

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 07-1328

**AMERICAN FOREST & PAPER ASSOCIATION,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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FEDERAL ENERGY REGULATORY
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WASHINGTON, D.C. 20426**

Final Brief: September 4, 2008

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties and *amici* are as stated in the brief of American Forest & Paper Association.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, “Order No. 688,” FERC Stats. & Regs., Regs. Preambles ¶ 31,233 (Oct. 20, 2006) (71 Fed. Reg. 64,342) (Nov. 1, 2006)), and

2. *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, “Order No. 688-A,” FERC Stats. & Regs., Regs. Preambles ¶ 31,250 (June 22, 2007) (72 Fed. Reg. 35,872) (June 29, 2007).

C. Related Cases:

The orders on review have never been before this Court or any other court. Counsel is aware of no other related cases pending in this or in any other court.

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GLOSSARY

American Forest & Paper	American Forest & Paper Association
Consumers Council	Electricity Consumers Resource Council
Day 1 markets	Auction-based energy markets that offer real-time markets only
Day 2 markets	Auction-based energy markets that offer both day-ahead and real-time markets
FERC	Federal Energy Regulatory Commission
PURPA	Public Utility Regulatory Policies Act of 1978
RTO	regional transmission organization

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**FEDERAL ENERGY REGULATORY COMMISSION,
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**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission reasonably interpreted § 210(m) of the Public Utility Regulatory Policies Act of 1978, newly enacted in the Energy Policy Act of 2005, 16 U.S.C. § 824a-3(m), which provides for termination, under certain conditions, of a requirement that electric utilities purchase electricity from qualifying cogeneration and small power production facilities.

STATUTORY AND REGULATORY PROVISIONS

The pertinent provisions are contained in the Addendum to this brief. (The most pertinent statutory text, from PURPA § 210(m)(1)(A)-(C), is provided *infra* at 12-13.)

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

The Public Utility Regulatory Policies Act of 1978 (“PURPA”), 16 U.S.C. § 824a-3, directed the Federal Energy Regulatory Commission (“Commission” or “FERC”), *inter alia*, to promulgate rules requiring utilities to purchase electric energy from “qualifying” cogeneration and small production facilities (collectively, “Qualifying Facilities”). *See* PURPA § 210(a), 16 U.S.C. § 824a-3(a). After almost three decades of change in the electric energy industry, Congress enacted legislation in 2005 requiring the Commission to terminate that obligation under certain conditions. Specifically, § 1253(a) of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), added new § 210(m) to PURPA which provides, *inter alia*, for termination of the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from a Qualifying Facility if the Commission finds that the Qualifying Facility has nondiscriminatory access to one of three market categories set forth in new PURPA § 210(m)(1)(A), (B), and (C).

In the challenged orders, the Commission issued procedural regulations for the filing of applications to terminate a utility’s obligation to purchase. *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs., Regs. Preambles ¶ 31,233 (2006) (“Final Rule”), R 109, JA 79, *order on reh’g*, Order No. 688-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,250 (2007) (“Rehearing Order”), R 135, JA 227. *See also* 18 C.F.R. §§ 292.309 (termination of purchase obligation) and 292.310 (filing procedures). The Commission explained its interpretation of the three § 210(m) market categories and adopted certain rebuttable presumptions to aid in determining, within the time constraints set forth in § 210(m), whether Qualifying Facilities have nondiscriminatory access to these markets for a particular electric utility. Two trade associations, Petitioner American Forest & Paper Association (“American Forest & Paper” or “Petitioner”) and *amicus* Electricity Consumers Resource Council (“Consumers Council”), raise various objections to the Commission’s construction of PURPA § 210(m).

STATEMENT OF FACTS

Statutory And Regulatory Background

1. Public Utility Regulatory Policies Act Of 1978 (“PURPA”)

Congress enacted PURPA – one of five statutes enacted in 1978 as part of the National Energy Act in response to increasing energy shortages and rising

energy costs – to promote the development of new types of generating facilities and to conserve the use of fossil fuels. *See FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982). Prior to PURPA, nontraditional generating facilities seeking interconnected operations with utilities faced three major obstacles: (1) the traditional utilities, which controlled the transmission lines, were reluctant to purchase power from nontraditional sources or to pay appropriate rates for power; (2) the utilities generally charged nontraditional producers high rates for back-up service; and (3) nontraditional producers providing energy to the grid might be considered public utilities subject to extensive state and federal regulation. Final Rule P 22, JA 94; *FERC v. Mississippi*, 456 U.S. at 750-51.

To address these problems, PURPA directed the Commission to promulgate rules requiring utilities to purchase power from (and sell power to) “qualifying” cogeneration and small power production facilities. PURPA § 210(a), 16 U.S.C. § 824a-3(a). PURPA also required FERC to exempt Qualifying Facilities from certain state and federal laws governing electric utilities. PURPA § 210(e), 16 U.S.C. § 824a-3(e); *see also, e.g., FERC v. Mississippi*, 456 U.S. at 750-51; *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 405 (1983).

A cogeneration facility is defined in the Federal Power Act (“FPA”), as amended by PURPA, as a facility which produces both (1) electric energy and (2)

steam or forms of useful energy (such as heat) used for industrial, commercial, heating, or cooling purposes. 16 U.S.C. § 796(18); Final Rule P 20, JA 94. The FPA defines a small power production facility as a facility which uses solar, wind, waste, geothermal, biomass, or renewable resources, and which generates no more than 80 megawatts of power. 16 U.S.C. § 796(17); Final Rule P 21, JA 94.¹

As mandated by PURPA § 210(a), the Commission promulgated regulations requiring utilities to purchase electricity from Qualifying Facilities. *See* 18 C.F.R. § 292.303. PURPA § 210(b), 16 U.S.C. § 824a-3(b), requires rates for such utility purchases to be just and reasonable to utility customers, in the public interest, and not discriminatory against Qualifying Facilities. Rates also must not exceed the purchasing utility's "avoided costs," *i.e.*, the incremental cost to the utility of alternative electric energy which the utility otherwise would have generated or purchased from another source. *See* PURPA § 210(d), 16 U.S.C. § 824a-3(d); 18 C.F.R. §§ 292.101(b)(6) and 292.304(a)(2); Final Rule P 23, JA 95. Specific rates for energy purchases or sales are set by the appropriate state regulatory

¹ As required by PURPA § 201, which added FPA §§ 3(17)-(18), 16 U.S.C. §§ 796(17)-(18), the Commission promulgated regulations defining the characteristics of a "qualifying" facility. *See* 18 C.F.R. §§ 292.201-.207 (setting out standards and procedures for determining eligibility as PURPA Qualifying Facilities). The Energy Policy Act of 2005 added § 210(n) to PURPA, which required FERC to revise the criteria in 18 C.F.R. § 292.205 to ensure that new qualifying cogeneration facilities are in accord with PURPA purposes. *See* Final Rule P 24 & n.15, JA 96.

authority pursuant to Commission regulations. PURPA § 210(f), 16 U.S.C. § 824a-3(f).

