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PUBLIC SERVICE COMMISSION

September 8, 2017

VIA HAND DELIVERY

Mr. John Lyons
Acting Executive Director
Kentucky Public Service Commission
P.O. Box 615
211 Sower Boulevard
Frankfort, Kentucky 40602

Re: PSC Case No. 2017-00212

Dear Mr. Lyons:

Please find enclosed and accept for filing in the above-styled matter on behalf of East Kentucky Power Cooperative, Inc. ("EKPC"), an original and ten (10) copies of EKPC's Notice of Filing. Please return file-stamped copies to my office.

I appreciate your assistance with this matter, and please do not hesitate to contact me with any questions or concerns.

Respectfully,

David S. Samford

Enclosures

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

TARIFF FILING OF EAST KENTUCKY POWER COOPERATIVE, INC. AND ITS MEMBER DISTRIBUTION COOPERATIVES FOR APPROVAL OF PROPOSED CHANGES TO THEIR QUALIFIED COGENERATION AND SMALL POWER PRODUCTION FACILITIES TARIFFS AND THE IMPLEMENTATION OF SEPARATE TARIFFS FOR POWER PURCHASES FROM SOLAR GENERATION QUALIFIYING FACILITIES	) Case No. 2017-00212

NOTICE OF FILING

Comes now East Kentucky Power Cooperative, Inc., by counsel, and hereby gives notice of its filing of an Order entered by the Federal Energy Regulatory Commission in the matter of *East Kentucky Power Cooperative, Inc.*, Docket No. QM17-5-000, on September 7, 2017. A copy of the Order is attached hereto.

Done this 8th day of September 2017.

Respectfully submitted,

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Counsel for East Kentucky Power Cooperative, Inc.

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing was served by depositing same into the custody and care of the U.S. Mails, postage pre-paid on this 8th day of September, 2017, addressed to the following:

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160 FERC ¶ 61,053
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

East Kentucky Power Cooperative, Inc. Docket No. QM17-5-000

ORDER GRANTING APPLICATION TO TERMINATE
MANDATORY PURCHASE OBLIGATION

(Issued September 7, 2017)

1. On June 9, 2017, East Kentucky Power Cooperative, Inc. (East Kentucky) filed an application (Application) pursuant to section 210(m) of the Public Regulatory Policies Act of 1978 (PURPA)[1] and section 292.310 of the Commission's regulations,[2] seeking to terminate, on a service territory wide basis, East Kentucky's obligation under section 292.303(a) of the Commission's regulations[3] to enter into new power purchase obligations or contracts to purchase electric energy and capacity from qualifying cogeneration or small power production facilities (QF) with a net capacity in excess of 20 MW. As discussed below we find that East Kentucky has met the statutory standard, and therefore we grant East Kentucky's Application, effective June 9, 2017, the date East Kentucky filed the Application.[4]

[1] 16 U.S.C. § 824a-3(m) (2012).

[2] 18 C.F.R. § 292.310 (2017).

[3] 18 C.F.R. § 292.303(a) (2017).

[4] East Kentucky previously filed similar applications for termination of its mandatory purchase obligation in Docket Nos. QM17-2-000 and QM17-3-000. Both of East Kentucky's previous applications expired and were deemed denied due to the Commission's lack of a quorum, limiting the Commission's ability to rule on the applications within the required 90-day time period. *See East Kentucky Power Coop., Inc.*, 158 FERC ¶ 62,188 (2017); *East Kentucky Power Coop. Inc.*, 159 FERC ¶ 62,265 (2017).

I. Background

2. On October 20, 2006, the Commission issued Order No. 688,[5] revising its regulations governing utilities' obligations to purchase electric energy produced by QFs. Order No. 688 implements PURPA section 210(m), which provides for termination of the requirement that an electric utility enter into new power purchase obligations or contracts to purchase electric energy from QFs if the Commission finds that the QFs have nondiscriminatory access to a market described in section 210(m) of PURPA.

