

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Revised Regulations Governing Small
Power Production and Cogeneration
Facilities

Docket No. RM05-36-000

**COMMENTS OF THE TRANSMISSION ACCESS
POLICY STUDY GROUP**

Pursuant to the Commission's October 11, 2005 Notice of Proposed Rulemaking ("NOPR"), the Transmission Access Policy Study Group ("TAPS") comments on the Commission's proposal to amend its regulations governing small power production and cogeneration facilities (hereafter "QFs") pursuant to Section 1253 of the Energy Policy Act of 2005 ("EPAAct").¹ TAPS supports the NOPR's proposed partial elimination of the current QF exemption from Section 205 and 206 of the Federal Power Act (*i.e.*, except for those sales that are governed by state regulatory authorities pursuant to Section 210(f) of the Public Utility Regulatory Policies Act ("PURPA")). TAPS also urges the Commission to go further and eliminate entirely the current exemption from Section 203 for all QFs, regardless of whether their sales are governed by state regulatory agencies.

I. INTEREST OF TAPS

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.² As entities

¹ The NOPR was published in the Federal Register on October 18, 2005, which established a November 8, 2005 due date for comments. 70 Fed. Reg. 60456.

² TAPS is chaired by Roy Thilly, CEO of Wisconsin Public Power Inc. Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power-Ohio; Blue Ridge Power Agency; Clarksdale, Mississippi; ElectriCities of North Carolina, Inc.; Florida Municipal Power Agency; Geneva, Illinois; Illinois Municipal Electric Agency; Indiana Municipal Power

entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members have long been concerned about competition in wholesale markets and have urged that the Commission work to ensure structurally competitive markets. TAPS has commented on nearly all of FERC's major rulemakings and policy inquiries involving the electricity industry over the past decade, including those that directly concern market power issues.

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II. COMMENTS

A. *The NOPR Correctly Proposes to Narrow the Section 205 and 206 Exemption*

TAPS supports the NOPR's elimination of the Sections 205 and 206 exemption for QFs, except for sales governed by state regulatory authorities. NOPR P 26. In light of EPCAct's amendments to PURPA and changes in the industry more generally, TAPS agrees that the Commission should "reexamine the broad exemptions from the FPA granted to QFs" (NOPR at P 22) and believes the proposed narrowing of the Sections 205

and 206 exemptions is an appropriate exercise of the Commission's discretion. While the exemptions can be safely retained for QF sales at state-regulated avoided cost rates, the ability of QFs to make market-based rate sales and to be owned 100% by traditional utilities render the broader exemptions inappropriate and significantly raise the risk of consumer harm if such sales are not scrutinized by the Commission.

The Commission notes that "a large number of QFs make market-based sales" and that "[m]any QFs are large units and their non-PURPA sales could potentially have a significant market effect." NOPR at P 23. It further expresses a valid concern about not being able to investigate and remedy potential misconduct if the exemption were continued. *Id.* The Commission cites EPCRA's elimination of the ownership restriction so that traditional utilities can now own up to 100% of a QF and observes that the "elimination of the ownership requirements will now permit a qualifying facility to sell electric energy other than electric energy produced by itself or another qualifying facility and still retain QF status." NOPR at P 25. The NOPR correctly concludes that "such sales should not be entitled to exemptions from the FPA; nor should qualifying facilities that make such sales be entitled to exemptions from the FPA." *Id.*

In the final rule, TAPS thus urges the Commission to adopt the NOPR's proposed narrowing of the exemption of QFs from Sections 205 and 206.

B. The Commission Should Eliminate Entirely the Section 203 Exemption

The NOPR (P 30) also invites comments on other FPA provisions for which the Commission should eliminate existing exemptions. TAPS urges the Commission to eliminate in its entirety the existing Section 203 exemption.

The Commission's reasons articulated in the NOPR (PP 22-6) for no longer exempting certain QFs from Sections 205 and 206 apply equally to Section 203. The consumer protection concerns, such as effects on competition or risks of harmful cross-subsidies, that led Congress to expand FERC's Section 203 authority over generation acquisitions are relevant to QF transfers as well. The Commission should not undermine its new authority by continuing a QF exemption developed when the Commission did not have jurisdiction over transfers of generation facilities.

Further, while in the Sections 205 and 206 context it makes sense to retain the exemption for state-regulated QF sales, in the Section 203 context the exemption should be eliminated as to all QFs. As the NOPR correctly observes, with EPCRA's elimination of the QF ownership restriction, such facilities "generally should not be exempt from regulation under the FPA." NOPR at P 24. Without the QF ownership restriction, a QF purchased by a public utility in many cases will likely be operated as part of that utility's fleet of generation. Even where a "PURPA sale" contract at avoided-cost rates remains in effect, the public utility will be able to dispatch the entirety of its fleet, including the QF, in satisfaction of those sales. The resulting modified dispatch could give the public utility an ability and/or incentive to exercise market power that would not have existed previously.

Thus, in light of EPAct, the existing QF exemption from Section 203 should be eliminated in its entirety.³

Respectfully submitted,

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³ In comments filed on November 7, 2005 in the proceeding on proposed rules to implement amended Section 203, TAPS asked that the Commission make clear that all existing QFs will be treated as existing generation facilities and subject to Section 203 review. See Comments of the Transmission Access Policy Study Group submitted in *Transactions Subject to FPA Section 203*, Docket No. RM05-34-000, at 10-12. Available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=10874927>.