2. Industry Experience Under PURPA

“Since Congress enacted PURPA, electric utilities have complained that their requirement to purchase from and sell to [Qualifying Facilities] . . . was not economically beneficial and that they were purchasing energy they did not need and selling energy they did not want to sell.” Final Rule P 24, JA 95. The avoided cost rate that utilities were required to pay Qualifying Facilities tended to be high in comparison to the prevailing market price. *See, e.g., Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1040 (D.C. Cir. 2000) (stating that “the rate that a [Qualifying Facility] can require a utility to pay is almost always higher than the regulated tariff rate at which the [Qualifying Facility] can purchase from the utility electricity for its internal operating needs”). Moreover, calculation of avoided cost is often difficult. *Id.*

In 1995, the Commission clarified that a utility must take into account all alternative sources in determining avoided cost and does not have to buy power it does not need. Final Rule P 24, JA 95 (citing *Southern California Edison Co. et al.*, 70 FERC ¶ 61,215 at 61,677-78, *recon. denied*, 71 FERC ¶ 61,269 at 62,078 (1995)). FERC observed that when Congress enacted PURPA in 1978, nearly all new generation capacity was provided by traditional utilities, which refused to buy

power from non-utility producers. 70 FERC ¶ 61,215 at 61,675. By 1995, nontraditional producers, including Qualifying Facilities, were providing well in excess of half of all new generation. *Id.* With more competition in the electric industry and with Qualifying Facilities now constituting a “developed industry,” it was increasingly imperative that Qualifying Facility rates not exceed avoided cost. *Id.* Congress gave Qualifying Facilities certain benefits, but did not intend them “to have any rate benefit above a market rate level.” *Id.* at 61,676 n.14.

In 1998, the Commission terminated rulemakings initiated to improve the process for determining rates for sales of Qualifying Facility power. *See, e.g., Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, 84 FERC ¶ 61,265 (1998). FERC found that over half of the states were now using competitive bidding in setting avoided cost rates, rather than administratively setting the rates. *Id.* at 62,301. Moreover (and as explained below), conditions affecting Qualifying Facilities, including the development of competitive power markets, had changed significantly since initiation of the rulemakings. *Id.*

3. Changes In The Electric Energy Industry Since 1978

Historically, electric utilities were vertically integrated monopolies that owned electric generating facilities, transmission lines and distribution systems, and sold all of these services as a “bundled” package to their customers. *See*

Wisconsin Public Power, Inc. v. FERC, 493 F.3d 239, 246 (D.C. Cir. 2007); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004) (describing historical structure and evolution of the electric utility industry). In subsequent years, the generation, transmission, and distribution functions became increasingly “unbundled” as competitive markets developed for the sale of electric energy at wholesale. *New York v. FERC*, 535 U.S. 1, 5-14 (2002) (describing technological advances and legislative and administrative initiatives promoting competitive wholesale electric markets); *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish Cty*, 128 S. Ct. 2733, 2740-41 (2008) (same).

To foster the further development of competitive wholesale electricity markets, the Commission issued its Order No. 888 rulemaking.² Order No. 888 mandated “functional unbundling,” which required each utility to state separate rates for its wholesale generation, transmission, and ancillary services, and to take transmission service used to transmit its own wholesale sales and purchases on a

² *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., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d 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).

non-discriminatory basis under filed open access transmission tariffs. *See New York*, 535 U.S. at 11.

Order No. 888 also encouraged, but did not direct, the formation of independent system operators to operate regional, multi-system transmission grids. Subsequently, in order (among other things) to foster competition over wider geographic areas, the Commission, in its Order No. 2000 rulemaking, directed transmission owning utilities to make filings either to participate in a regional transmission organization (“RTO”) or to explain efforts to so participate.³ RTOs, among other things, must be independent from market participants, have planning and expansion authority, and be the only provider of transmission services over the facilities they control. *See* 18 C.F.R. §§ 35.34(j)-(k); *see also*, *Morgan Stanley Capital Group Inc.*, 128 S. Ct. at 2741 (explaining development of RTOs).

Besides providing transmission service, RTOs also administer auction-based wholesale electric energy markets. *See Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 965 (D.C. Cir. 2005) (describing markets); *Wisconsin Public Power*, 493 F.3d at 250 (same); Final Rule P 8, JA 87. For the “day-ahead market,” the RTO “derives a market-clearing price from the sellers’ and buyers’ price and quantity indications for the next day.” *Edison Mission Energy*, 394 F.3d at 965. The “real-

³ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *dismissed*, *Public Utility District No. 1 of Snohomish County v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

time market” ensures system reliability “by calculating hourly clearing prices and allowing sellers to offer supplies to meet additional demand.” *Id.*

To date, the Commission has approved four RTOs that provide advanced “Day 2” energy markets that include both auction-based day-ahead and real-time markets. The four are: (1) the Midwest Independent System Operator, Inc. (“Midwest ISO”), which operates in 15 Midwestern states; (2) PJM Interconnection, which provides service to all or most of Pennsylvania, New Jersey, Maryland, Delaware, Virginia, and West Virginia, and to parts of five other states; (3) ISO New England Inc. (“ISO New England”), which covers all of the New England states except the northern portion of Maine; and (4) New York Independent System Operator Inc. (“New York ISO”).⁴ There are also two FERC-approved entities which have less advanced “Day 1” markets that offer auction-based real-time markets only: California Independent System Operator and Southwest Power Pool. *See* Final Rule P 11, JA 90. (A seventh RTO exists in the Electric Reliability Council of Texas, which is not regulated by the Commission under the FPA but, as discussed *infra* at 14, is subject to the PURPA regulations being challenged here.)

