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Congress of the United States

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OFFICE OF
EXTERNAL AFFAIRS

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FEDERAL ENERGY
REGULATORY COMMISSION

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The Honorable Joe Kelliher, Chairman
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Dear Joe:

We are writing regarding the FERC's recently proposed rule to implement the changes made to Section 210 of the Public Utility Regulatory Policies Act (PURPA) by the Energy Policy Act of 2005 (EPAAct). We led the development of the PURPA language included in the final enacted law and are concerned that the proposed rule does not fulfill our intent.

Our purpose in drafting the PURPA provision was to promote the use of cogeneration and to continue the mandatory purchase and sale requirements in Section 210 of the underlying PURPA statute until such time as there are competitive wholesale and retail electricity markets which would make those mandates unnecessary by ensuring that cogenerators have ready access to a market from which to buy or sell electricity. Accordingly, the PURPA provision included in EPAAct establishes a test under which a utility can petition to the FERC for relief from its obligations. The relief would be granted only if the utility demonstrates that it operates in a fully competitive market as outlined in EPAAct.

Specifically, Section 1253 of EPAAct outlines very specific criteria which must be met before a market is deemed to be competitive for purposes of relieving a utility's mandatory purchase and sale obligation. The statute explicitly states in detail the minimum requirements that must be met to ensure that a cogenerator has nondiscriminatory access to 1) wholesale markets for the sale and purchase of electricity and 2) to transmission and interconnection services. The test for relief as outlined in EPAAct is intended to be highly market specific and should be determined only upon a weighing of the specifically stated factors both with respect to the adequacy of the market for power sales and adequacy of the market for power purchases viewed from the perspective of the PURPA qualified entity.

The proposed rule does not follow this statutory direction because it treats as de facto competitive any market that is served by a regional transmission organization (RTO) that the FERC has approved. Giving a blanket exemption from PURPA's mandatory sale and purchase obligations to all utilities in the four FERC-approved regional transmission organization markets (ISO-NE, NYISO, PJM and MISO), as proposed by the rule, does not allow for a thorough examination regarding whether the markets in which a particular

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cogenerator operates are fully competitive as required by the statute. In fact, the statute specifically states that membership in a FERC approved RTO is only one of the several requirements which must be met in order to ensure that the cogenerator has access to a sufficiently competitive market.

The statute also dictates that the cogenerator must have access to a competitive wholesale market that provides a meaningful opportunity to sell electricity and capacity, including long-term and short-term sales to buyers other than the utility to which the cogenerator is interconnected. Other factors listed in the statute include access to a market with independently administered, auction-based day ahead and real time wholesale markets for the sale of electricity and capacity. In addition, the statute expressly states that relief from a utility's obligation to sell power to a cogenerator may only be relieved if the cogenerator has access to competing retail suppliers which are willing and able to sell and deliver electricity to the cogenerator.

We share the concerns of many cogenerator operators that while some RTO served markets may meet the criteria we established in EPAct, others clearly do not, and RTO status alone is insufficient to determine whether a market meets the competitive standard necessary for relief from PURPA obligations. While we understand that a rule establishing general guidelines for utilities seeking relief from PURPA obligations as outlined by EPAct may be helpful, we believe that it is essential that utilities be obligated to apply for such relief individually with each application judged on its individual merit.


We hope that you will consider carefully these concerns as you work to finalize regulations relating to relief of a utility's PURPA Section 210 mandatory sale and purchase obligations as established by EPAct. We look forward to hearing from you regarding this matter.

With kind regards and best wishes, we remain

Sincerely,



Rick Boucher



Charles "Chip" Pickering



Sherrod Brown