II. Application

3. East Kentucky states that it is a generation and transmission cooperative, governed by its 16 member-owners, that receives financing under the Rural Electrification Act of 1936 and is not subject to the Commission's authority under the Federal Power Act.[6] East Kentucky states that it is a member of PJM Interconnection, LLC (PJM) and asserts that it satisfies the requirements of PURPA section 210(m) and sections 292.309 and 292.310 of the Commission's regulations. Specifically, East Kentucky believes PJM meets the criteria set out in sections 292.309(a)(1) and 292.309(e) of the Commission's regulations, 18 C.F.R. §§ 292.309(a)(1), 292.309(e) (2017), and therefore that the QFs in PJM have nondiscriminatory access to a market that satisfies the requirements of section 210(m) of PURPA as a market that warrants termination of an electric utility's purchase obligation.[7]

4. East Kentucky states that it does not serve load, but instead supplies the power requirements for its distribution cooperative member-owners that do serve load. Accordingly, East Kentucky requests that the Commission grant the termination within the service territories of its 16 member-owners.[8]

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[5] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *aff'd sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

[6] East Kentucky Application at 2.

[7] *Id.* at 3-4.

[8] East Kentucky Application at 16 (citing *Old Dominion Electric Coop.*, Delegated Letter Order, Docket No. QM09-7-000, Jan. 8, 2010).

5. East Kentucky requests that the effective date for the termination of its purchase obligation be the date of its initial application, November 4, 2016.[9] East Kentucky argues that, since it has yet to receive a Commission order on its initial filing, the temporary suspension of its obligation to enter into new purchase obligations that arose with East Kentucky's initial application is still effective.[10] East Kentucky argues that the Commission erroneously denied its previous applications and that East Kentucky should not be blamed for circumstances beyond its control (i.e., the Commission's lack of a quorum).[11]

III. Notices of Filing and Pleadings

6. Notice of East Kentucky's filing was published in the *Federal Register*, 82 Fed. Reg. 27,478 (2017), with interventions and protests due on or before July 7, 2017. The Commission served notices of the Application on the potentially-affected QFs identified by East Kentucky by letters dated June 9, 2017.

7. Bluebird Solar LLC (Bluebird) and Blue Jay Solar LLC (Blue Jay) each filed a motion to intervene and protest. On July 24, 2017, East Kentucky filed an answer and on August 14, 2017, East Kentucky filed a request for timely Commission action on its Application. On August 28, 2017, Bluebird filed a response to East Kentucky's request and an update on the arguments before the state commission. On August 30, 2017, East Kentucky filed an answer to Bluebird's August 28, 2017 response.

IV. Protests and Answer

A. Bluebird Protest

8. Bluebird, developer of an 80 MW QF to be located in East Kentucky's service territory, states that it filed its QF self-certification with the Commission on November 2, 2016.[12] Bluebird also states that, on December 5, 2016, it notified East Kentucky that it

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[9] We note that, on December 7, 2016, East Kentucky amended its November 4, 2016 application, thereby extending the 90-day deadline for Commission action to March 7, 2017, at which time the Commission was unable to act due to the absence of a quorum. *See East Kentucky Power Coop. Inc.*, 81 FERC ¶ 90,835 (2016).

[10] East Kentucky Application at 20.

[11] *Id.* at 17.

[12] Bluebird Protest at 3.

intended to sell its output to East Kentucky at an avoided cost rate.[13] Bluebird contends that East Kentucky has had a legally enforceable obligation to purchase Bluebird's net output, pursuant to PURPA, since Bluebird's December 5, 2016 communication, i.e., prior to the June 9, 2017 date on which East Kentucky filed the Application.

