



Federal Energy Regulatory Commission
October 19, 2006
Open Commission Meeting
Statement of
Chairman Joseph T. Kelliher

Item E-2: New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities (RM06-10-000)

"Today the Commission adopts a final rule implementing the provisions of the Energy Policy Act of 2005 relating to termination of the mandatory purchase obligation of the Public Utility Regulatory Policies Act of 1978.

The final rule is consistent with the language and intent of the Energy Policy Act provisions. The statutory language clearly conceives that the Commission analysis should vary based on the nature of the wholesale power market. The statute describes three different kinds of wholesale power markets that correspond to "Day 2" regional transmission organization markets, "Day 1" regional transmission organization markets, and bilateral wholesale markets.

The statutory findings that we are required to make before we can grant relief from the mandatory purchase obligation vary in each of these three kinds of markets. In my view, the statutory hurdle for relief from the mandatory purchase obligation in the "Day 2" regional transmission organization markets is significantly lower than in the other two wholesale markets, for reasons discussed fully in the final rule. That is reflected in the final rule.

I acknowledge that the statutory language is not a model of clarity. That has made it more difficult for the Commission to act on the final rule. By applying the traditional statutory rules of construction we have been able to provide more clarity in our final rule.

The final rule makes generic preliminary findings that the existing "Day 2" regional transmission organization markets in New England ISO, New York ISO, PJM Interconnection, Midwest ISO, and ERCOT meet the statutory test for one of the types of markets that is eligible for relief from the PURPA mandatory purchase obligation. This recognizes the nature of the statutory findings we must make in these regions.

Our order does not grant relief to any utility. To seek relief, utilities in the "Day 2" regional transmission organization markets would have to file with the Commission for relief. The applications could rely on our preliminary findings. In addition, qualifying facilities would have an opportunity to rebut the presumption that they have "non-discriminatory access" to the "Day 2" market.

The final rule marks a significant change from the proposed rule we approved earlier in the year. The proposed rule would have established an irrebuttable presumption that qualifying facilities have non-discriminatory access to the "Day 2" regional transmission organization markets. My colleagues and I were convinced by the record that this approach was not consistent with the statutory scheme. This change significantly improves the ability of qualifying facilities in "Day 2" regional transmission organization markets to retain the mandatory purchase obligation.

In the other wholesale power markets, the "Day 1" regional transmission organization markets and bilateral markets, the Commission generally will rely on case-by-case proceedings. In addition we establish a rebuttable presumption, as we

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RM06-10-000

do in the "Day 2" regional transmission organizations, that by virtue of the existence of an Open Access Transmission Tariff or reciprocity tariff, qualifying facilities have "non-discriminatory access" to the relevant market. Nonetheless, we will determine on a case-by-case basis whether the "Day 1" regional transmission organization market and bilateral markets meet the statutory criteria.

The rule makes other changes that improve the ability of qualifying facilities to retain the mandatory purchase obligation. For example, the final rule requires utilities to provide information to qualifying facilities that would allow them to show that they do not have access to wholesale markets. That is an advantage to qualifying facilities that would not have been available if we had proceeded case-by-case on relief filings.

There is no doubt the Commission has discretion to implement these provisions by rulemaking, and is not bound by the statute to proceed case by case. The statute requires us to make certain findings, without specifying the manner in which we can make these findings. We have discretion under the Administrative Procedure Act to proceed by rulemaking or adjudication.

At one level is it inevitable that the Commission would have to make generic findings with respect to the "Day 2" regional transmission organization markets, given the nature of the findings, regardless of whether we proceeded by rulemaking or through adjudication."