⁴ *See generally* New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, Notice of Proposed Rulemaking, FERC Stats. & Regs., Prop. Regs. Preambles ¶ 32,597, P 23-26 (2006) (“Notice of Proposed Rulemaking”), R 1, JA 50-53, and the cases cited therein.

In addition to open access transmission and regional auction-based markets, changes in the electric power industry include new interconnection requirements and the development of exempt wholesale generators. Final Rule P 24, JA 96. Because interconnection is a critical component of open access transmission service, FERC established a single set of interconnection procedures for transmission providers and a single uniformly applicable interconnection agreement for large generators. *See National Association of Regulatory Utility Commissioners v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007) (affirming FERC large generator interconnection rulemaking). In a separate proceeding, the Commission did the same thing for small generators (any energy resource having a capacity of no more than 20 megawatts). *Standardization of Small Generator Interconnection Agreements and Procedures*, FERC Stats. & Regs., Regs. Preambles ¶ 31,180, *on reh'g*, FERC Stats. & Regs., Regs. Preambles ¶ 31,196 (2005), *appeal pending*, *Southern California Edison Co., et al. v. FERC*, D.C. Cir. Nos. 06-1031, *et al.*

Exempt wholesale generators (“EWGs”) were a new category of nontraditional power producers created by the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992). Final Rule P 24, JA 96. EWGs sometimes competed with Qualifying Facilities and, like most of the latter, were exempt from the requirements of the Public Utility Holding Company Act of 1935, 15 U.S.C.

§§ 79a *et seq.*⁵

4. Energy Policy Act Of 2005

Recognizing the increased competition arising from these changes, Congress enacted the Energy Policy Act of 2005 § 1253(a), which added § 210(m) to PURPA. Section 210(m)(1) (“Obligation to purchase”) provides for termination of the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from a Qualifying Facility if the Commission finds that the latter has nondiscriminatory access to one of three alternative categories of markets set forth in § 210(m)(1)(A), (B), and (C):

(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

⁵ The Energy Policy Act of 2005 repealed the 1935 Act and enacted the Public Utility Holding Company Act of 2005 in its place. *See* Pub. L. No. 109-58, tit. XII, subtit. F, § 1261, *et seq.*, 119 Stat. 594, 972-78.

(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).

16 U.S.C. § 824a-3(m)(1).

Contracts already in existence pursuant to PURPA § 210(a) are not affected by this provision. Section 210(m)(2)-(7) modified PURPA in other ways, *see* Final Rule P 25, JA 96-97, but only the Commission's interpretation of PURPA § 210(m)(1) has been challenged on appeal.

B. Challenged Orders Implementing PURPA § 210(m)

In the Notice of Proposed Rulemaking (*see supra* note 4), the Commission proposed to terminate, pursuant to PURPA § 210(m)(1)(A), the mandatory purchase requirement for utilities which are members of Day 2 markets (*i.e.*, Midwest ISO, PJM Interconnection, ISO New England, or New York ISO). Notice of Proposed Rulemaking P 22-26, JA 49-53. The Commission received extensive comments on its proposals. At one extreme were commenters who argued that the Commission may not address the mandatory purchase requirement by rulemaking and that competitive markets do not yet exist to justify eliminating the requirement for utilities in the four advanced Day 2 regional systems. Final Rule P 3, JA 83. At the other extreme were those who argued that the Commission, with limited exceptions, should eliminate the purchase requirement completely. *Id.*

The Commission took a middle course. Unlike the Notice proposal, the Final Rule does not terminate the purchase obligation of any utility. Final Rule P 5, JA 84. FERC interpreted PURPA § 210(m)(1) as requiring it to eliminate the purchase requirement in markets meeting the § 210(m)(1)(A), (B), or (C) criteria if Qualifying Facilities have nondiscriminatory access to those markets. Rehearing Order P 8, JA 234. FERC further concluded that the four existing Day 2 markets satisfy the subparagraph (A) requirements, the existing Day 1 markets (California Independent System Operator and Southwest Power Pool) satisfy some, but not all, of the subparagraph (B) requirements, and Electric Reliability Council of Texas markets satisfy the subparagraph (C) requirements. *Id.* P 3, JA 231; Final Rule P 11-12, JA 90-91. All of these markets are administered by regional transmission organizations or independent system operators.

To assist in determining, within the 90-day period required by PURPA § 210(m)(3), whether a Qualifying Facility has nondiscriminatory access to one of these markets, the Commission adopted three rebuttable presumptions:

(1) For all three of the § 210(m)(1) markets (except for small Qualifying Facilities, *see* (2) below), the existence of an open access transmission tariff creates a rebuttable presumption that Qualifying Facilities have nondiscriminatory access to the relevant wholesale markets;

(2) For all three of the markets, there is a rebuttable presumption that small Qualifying Facilities, with a net capacity no greater than 20 megawatts, do not have nondiscriminatory access to wholesale markets; and

(3) The four regional transmission organizations with advanced “Day 2” markets (Midwest ISO, PJM Interconnection, ISO New England, and New York ISO) qualify as § 210(m)(1)(A) markets. There is a rebuttable presumption that these RTOs provide large Qualifying Facilities with nondiscriminatory access to these markets.

Final Rule P 9, JA 88-89; 18 C.F.R. § 292.309(c), (d) and (e).

A utility located in the four advanced “Day 2” RTOs must file an application to obtain relief from the mandatory purchase requirement. It must also submit certain information, including information about transmission constraints, in order to provide Qualifying Facilities with information that may be useful in rebutting the presumption of nondiscriminatory access. Final Rule P 9, JA 89-90; 18 C.F.R. § 292.310(d). A Qualifying Facility may rebut the nondiscriminatory access presumption by demonstrating that it has operational characteristics that effectively prevent its participation in a market, or that it lacks access due to transmission constraints. 18 C.F.R. § 292.309(e). If a Qualifying Facility desires regulatory certainty earlier rather than later, it may seek a declaratory order that it does not have nondiscriminatory access to markets. Final Rule P 147, JA 169.

Petitioner American Forest & Paper and *Amicus* Consumers Council, among others, filed rehearing requests which the Commission, in relevant part, denied. This appeal followed.

