

Statement of Chairman Joseph T. Kelliher on PURPA Small Power Production Notice of Proposed Rulemaking

Today, the Commission issues proposed rules to implement provisions of the Energy Policy Act of 2005 regarding termination of the mandatory purchase obligation in section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA).

Under new section 210(m) of PURPA, electric utilities may apply to the Commission for relief from the mandatory purchase obligation on a service territory-wide basis, and the Commission may terminate the purchase obligation if it makes certain findings. The new section also charges the Commission with protecting existing rights and remedies under any contract or obligation in effect or pending approval involving the purchase of energy or capacity from a qualifying facility or sale to a qualifying facility. Further, the Commission is authorized to issue and enforce rules to ensure that an electric utility recovers all prudently incurred costs associated with the purchase of energy from a qualifying facility.

The statutory scheme adopted by Congress is a complicated one and the proposed rules seek to provide as much clarity and certainty as possible given the statutory language.

Under the Energy Policy Act, the Commission may terminate the mandatory purchase obligation if it finds, in effect, that there is a sufficiently competitive market for a qualifying facility to sell its power. Essentially, Congress directed the Commission to make determinations about the competitiveness of three types of wholesale markets: (1) "Day 2" RTO and ISO markets, (2) "Day 1" RTO and ISO markets, and (3) other wholesale markets. The statutory findings required vary depending on the nature of the wholesale market.

As we discuss in the proposed rules, many of these determinations will have to be made on a case-by-case basis. However, there are certain findings that can be made generically and thereby reduce the administrative burdens of handling each request individually.

The proposed rule finds that electric utilities that are members of the "Day 2" markets in Midwest ISO, PJM, ISO-New England, and NYISO meet the requirements for relief from the mandatory purchase obligation because these RTOs administer day ahead and real time markets, and bilateral long term contracts for the sale of capacity and electric energy are available to qualifying facilities in these markets. Effectively, the Commission is preapproving termination of the mandatory purchase obligation in these areas, and electric utilities in these regions would only have to make certain compliance filings.

In "Day 1" regions, the proposed rule finds that the transmission and interconnection services provided by CAISO and SPP meet the statutory standard, because these entities are Commission approved RTOs or ISOs that provide non-discriminatory open

access transmission services under an Open Access Transmission Tariff. Electric utilities in these regions would have to show that they are members of these organizations. They would also have to show that qualifying facilities in the region have a “meaningful opportunity” to sell energy and capacity, as defined in the Energy Policy Act, which appears to require a case-by-case approach.

With respect to bilateral wholesale markets, the statutory language is not clear on its face. The language allows the Commission to terminate the mandatory purchase obligation in these wholesale markets if the sale of energy and capacity is “at a minimum, of comparable competitive quality” as the other wholesale markets. We interpret this language by reference to the statutory language governing the other wholesale markets to require nondiscriminatory access to transmission and interconnection services and competitive short term and long term energy and capacity markets.

The provisions here appear to require a case-by-case approach, but the Commission seeks comment on whether we can make generic findings that would narrow the scope of issues to be addressed in case-by-case determinations. For example, the Commission proposes that the OATT and reciprocity tariff are sufficient to assure nondiscriminatory access by a qualifying facility to transmission services. We also propose that an organized procurement process would demonstrate access to competitive short term and long term energy and capacity markets. We are not imposing any particular form of competitive solicitation on electric utilities, and we seek comment on other means of demonstrating market access by qualifying facilities.

The approach we are taking is based on a faithful reading of the statutory language, a goal of providing regulatory certainty, and a desire to minimize administrative burdens. We are able to effectively preapprove termination of the PURPA mandatory purchase obligation because the statute permits it, we rely on case-by-case determinations in other markets because we think the statute requires it.

The Commission has a continuing duty under PURPA to have in place such rules as are necessary to encourage cogeneration and small power production. We believe this proposed rule is consistent with that duty, as well as our new responsibility under the Energy Policy Act.

I support the proposed rule.