 2008).

(B). Here we find that, taken together, the four components that the Joint Applicants rely on contain competitive qualities that warrant termination of the mandatory purchase obligation for PG&E, SDG&E, and SoCal Edison. In this regard, we also note that a large sector of QFs in California have actively supported Joint Applicants' application and that not one identifiable QF has opposed the application. And the CPUC likewise has supported Joint Applicants' application and a finding that the four components taken together provide comparable competitive quality markets.

30. The City and Protesting Parties' remaining arguments go to the terms of the QF/CHP Settlement Agreement and, because that settlement is a settlement before, and approved by, the CPUC, their arguments consequently are outside the scope of this proceeding. Arguments claiming they had insufficient opportunity to participate and that the QF/CHP Settlement Agreement is anti-competitive and discriminatory, for example, are thus not relevant here.

The Commission orders:

(A) The request of each of the Joint Applicants to terminate its mandatory purchase obligation, pursuant to section 210(m) of PURPA and section 292.310 of the Commission's regulations, on a service territory-wide basis applicable to QFs over 20 MW net capacity is hereby granted, effective on the later of either the date that the CPUC decision approving the QF/CHP Settlement Agreement is final and non-appealable, or the date the Commission's approval of the Joint Applicants' section 210(m) application is final and non-appealable, as discussed in the body of this order.

(B) Joint Applicants are hereby directed to notify the Commission of the actual effective date of the termination of the mandatory purchase obligations within 10 days after the termination becomes effective.

By the Commission. Chairman Wellinghoff is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company
San Diego Gas & Electric Company
Southern California Edison Company

Docket No. QM11-2-000

(Issued June 16, 2011)

WELLINGHOFF, Chairman, *concurring*:

I write separately to recognize the efforts of market participants in California that led to the filing we approve today. The settlement that brought about the filing would not have been possible without the hard work and dedication of many entities and the California Public Utilities Commission. Those efforts recognize the important contribution that qualifying facilities have made and can continue to make in the future to California.

I have stated frequently – and the Commission recognized in Order No. 890, Order No. 719, Order No. 745, and in other orders – that demand response also can make an important contribution. I recognize that many entities in California are currently engaged in discussion on the role of demand response, and I encourage them to continue to aggressively pursue steps that will allow demand response to achieve its full potential in California and bring efficiencies to all market customers.

Jon Wellinghoff
Chairman