SUMMARY OF ARGUMENT

The Commission's interpretation of PURPA § 210(m), 16 U.S.C. § 824a-3(m), is a permissible construction of the statute. Consequently, its interpretation should be sustained under the deferential standard of review.

Section 210(m)(1)(A)(ii) refers generally to “wholesale markets.” Subparagraph (B)(ii), in contrast, specifies “competitive wholesale markets that provide a meaningful opportunity to sell.” The Commission's conclusion that Congress intended a competitive analysis only for (B)(ii) markets is consistent with the canon that Congress acts intentionally when it includes language in one section of a statute but omits it in another. The argument of American Forest & Paper – that the Commission erred in refusing to add the word “competitive” before the words “wholesale markets” in PURPA § 210(m)(1)(A)(ii), when Congress chose precisely to do that in adjacent § 210(m)(1)(B)(ii) – thus lacks any basis in the statute that Congress entrusted the Commission to administer.

The Commission's interpretation is also consistent with the canon that the words of statutes should be interpreted where possible in their ordinary, everyday senses. The ordinary meaning of “market” is a meeting together of people for the purpose of trade by purchase and sale. It is undisputed that there are, in fact, bilateral long-term contracts in all of the advanced “Day 2” regional transmission organizations, whose characteristics are enumerated in PURPA § 210(m)(1)(A).

Moreover, because all Day 2 RTOs operate under open access transmission tariffs, Qualifying Facilities have access to buyers and sellers for long-term contracting purposes in all Day 2 regions. Consequently, the (A)(ii) requirements have been met.

The Commission's interpretation that (A) and (B) markets entail different analyses is permissible given the significant, real-world differences between the advanced Day 2 auction markets addressed in subparagraph (A) and the less advanced markets addressed in subparagraphs (B) and (C). The Day 2 markets described in (A)(i) are "independently administered, auction-based day ahead and real time wholesale markets." These markets provide greater opportunities for Qualifying Facilities and other independent generators to compete than do less organized markets because day-ahead and real-time markets allow all competing generators to participate on equal terms by submitting bids.

Day 2 markets, moreover, facilitate participation in bilateral, long-term contract markets in significant ways. Regional transmission organizations provide independent, nondiscriminatory access to many different wholesale buyers. The organized day-ahead and real-time markets facilitate contract formation by reducing supplier contracting costs and by providing transparent spot energy prices that can serve as a reference in negotiating contracts. Consequently, it was permissible for the Commission to conclude that Congress, as demonstrated by its

careful choice of specific words reflecting the evolved state of the electric industry, believed Day 2 markets to be sufficiently competitive, in combination with markets for long-term contracts, to justify termination of the mandatory purchase obligation.

The Commission's interpretation also accords with the purposes of PURPA. Congress did not repeal PURPA § 210(a)'s 30-year-old directive to encourage cogeneration and small power production. However, Congress recognized the significant changes in the electric energy industry over the last 30 years, and fundamentally changed the rights of Qualifying Facilities by requiring termination of the mandatory purchase requirement when specified market conditions exist. The Commission's interpretation of recently-enacted PURPA § 210(m) supports Qualifying Facility development by ensuring that where these specified markets exist, development will be stimulated by market forces and, where they do not exist, development will continue to be stimulated through the mandatory purchase obligation.

Finally, American Forest & Paper's argument that the Commission has singled out Qualifying Facilities as the one class of generators not entitled to competitive rates is without merit. If a Qualifying Facility successfully rebuts the presumption that a regional transmission organization's open access transmission tariff provides the Facility with nondiscriminatory access, then the mandatory

purchase obligation will continue. If the tariff does provide nondiscriminatory access, then the Qualifying Facility will have access to the same markets as do all other generators, and thus the same access to independent transmission service, auction markets, and monitoring for (and mitigation, if necessary, of) market power.

ARGUMENT

I. STANDARD OF REVIEW

Where a court is called upon to review an agency's construction of a statute it administers, well-settled principles apply. If Congress has directly spoken to the precise question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). *See also, e.g., Southern California Edison Co. v. FERC*, 195 F.3d 17, 22-27 (D.C. Cir. 1999) (applying *Chevron* principles, as well as traditional tools of statutory construction, in construing PURPA). "[I]f the statute is silent or ambiguous with respect to the specific issue," however, the Court must "proceed to step two and defer to any 'permissible construction of the statute' offered by the agency." *HolRail, LLC v. STB*, 515 F.3d 1313, 1316 (D.C. Cir. 2008), quoting *Chevron*, 467 U.S. at 843. The Court "need not find that [FERC's] construction is the only reasonable one, or even that it is the result [the Court] would have reached

. . . in the first instance in judicial proceedings.” *American Paper Institute*, 461 U.S. at 422 (citations omitted).

American Forest & Paper contends that *Chevron* step one applies here. *See* Br. at 18 (stating that FERC’s interpretation of the statute is inconsistent with “the plain meaning of the statute” and “the unmistakable intent of Congress”); *see also* Br. at 1 and 44 (“plain meaning of the Statute”) and 31 (statutory language is “plain,” “clear,” and “unambiguous”). *But see* Br. at 42 (acknowledging that statute “may not be a masterpiece of legislative draftsmanship”). However, if, as American Forest & Paper submits, the language of PURPA § 210(m)(1) is clear, then it is clear in favor of the Commission’s efforts to effectuate Congress’s intention to make meaningful distinctions between the specific types of markets enumerated in sub-paragraphs (A), (B), and (C). *See* Final Rule P 38, JA 107 (“Although the statute is ambiguous in certain respects, it clearly reflects Congressional intent that the Commission differentiate among these three markets in making its determination regarding whether to terminate the purchase obligation.”).

If the statutory language is ambiguous, and thus deserving of *Chevron* step two analysis, then the Commission’s efforts to make meaningful distinctions, based on Congress’s precise choice of words that accurately reflect the current state of markets regulated by the Commission, must be sustained as reasonable. *Id.*

(“The most reasonable interpretation of Section 210(m)(1) is that Congress, in setting forth discrete tests for three different types of markets, was requiring the Commission to differentiate among these markets, and the differing circumstances they present. . . .”). It is not the task of the reviewing court to determine if petitioner offers the “better reading” of the statute, *see* Pet. Br. at 32, but only that the agency’s reading is a permissible or reasonable one – which, as explained below, it is here.

