

120 FERC ¶ 61,052
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellingshoff.

American Electric Power Services Corporation
Appalachian Power Company
Columbus Southern Power Company
Indiana Michigan Power Company
Kentucky Power Company
Kingsport Power Company
Ohio Power Company
Wheeling Power Company

Docket No. QM07-4-000

ORDER GRANTING APPLICATION TO TERMINATE PURCHASE OBLIGATION

(Issued July 18, 2007)

1. On April 19, 2007, American Electric Power Services Corporation, on behalf of certain operating companies¹ of the American Electric Power System, (collectively AEP) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)² and section 292.310 of the Commission's regulations³ seeking termination on a service territory-wide basis of the obligation of these franchised utility affiliates to enter into new power purchase obligations or contracts to purchase electric energy from qualifying cogeneration and small power production facilities (QFs) with net capacity in excess of 20 MW. In this order, we grant AEP's application.

¹ Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company. In its application, AEP refers to these franchised utility affiliates as the AEP East system.

² 16 U.S.C.A. § 824a-3(m) (West Supp. 2006).

³ 18 C.F.R. § 291.310 (2007).

Background

2. On October 20, 2006, the Commission issued Order No. 688,⁴ in which the Commission revised its regulations governing utilities' obligations to purchase electric energy produced by QFs. Order No. 688 implements PURPA section 210(m),⁵ which, generally speaking, 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 markets.

3. As relevant here, the Commission found in Order No. 688 that the markets administered by PJM Interconnection, LLC (PJM) satisfy the criteria of PURPA section 210(m)(1)(A).⁶ Accordingly, section 292.309(e) of the Commission's regulations established a rebuttable presumption that PJM provides large QFs (over 20 MW net capacity) interconnected with member electric utilities with nondiscriminatory access to markets described in section 210(m)(1)(A).⁷

AEP's Filing

4. In its application, AEP states that it meets the requirements for relief under section 292.309(a)(1) of the Commission's regulations.⁸ AEP states that it is a member of PJM. AEP also states that it is relying on the rebuttable presumptions contained in section 292.309(e) that, as a member of PJM, it should be relieved of the obligation to purchase electric energy from QFs larger than 20 MW net capacity. Accordingly, AEP asks for relief, on a service territory-wide basis for the AEP East system, of the requirement to

⁴ New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, Order No. 688, 71 Fed. Reg. 64,342 (2006), FERC Stats. & Regs. ¶ 31,233 (2006).

⁵ Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005. *See* Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-69 (2005).

⁶ 16 U.S.C.A. § 842a-3(m)(1)(A) (West Supp. 2006); *see* 18 C.F.R. § 292.309(a)(1) (2007).

⁷ 18 C.F.R. § 292.309(e) (2007).

⁸ 18 C.F.R. § 292.309(a)(1) (2007).

enter into new power purchase obligations or contracts⁹ with QFs over 20 MW net capacity.

Notice and Responsive Pleadings

5. Notice of AEP's filing was mailed by the Commission on April 24, 2007 to each of the eleven potentially-affected QFs identified in AEP's application.¹⁰ Notice of AEP's filing was published in the *Federal Register*, 72 Fed. Reg. 23,813 (2007), with interventions and protests due on or before May 17, 2007. PJM, Gauley River Power Partners, LP, and PPG filed timely motions to intervene. The Electricity Consumers Resource Council (ELCON) filed a timely motion to intervene and comments. American Forest & Paper Association (American Forest & Paper) filed a timely motion to intervene and protest.

6. ELCON argues that the Commission should wait until it addresses the requests for rehearing of Order No. 688 before it responds to AEP's application. On rehearing of Order No. 688, ELCON has asked the Commission to adopt different procedures and criteria for the analysis of section 210(m) applications; ELCON asks the Commission to apply those procedures and criteria to AEP's application. ELCON has attached a copy of its request for rehearing of Order No. 688 to its intervention.

⁹ AEP states that it has existing contracts with QFs in its East system territory. AEP states that it is not requesting to terminate these existing QF contracts or to obtain relief from any obligation to purchase energy or capacity from any QF in its East system territory with which AEP has an existing contract.