9. Additionally, Bluebird requests that, if the Commission does not summarily deny East Kentucky's Application based on Bluebird's pre-existing legally enforceable obligation, that it deny East Kentucky's Application based on the merits.[14] Specifically, Bluebird argues that: (1) Kentucky laws discriminate against independent solar facilities as compared with utility-owned generation; (2) East Kentucky's Application is deficient because it lacks required information about transmission constraints in PJM; and (3) PJM markets have changed substantially since the Commission promulgated Order No. 688. Bluebird asserts that for these reasons the Commission should deny the Application.

B. Blue Jay Protest

10. Blue Jay, a 60 MW QF to be located in East Kentucky's service territory, contends that it notified East Kentucky on March 8, 2017, that it intended to sell its full output to East Kentucky at an avoided cost rate.[15] Blue Jay asserts that therefore, as of March 8, 2017, it established a legally enforceable obligation requiring East Kentucky to purchase Blue Jay's output pursuant to PURPA, predating the June 9, 2017 date of East Kentucky's Application. Blue Jay opposes East Kentucky's request for a November 4, 2016 effective date arguing that the statutory 90-day time period expired and the Commission is therefore statutorily foreclosed from acting on such an application after the 90-day time period has expired.[16]

11. Like Bluebird, Blue Jay requests that, if the Commission does not summarily deny East Kentucky's Application based on Blue Jay's pre-existing legally enforceable obligation, it deny East Kentucky's Application based on the merits. Blue Jay argues that QFs in East Kentucky's service territory lack nondiscriminatory or meaningful access to competitive markets. Blue Jay asserts that non-utility QFs face discriminatory treatment as a result of East Kentucky's practices. Specifically, Blue Jay contends that it lacks access to similar energy rates, capacity rates, and contract terms as East Kentucky's own solar generation, that revenue for a utility-owned solar plant is calculated differently than

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[13] *Id.* at 3.

[14] *Id.* at 20.

[15] Blue Jay Protest at 4.

[16] *Id.* at 14-15.

revenue for a QF, and that capacity payments for a QF are based on dispatch instead of resource value.[17] Blue Jay also contends that the lack of long-term contracts prevents QFs from financing projects and that Kentucky's discriminatory siting restrictions hinder QF development.[18]

C. East Kentucky and Bluebird Answers

12. In its answer, East Kentucky argues that the Commission should find that East Kentucky's purchase obligation terminated effective November 4, 2016, the date it filed its initial application. East Kentucky asserts that neither PURPA nor Commission regulations restrict the Commission from granting its requested effective date of November 4, 2016. East Kentucky also contends that Commission regulations require the Commission to act within 90 days of the filing of an application, not to establish an effective date that is within 90 days of the filing of an application. East Kentucky recognizes that Order No. 688 states that if an application is granted then the purchase obligation is terminated as of the date the utility filed the application.[19] However, East Kentucky requests that the Commission exercise its discretion in granting the November 4, 2016 effective date because: (1) East Kentucky reasonably believed that, but for the Commission's lack of quorum, its initial application would have been granted; (2) the 90-day time period establishes the time in which the Commission is required to act, it does not establish an effective date; (3) the Commission was not required to deem East Kentucky's initial application denied.[20]

13. In its August 14, 2017 filing, East Kentucky requests that the Commission act on its Application in a timely manner. In its August 28, 2017 answer, Bluebird requests that the Commission act deliberately and it provides an update on arguments before the state commission. In East Kentucky's August 30, 2017 answer, East Kentucky requests that the Commission disregard the substance of Bluebird's August 28, 2017 response and grant the relief requested in East Kentucky's Application on or before September 7, 2017.

V. Discussion

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the timely, unopposed motions to intervene serve to make

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[17] *Id.* at 19-20.

[18] *Id.* at 22-26.

[19] East Kentucky Answer at 8 (citing Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 228.

[20] *Id.* at 8-13.

the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2017), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Bluebird's and East Kentucky's answers because they have provided information that assisted us in our decision-making process.