II. THE COMMISSION’S INTERPRETATION OF PURPA § 210(m) IS REASONABLE AND CONSISTENT WITH CONGRESSIONAL INTENT.

American Forest & Paper’s overarching contention (*see* Br. at 10) is that the Commission did not properly interpret the word “markets” in subparagraph (A). More specifically, Petitioner argues (*see* Br. at 17-18) that because of the “comparable competitive quality” clause in subparagraph (C), subparagraph (A) and (B) markets must meet the same competitive standards as between themselves.

The Commission disagreed, concluding from the precise language of PURPA § 210(m)(1)(A)-(C) that “Congress, in setting forth discrete tests for three different types of markets,” directed the Commission to engage in a different analysis for each of the different types of markets identified. Final Rule P 38, JA 107; Rehearing Order P 42-47, JA 255-59. As demonstrated below, this

conclusion, which is supported by detailed analysis,⁶ is a permissible one given:

(1) the presumption that Congress knows what it is doing when it uses different words in different statutory sections; (2) the ordinary meaning of “market;” (3) the significant, real-world differences between the advanced “Day 2” auction markets specified in (A) and the less-organized markets specified in (B) and (C); and (4) the purposes of PURPA.

A. The Commission’s Findings Comport With The Canon That Congress Is Presumed To Act Intentionally When It Uses Different Words In Different Statutory Sections.

Subparagraph (A)(ii) requires access simply to “wholesale markets for long-term sales of capacity and electric energy.” Subparagraph (B)(ii) specifies “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.” Subparagraph (C) wholesale markets are those that are of “comparable competitive quality” to subparagraph (A) and (B) markets. 16 U.S.C. § 824a-3(m)(1)(A)-(C).

The Commission employed a standard canon of construction in construing these three provisions. “[Where] Congress includes particular language in one

⁶ See, e.g., Notice of Proposed Rulemaking P 13-18, 22, JA 44-46, 49-50; Final Rule P 31-34, 38, 117-120, JA 102-04, 107, 152-55; Rehearing Order P 19-26, 40, 42-48, JA 240-45, 254, 255-59.

section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1984) (citation omitted); *see also Christopher Shays v. FEC*, 528 F.3d 914, 934 (D.C. Cir. 2008) (the “usual canon” is that “when Congress uses different language in different sections of a statute, it does so intentionally”) (citation omitted).

Here, Congress employed different language in describing subparagraph (A) and (B) markets. Presumably, if Congress had wanted the same test to apply in both, it would have collapsed subparagraphs (A) and (B) into one test. Rehearing Order P 42, JA 255-56. As “Congress chose not to require a finding of ‘competitive’ long-term markets as a condition of invoking Section 210(m)(1)(A)(ii),” Rehearing Order P 24, JA 243-44, the Commission, by declining to conflate the (A)(ii) and (B)(ii) wholesale markets, “gave reasonable meaning to this difference in language.” *Id.*; *see also id.* P 42-47, JA 255-59; Final Rule P 38, JA 107-08; *cf. Bluewater Network v. EPA*, 370 F.3d 1, 14 (D.C. Cir. 2004) (“The repeated use of the term ‘significant’ to modify the contribution required for all nonroad vehicles, coupled with the omission of this modifier from the ‘cause, or contribute to’ finding required for individual categories of new nonroad vehicles, indicates that Congress did not intend to require a finding of ‘significant contribution’ for individual vehicle categories.”).

For their part, American Forest & Paper (Br. at 17-18, 34-36) and Consumers Council (Br. at 5-6) contend that if the Commission does not read the (B)(ii) competitive standard into (A)(ii), the “comparable competitive quality” wording in (C) has no meaning. The challenged orders, however, explain fully why the Commission rejected this argument. *See* Rehearing Order P 42-47, JA 255-59. In brief, the most reasonable interpretation is that Congress believed that subparagraph (A) and (B) markets, while distinct, contain certain competitive qualities that FERC must consider when analyzing markets under (C). *Id.* P 43, JA 256.

However, that does not mean that a single test must be adopted for (A) and (B) markets:

The fact that the markets identified in subparagraphs (A) and (B) contain certain competitive qualities does not mean that they are the same type of market, or that a single test must be adopted for determining whether a particular market satisfies the requirements of a particular subparagraph. Such an interpretation would undermine Congress’s decision to separately identify the two types of markets that it believes are sufficiently competitive to justify termination of the purchase requirement. It would also conflict with the particular determinations to be made under each of the subparagraphs.

Id. P 44, JA 256-57. As explained in the challenged orders and addressed *infra* at 38, subparagraph (A) “Day 2” markets are auction-based and operate under market rules and market mitigation aimed at preventing exercises of market power. Consequently, it was reasonable for the Commission to conclude that “Congress

assumed these markets to be sufficiently competitive, in combination with markets for long-term contracts, to justify termination of the mandatory purchase provision.” Rehearing Order P 44, JA 256-57.

For “Day 1” markets, which provide more limited market structures, Congress reasonably required the more difficult subparagraph (B) showing before the purchase requirement is eliminated. *Id.* P 45, JA 257. For other markets, the Commission must, pursuant to subparagraph (C), determine whether they, like markets under (A) and (B), can meet the “common objective” of providing Qualifying Facilities with alternatives to their local utilities for the sale of their electric energy. *Id.* P 46-47, JA 258-59.

American Forest & Paper agrees that Congress intended a differentiation among the three markets, but argues that “the differences are in market *structure*, not *competitive quality*.” Br. at 35 (emphasis in original). According to Petitioner, “[a] review of the Statute reveals basic structural distinctions between the markets in the three sections that have nothing to do with competitive quality.” *Id.* This argument fails because, as discussed in more detail *infra* at 30-31, and in the challenged orders, the structural distinctions among the three markets have everything to do with competitive quality.

B. The Commission’s Interpretation Is A Reasonable Construction Of The Words Used By Congress In § 210(m)(1).

Contrary to Petitioner’s claim (Br. at 11), the canon of construction addressed above is not the only canon the Commission employed. “The words of statutes . . . should be interpreted where possible in their ordinary, everyday senses.” *Malat v. Riddell*, 383 U.S. 569, 571 (1966); *Wisconsin Electric Power Co. v. DOE*, 778 F.2d 1, 4 (D.C. Cir. 1985) (same); *Bluewater Network v. EPA*, 370 F.3d at 13 (beginning statutory interpretation with the “assumption that legislative purpose is expressed by the ordinary meaning of the words used”) (citations omitted).

Here, PURPA § 210(m)(1)(A)(ii) does not define “the term ‘market’ with respect to any particular number of purchasers or sellers or the quality of the contracts available.” Rehearing Order P 24, JA 243. Consequently (and in accord with standard canons of construction), FERC looked at the “ordinary everyday sense” of the word:

One definition is “the action or business of buying and selling; an instance of this, a commercial transaction; a (good or bad) bargain.” Another definition is “a meeting together of people for the purpose of trade by private purchase and sales and usually not by auction.”

Rehearing Order P 24, JA 243 (citing dictionary definitions). These standard definitions, as FERC found, support the finding “that the ability of [Qualifying Facility] sellers to reach purchasers and the existence of long-term contracts for

capacity and energy are sufficient to determine that ‘markets’ exist for purposes of Section 210(m)(1)(A)(ii).” *Id.*

The first market standard is satisfied because the Day 2 RTO open access transmission tariffs are presumed to provide Qualifying Facilities with access to purchasers. *See* discussion *supra* at 8-9, 14. The second is satisfied because bilateral long-term contracts for sales of capacity and energy do, in fact, exist in all of the Day 2 regions. Final Rule P 120, JA 154. No party argues they do not exist, *id.*, and their existence is confirmed by the electric quarterly report filings that are available on FERC’s website (at <http://www.ferc.gov/docs-filing/eqr/data.asp>). *Id.* n.61, JA 154; Rehearing Order P 22, JA 242.

Consumers Council argues (Br. at 6-10) that Day 2 markets are “in their infancy” and provide insufficient opportunity for long-term contracting. The challenged orders fully address this contention. *See* Final Rule P 118-121, JA 152-55; Rehearing Order P 23-28, JA 242-46. In brief, the relevant issue under the statute is “whether these markets satisfy the [statutory] requirements,” not whether they are “perfect today,” as “competitive or as robust” as the Qualifying Facilities would like, or “undergoing reform.” Final Rule P 28, JA 100; Rehearing Order P 23, JA 242. As the contrasting language in § 210(m)(1)(B)(ii) demonstrates, Congress knew how to impose a more specific level of review regarding the quality of long-term markets when it wanted to do so. *Id.* Here the four Day 2

RTOs are established and operate independent, auction-based markets, as § 210(m)(1)(A)(i) requires, and there is long-term contracting, as (A)(ii) requires.

For its part, American Forest & Paper cites the canon that “Congress is presumed to know how the courts have interpreted extant law when it enacts a new law.” Br. at 24, citing *Louisiana Public Service Commission v. FERC*, 482 F.3d 510, 519 (D.C. Cir. 2007). Petitioner contends (Br. at 21) that jurisprudence has established that all markets must be competitive, and that FERC erred in rejecting a competitive analysis for § 210(m)(1)(A)(ii) and reading “market” in an “empty mechanical way.”

Petitioner’s arguments lack merit. If Congress had assumed that “market” meant “competitive” markets it would not have modified “wholesale markets” in subparagraph (B) with the word “competitive.” Moreover, the canon that Congress is presumed to know extant law supports, rather than undercuts, the Commission’s interpretation. The electric industry has undergone much change in the 30 years since PURPA was enacted, and there is now a considerable body of “extant law” on these changes. *See, e.g., Morgan Stanley Capital Group*, 128 S. Ct. at 2740-41 (noting “recent FERC innovations,” including non-discriminatory open access transmission service, independent system operators, regional transmission

organizations, market-based sales, and “auction markets for electricity sales.”⁷

That Congress specifically considered these changes is demonstrated by the fact that the alternative § 210(m)(1) markets track the markets that currently exist and that have developed pursuant to regulatory initiatives (and technological advances). *See* Final Rule P 38, JA 107-8.

Consequently, as the Commission found, the more reasonable application of traditional canons of statutory interpretation is that Congress was aware of the changes to electric markets (including the characteristics of Day 2 markets), recognized that current markets offer varying levels of competition, and crafted the three subsections of § 210(m)(1) – phrased in the disjunctive ((A) “or” (B) “or” (C)) – to reflect those differences. *See id.*; *see also State of North Carolina v. EPA*, 531 F.3d 896, 910 (D.C. Cir. 2008), (“Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless

⁷ Contrary to Petitioner’s submission (Br. at 21-24), there is no “extant law,” imposed by either the FERC or the courts, that compels the agency to ensure that wholesale markets are (or remain) competitive. *See Morgan Stanley Capital Group*, 128 S. Ct. at 2741 (noting that “FERC will grant approval of a market-based tariff only if a utility demonstrates that it lacks or has adequately mitigated market power,” that the utility must periodically demonstrate “that it still lacks or has adequately mitigated market power,” and that the agency “may take appropriate remedial action” if it finds “that a seller has reattained market power”). *See also id.* (Supreme Court noted, without expressing any opinion itself, that the courts of appeals “have generally approved FERC’s scheme of market-based tariffs”).

the context dictates otherwise. . . .”) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

C. The Commission’s Interpretation Is Permissible In Light Of The Real-World Differences Between The Day 2 Regional Markets Addressed In Subparagraph (A) And The Markets Addressed In Subparagraphs (B) and (C).

The reasonableness of the Commission’s conclusion that Congress intended three discrete tests under PURPA § 210(m)(1) is confirmed by the real-world differences in the three types of § 210(m)(1) markets. By definition, subparagraph (A)(i) markets must be “independently administered” and “auction-based.” “There is little debate . . . that [such markets], as a general matter, provide greater opportunities for Qualifying Facilities (and other independent generators) to compete than unorganized markets because of the existence of day-ahead and real-time energy markets that allow *all* competing generators to submit bids to participate in the market on a nondiscriminatory basis.” Final Rule P 38, JA 107-08 (emphasis in original).