15. As a member of PJM, East Kentucky relies upon the QFs in PJM having nondiscriminatory access to a market that satisfies the requirements of section 210(m) of PURPA. We find that, based on East Kentucky's Application, QFs over 20 MWs have nondiscriminatory access to wholesale markets for the sale of capacity and energy warranting termination of East Kentucky's mandatory purchase obligation pursuant to section 210(m) of PURPA; we grant the request with respect to all new contracts or obligations for QFs larger than 20 MW.

16. In Order No. 688, the Commission explained that there can be factors unique to individual QFs, including operational characteristics and transmission limitations, that prevent such QFs from having nondiscriminatory access to the markets described in section 210(m)(1) of PURPA.[21] Thus, the Commission expressly provided the opportunity for QFs larger than 20 MW to rebut the presumption that such QFs have nondiscriminatory access to the markets described in section 210(m)(1) of PURPA.[22]

17. A QF wishing to rebut the presumption must demonstrate either: (1) that the facility has certain operational characteristics that effectively prevent it from participating in a market; or (2) that the facility lacks access to markets due to transmission constraints.[23] Protesters did not present any unique operational characteristics that prevent them from participating in the PJM market. As noted above, protesters argue that

[21] Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 82. For example the Commission noted that a QF's operational characteristics could "effectively prevent the QFs participation in a market." *Id.* The Commission noted that such operational characteristics might include "highly variable thermal and electrical demand (from the QF host) on a daily basis, such that the QF cannot participate in a market" or "highly variable and unpredictable wholesales sales on a daily basis." *Id.*

[22] *Id.* P 83. In Order No. 688-A, the Commission reiterated that the presumptions were not final determinations, and that they were rebuttable; the Commission stated that there may be circumstances unique to a particular QF that interfere with that QF's nondiscriminatory access. As an example, the Commission noted that "a QF might have operational characteristics that effectively prevent its participation in a market." Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 66.

[23] 18 U.S.C. § 292.309(e) (2017).

QFs as a group in East Kentucky's service territory lack nondiscriminatory access to the PJM market. Neither Bluebird nor Blue Jay provided any evidence, beyond their allegations, to demonstrate that its particular QF lacks access to PJM markets based on the operational characteristics of the QFs. Furthermore, they have not demonstrated that transmission constraints would deny their QFs nondiscriminatory access to the PJM market.[24] In sum, the Commission finds that protesters have failed to rebut the presumption that QFs larger than 20 MW have nondiscriminatory access to the PJM market.

18. Accordingly, we grant East Kentucky's request to terminate the mandatory purchase obligation pursuant to section 210(m) of PURPA to enter into new contracts or obligations to purchase electric energy or capacity from QFs larger than 20 MW net capacity that are located within East Kentucky's service territory.[25]

19. PURPA and the Commission's regulations provide that a QF that has initiated a proceeding before the appropriate state regulatory authority or non-regulated electric utility that may result in a legally enforceable contract or obligation prior to an electric utility filing its petition for relief pursuant to section 292.310 of the Commission regulations, 18 C.F.R. § 292.310 (2017), will be entitled to have any contract or obligation that may be established by state law grandfathered.[26] Therefore, until a utility applies for termination of the PURPA mandatory purchase obligation, and the Commission grants such application, a QF has the statutory right to pursue a contract or other legally enforceable obligation with that utility. The Commission will grandfather any such legally enforceable obligation that exists prior to that date.[27]

20. The Commission stated in Order No. 688-A that:

> the date when an "obligation" under PURPA is established is the date such obligation is established by each state regulatory authority or non-regulated utility....[In Order No. 688,] the Commission determined that a QF that has initiated a state PURPA proceeding that may result in a legally enforceable contract or obligation prior to the applicable electric utility filing its petition for

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[24] Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 83.

[25] To the extent that a potentially affected QF's net capacity is 20 MW or smaller, this order also does not terminate the mandatory purchase obligation for that QF.

[26] Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 213; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 137-138.