The Day 2 markets identified in subparagraph (A)(i) also facilitate participation in bilateral (contract) markets. *See id.* P 120, JA 154-55; Rehearing Order P 20-26, JA 240-45. The independent regional transmission organizations have no incentive to discriminate among suppliers in providing transmission service for energy sold under long-term contracts. RTOs, with their large regional footprints, also provide Qualifying Facilities, like other suppliers, with access to

many different wholesale buyers. Final Rule P 120, JA 154. Moreover, by “eliminating pancaked rates, eliminating problems with internal loop flows, and improving the reliability of transmission operations over a broad multi-utility region, an RTO offers regional transmission service which facilitates longer-term contracting practices.” Rehearing Order P 20, JA 241.

The organized Day 2 markets also facilitate contract formation by providing transparent spot energy prices that can provide a basis for negotiation. Final Rule P 120, JA 154. They can also reduce the cost to suppliers of entering into long-term contracts because a supplier can easily acquire replacement energy from the markets if it has an outage or if the replacement energy is cheaper than the supplier’s generated energy. *Id.* In other words, the existence of organized Day 2 market institutions, identified in subparagraph (A)(i), facilitates the development of markets for long-term sales, contemplated in subparagraph (A)(ii).

The less organized markets do not offer the same enhancements to long-term contracting. *Id.* P 38, JA 107-08. Accordingly, as the Commission permissibly concluded, Congress placed a heavier burden on utilities seeking relief from the mandatory purchase requirement in the subparagraph (B) and (C) markets by imposing competitive analysis standards on such applications. *Id.*

D. The Commission's Construction Of § 210(m)(1) Is Consistent With The Purpose Of PURPA.

American Forest & Paper contends (Br. at 13-15) that FERC's interpretation is inconsistent with PURPA § 210(a), 16 U.S.C. § 824a-3(a), which directs the Commission to prescribe rules to encourage cogeneration and small power production. The challenged orders fully address this contention. *See* Final Rule P 6, JA 84-85; Rehearing Order P 48, JA 259.

Congress, of course, did not repeal § 210(a). Nevertheless, § 210(m)(1) made a "fundamental change" to the rights of Qualifying Facilities by terminating the purchase requirement if a Qualifying Facility has nondiscriminatory access to any of the § 210(m) markets. Final Rule P 6, JA 84; Rehearing Order P 48, JA 259. As the Commission stated, "[i]t would be inappropriate . . . to ignore this mandate by implementing Section 210(m)(1) in a way that undermines the specific standards of relief Congress chose to establish in the statute." *Id.*

More fundamentally, Congress did not enact PURPA's directive to encourage cogeneration and small power production in a vacuum, but after considering specific problems faced by these entities in the electric industry as it existed in 1978. At that time, traditional utilities controlled transmission and were reluctant to purchase power from nontraditional facilities or to pay appropriate rates. *See, e.g., FERC v. Mississippi*, 456 U.S. at 750-51; discussion *supra* at 4.

Now, 30 years later, independent regional transmission organizations, not traditional utilities, control transmission in the § 210(m)(1)(A) markets. By 1995, nontraditional producers were providing more than half of all new generation (*see supra* at 7), and the interconnection regulations allow them to connect to the grid and to obtain access to potential purchasers. Day-ahead and real-time markets are auction-based. All generators, including Qualifying Facilities and other independent generators, may submit bids to participate in them. Auction markets facilitate formation of long-term contracts as well. *See* discussion *supra* at 30-31.

As Congress recognized when it enacted PURPA § 210(m)(1), the specific problems faced by Qualifying Facilities in 1978 no longer exist in some markets. Congress, therefore, directed the Commission to terminate the mandatory purchase requirement for utilities in those markets. Under these circumstances, the Commission's interpretation of PURPA's continuing purpose strikes the proper balance:

Our action continues to support [Qualifying Facility] development by ensuring that, where the requirements of Section 210(m) are met, [Qualifying Facility] development will, as determined by Congress, be stimulated by market forces, and that where those requirements have not been met, [Qualifying Facility] development will continue to be stimulated as it is today through the mandatory purchase requirement.

Final Rule P 6, JA 85.

III. OTHER ARGUMENTS OF PETITIONER AND AMICUS ARE UNPERSUASIVE.

A. The Commission's Regulations Are Fully In Accord With The Procedural Requirements Of PURPA § 210(m)(3).

Section 210(m)(3) requires an electric utility's application for relief from the mandatory purchase obligation to state the "factual basis" upon which relief is requested (including why the requirements of § 210(m)(1) subparagraph (A), (B), or (C) have been met). After notice and comment, the Commission must issue a final decision within 90 days of the application. 16 U.S.C. § 824a-3(m)(3).

American Forest & Paper contends (Br. at 15, 36-38) that the Commission has rendered the "factual basis" requirement a "nullity" by "automatically deeming" the four Day 2 regional transmission organizations to have met the subparagraph (A) requirements. The challenged orders fully address these contentions. *See* Final Rule P 98-102, JA 141-44; Rehearing Order P 29-30, JA 246-48.

In brief, PURPA § 210(m)(3) "does not specify the particular procedural mechanism the Commission must use in making [the required findings]." "[T]hus, the Commission has discretion to act through a rulemaking, case-by-case determinations, or some combination thereof." Rehearing Order P 30, JA 247; *see* Final Rule P 99, JA 142; *see also, e.g., New York State Comm'n on Cable*

Television v. FCC, 749 F.2d 804, 815 (D.C. Cir. 1984) (“The decision whether to proceed by rulemaking or adjudication lies within the [agency’s] discretion.”).

Relying on generic findings and presumptions makes sense here. “To some extent, generic aspects about certain aspects of ‘Day 2’ markets are inevitable, either by rulemaking or in the first utility specific filing in each ‘Day 2’ market.” Final Rule P 99, JA 142. There is no need, for example, to relitigate hundreds of times the issue of whether the four Day 2 regional transmission organizations meet the § 210(m)(1)(A)(i) standard. *Id.* P 100, JA 142. Making generic determinations through rulemaking, moreover, gave all affected entities a reasonable opportunity to be heard on the issue. *Id.* at 99, JA 142; Rehearing Order P 29, JA 246.

The Commission’s approach is also consistent with the language of the statute. “Section 210(m)(1)(B) provides for the submission of ‘evidence of transactions within the relevant market.’ Because this language is not included in Section 210(m)(1)(A), [the Commission’s] approach providing for findings and rebuttable presumptions is consistent with the statute.” Final Rule P 100, JA 143.

American Forest & Paper argues, inaccurately, that Qualifying Facilities have no real opportunity to rebut the Commission’s generic findings and presumptions. *See* Br. at 29-30. In fact, a utility seeking relief must “set forth the factual basis upon which relief is requested” in its application. Final Rule P 102, JA 102. In particular, the utility must file information that potentially affected

Qualifying Facilities may be able to use to rebut the presumption that they have access to all aspects of the relevant Day 2 market. *Id.* This information includes the utility's long-term transmission plan; transmission constraints by path, element or other level of comparable detail; and other information pertaining to the availability of transfer capability. *Id.*, *see also* 18 C.F.R. § 292.310(d)(3). Moreover, for Qualifying Facilities smaller than 20 megawatts, a utility will have to overcome the presumption that such facilities do not have nondiscriminatory access to wholesale markets. Final Rule P 9, JA 89; *see also* 18 C.F.R. § 292.309(d).

American Forest & Paper also argues (Br. at 38) that the Commission's interpretation renders null the § 210(m)(4) provisions permitting requests for reinstatement of the purchase obligation. According to Petitioner, the Commission's interpretation requires so minimalist an (A)(ii) long-term sales market that "[t]here are no conceivable *facts* that could change the Commission's [(A)(ii)] determination" and only a congressional change in the law "could possibly be offered as justification for reinstating" the purchase requirement. Br. at 39 (emphasis original).

This argument is entirely without merit. A Qualifying Facility can submit facts supporting the proposition that it no longer has nondiscriminatory access due to transmission constraints or other circumstances, or that long-term contracts are

no longer available in the RTO. If there is a change in the operations, composition, or geographic reach of the RTO, a Qualifying Facility might be able to show that the RTO no longer meets the subparagraph (A)(i) requirements or that the utility it connects with is no longer a member of the RTO.

Finally, a Qualifying Facility, like other market participants, can file a complaint with the Commission alleging that a regional transmission organization is violating its open access transmission tariff. *See* Final Rule P 53, JA 115. There are established statutory and regulatory procedures for addressing such allegations which a Qualifying Facility can invoke at any time. *Id.*

B. Qualifying Facilities Will Have Access To The Same Rates And Practices As Do Other Generators.

American Forest & Paper's argument (Br. at 26-30) that the Commission has singled out Qualifying Facilities as the one class of generators not entitled to competitive rates is without merit. If a Qualifying Facility successfully rebuts the presumption that a regional transmission organization's open access transmission tariff provides the Facility with nondiscriminatory access, then the mandatory purchase obligation will continue. If the tariff does provide nondiscriminatory access, then the Qualifying Facility will have the same access to the same markets as do all other generators.

Petitioner nevertheless argues (Br. at 29) that since the Commission has not required a competitive analysis under (A)(ii), Qualifying Facilities will be selling

energy into noncompetitive markets at unreasonable rates. This overlooks the fact that the long-term contracting under (A)(ii) occurs in the context of the formalized Day 2 competitive structures identified in (A)(i). Congress determined that with these formalized structures, the competitive analyses required under subparagraphs (B) and (C) are unnecessary under subparagraph (A). *See* discussion *supra* at 28-31.

In addition to operating the transmission grid under an open access transmission tariff under which all generators (including Qualifying Facilities) receive access to the grid under the same terms, and conducting auction markets into which all generators (including Qualifying Facilities) may bid, the Day 2 regional transmission organizations also monitor the markets for the exercise of market power and require the mitigation of market power if necessary. Rehearing Order P 44, JA 257; *see, e.g., Wisconsin Public Power*, 493 F.3d at 256-64 (describing market power mitigation in the Midwest ISO). The Commission monitors market conditions as well through its reporting requirements. *See, e.g., California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1011-13 (9th Cir. 2004) (before-the-fact FERC authorization of market-based rates, followed by effective after-the-fact reporting and review, satisfies statutory requirements).

Finally, American Forest & Paper contends that Qualifying Facilities enjoy a “special statutory entitlement” to just and reasonable rates “even beyond” the

general statutory entitlement of all buyers and sellers. Br. at 28 (citing *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 132 (3rd Cir. 1998)). *Crossroads*, however, fails to help Petitioner, as it refers to the reluctance of traditional utilities to purchase from independent providers and the burden of traditional utility regulation. As explained *supra* at 32-33, Congress, in amending PURPA in 2005, and in recognizing the development and regulation of electricity markets since 1978, intended to continue to confer “special” entitlements to Qualifying Facilities only where its traditional concerns remain – not where Qualifying Facilities now have access to the markets identified in PURPA § 210(m)(1). *See* Rehearing Order P 48, JA 259.

C. The Definition Of “Long-Term” Contracts Is Not Properly Before This Court, But, In Any Case, Consumers Council’s Arguments Lack Merit.

Amicus Consumers Council alone contends (Br. at 10) that the Commission failed to give meaningful consideration to comments that the duration of long-term contracts, contemplated in PURPA § 210(m)(1)(A)(ii), must exceed one year. Consumers Council may not raise that issue now. One seeking to intervene or to present an *amicus* brief may, absent extraordinary circumstances (not alleged here), join issue only on a matter that properly has been brought before the court by a petitioner. *See, e.g., California Dept. of Water Resources v. FERC*, 306 F.3d 1121, 1126 (D.C. Cir. 2002) (citing cases). Petitioner American Forest & Paper

has not raised that issue, and the Consumers Council's attempt to expand the issues in the proceeding must be rejected.

In any event, the Council's argument lacks merit. The Commission, at the time of PURPA's amendment in 2005, had for years defined long-term contracts under open access transmission tariffs as one year or longer, and had treated power sales with a contract term of greater than one year to be "long-term" for reporting purposes. *See* Rehearing Order P 27 & n.17, JA 245, and the cases cited therein. Congress refrained from prescribing a different duration, and left it to the agency's discretion to determine the "long-term" contract duration. *See, e.g., South Dakota v. Yankee Sioux Tribe*, 522 U.S. 329, 351 (1998) ("[W]e assume that Congress is aware of existing law when it passes legislation.") (internal quotation marks omitted). Thus, the Commission acted reasonably in treating contracts of a year or longer as "long-term."

CONCLUSION

For the reasons stated, American Paper & Forest's petition for review should be denied, and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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Docket No. RM06-10

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C)(i), I certify that the brief of Respondent Federal Energy Regulatory Commission contains 8,421 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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