[27] *Fitchburg Gas and Light Co.*, 146 FERC ¶ 61,186, at P 34 (2014).

relief pursuant to § 292.310 of the Commission's regulations will be entitled to have any contract or obligation that may be established by state law grandfathered.[28]

21. Here, Bluebird potentially established a legally enforceable obligation on December 5, 2016, when it notified East Kentucky of its intent to sell its output to East Kentucky pursuant to PURPA.[29] Similarly, Blue Jay potentially established a legally enforceable obligation on March 8, 2017, when it provided notice to East Kentucky of its commitment to sell its output to East Kentucky pursuant to PURPA.[30] Since Bluebird and Blue Jay notified East Kentucky of their intention to sell their output under PURPA, this Application does not foreclose Bluebird or Blue Jay from having established a legally enforceable obligation under PURPA.[31] Barring any restrictions under state law, Bluebird and Blue Jay would be grandfathered such that Commission approval of this Application would not include Bluebird or Blue Jay QFs.

22. We disagree with East Kentucky's contention that the Commission should establish November 4, 2016 as the effective date for this Application. The statute and Commission regulations require that the Commission "shall make a final determination within 90 days of such application" regarding whether the conditions set forth for termination of the mandatory purchase obligation – i.e., whether the QF has nondiscriminatory access to certain specified markets or services – have been met.[32] The Commission did not make the required final determination within the 90-day time period

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[28] Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 137 (citing Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 213). "[I]n the division of responsibilities of administering PURPA between this Commission and state regulatory authorities (and non-regulated utilities), it is the state regulatory authorities (or non-regulated utilities) that determine whether and when a legally enforceable obligation is created, and the procedures for obtaining approval of such an obligation. QFs that believe that some other sort of state proceeding has created a legally enforceable obligation under state law may argue their claim before the Commission, and we will make such determinations on a case-by-case basis based on state law. Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 139.

[29] Bluebird Protest at 4-5.

[30] Blue Jay Protest at 4.

[31] *See supra* P 20 & n.28.

[32] 16 U.S.C. §§ 824a-3(m)(1), 824a-3(m)(3) (2012); 18 C.F.R. §§ 292.309(a), 292.310(a) (2017).

for East Kentucky's November 4, 2016 application, as amended on December 7, 2016, and as a consequence the time period expired on March 7, 2017, and that application was, by notice issued on March 10, 2017, deemed denied.[33]

23. As East Kentucky acknowledged, Order No. 688 provides that, if the Commission approves a utility's application to terminate its mandatory purchase obligation, the termination is effective on the date the application was filed.[34] Here, the Application was filed on June 9, 2017, and therefore, consistent with Order No. 688, the Application's effective date is June 9, 2017. The earlier November 4, 2016 application expired on March 7, 2017, as explained above. Hence, the November 4, 2016 date is no longer an option for the Commission to accept as an effective date for this new Application. While East Kentucky argues that, because East Kentucky reasonably believed that the Commission would have accepted its initial application had the Commission had a quorum, the Commission should now grant East Kentucky an earlier effective date than that provided for in Order Nos. 688 and 688-A, the application of record and before this Commission now was filed on June 9, 2017. Although the Application is substantively identical to the November 4, 2016 filing, it is a different filing. This Application, filed June 9, 2017, is the application the Commission has reviewed, and, herein, grants effective June 9, 2017 consistent with Order Nos. 688 and 688-A.

The Commission orders:

The Commission grants East Kentucky's Application to terminate the requirement under section 292.303(a) of the Commission's regulations that East Kentucky enter into new power purchase obligations or contracts to purchase electric energy and capacity from qualifying cogeneration or small power production QFs, located within PJM, with a net capacity in excess of 20 MW, effective June 9, 2017.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[33] *East Kentucky Power Coop., Inc.*, 158 FERC ¶ 62,188 (2017). Rehearing of that notice was subsequently dismissed. *East Kentucky Power Coop., Inc.*, 159 FERC ¶ 62,180 (2017). We note that any argument here as to the appropriateness of that notice, or the dismissal of rehearing, is outside the scope of this proceeding.

[34] Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 213; *accord* Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 137.