¹⁰ AEP identifies eleven potentially-affected QFs in its application: AE Operations, LLC; Brookfield Power; Chillicothe Paper Inc.; Eastman Chemical Co.-TN Ops; Gauley River Power Partners, LP; Hoechst Celanese; Waste Management of Indiana; Weyerhaeuser; U.S. Army-Radford; University of Norte Dame and PPG Industries Inc. Natrium and we rely upon this representation. It is not clear that all eleven of these QFs are over 20 MW, however.

AEP states that it served notice of its filing on each of the potentially-affected QFs named in its application on April 18, 2007. AEP also mailed its filing to four affected state commissions. In the April 24 Commission letter notifying the eleven potentially affected QFs of AEP's filing, the Commission explained how to access the filing on line, the comment date, and procedures for intervention and protest.

7. American Forest & Paper argues that AEP has made no factual demonstration that there is a meaningful competitive market for long term sales of energy and capacity in its footprint, and notes that AEP instead relies on the rebuttable presumptions established in Order No. 688, a Final Rule that is still subject to outstanding request for rehearing.¹¹

8. On May 31, 2007, AEP filed an answer opposing the interventions of American Forest & Paper and ELCON.

Discussion

Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

10. With regard to the opposed motions to intervene of American Forest & Paper and ELCON, Rule 214 states that a movant must demonstrate that it has an interest that may be directly affected by a proceeding.¹² We find that American Forest & Paper has demonstrated such an interest, but ELCON has not. American Forest & Paper states that its member companies own and operate QFs in the PJM region, including specifically in AEP's service territory. These American Forest & Paper members have an interest that may be directly affected by this proceeding, and, accordingly, we will grant American Forest and Paper intervenor status.

11. By contrast, ELCON states that many ELCON members operate major facilities within the footprint of PJM and at least one ELCON member operates a QF in the region and therefore will be affected by the outcome of the proceeding. However, ELCON does not assert that it has any members within the AEP service territory. ELCON is primarily concerned with the precedential effect of the Commission determination in this proceeding. However, the possible precedential effect of a Commission determination

¹¹ In fact, American Forest & Paper states that the issues it raises here have been raised and are pending on rehearing of Order No. 688. *See* American Forest & Paper Intervention at 4-5.

¹² *See* 18 C.F.R. § 385.214(b)(2)(ii) (2006).

normally is not, by itself, a basis for intervention.¹³ Accordingly, we find that ELCON has not shown an interest in this proceeding that warrants granting its motion to intervene.

12. While we are permitting American Forest & Paper to intervene in this proceeding because it has a member in the affected AEP service territory, we remind American Forest & Paper and all membership organizations that going forward, when seeking to intervene in case-specific adjudications such as this one, they are expected to confine their comments to specific factual and legal arguments raised in the individual proceeding. We do not intend to encourage, or permit, movants to renew arguments made in a generic proceeding in case-specific dockets. In addition, we expect that membership organizations seeking to intervene in a case-specific proceeding on the basis that they have a member in a relevant geographic area, or are representing a specific member or members, will state that member's identity and comply with section 385.214(b) of our regulations.

Commission Determination

13. AEP, as a member of PJM, relies upon the rebuttable presumptions set forth in section 292.309(e) of our regulations, *i.e.*, that PJM provides QFs larger than 20 MW net capacity nondiscriminatory access to independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy.¹⁴ The potentially affected QFs identified by AEP were provided notice of AEP's application and none protested.¹⁵ Accordingly, we find, based on the un rebutted statements by AEP in its application, that AEP provides QFs larger than 20 MW nondiscriminatory access to independently administered, auction-based day ahead and real time wholesale markets for

¹³ *E.g.*, *Duke Energy Shared Services, Inc.*, 119 FERC ¶ 61,146 (May 17, 2007); *Northeast Utilities Service Co.*, 53 FERC ¶ 61,135 at 61,456 (1990); *New England Power Co.*, 37 FERC ¶ 61,078 at 61,196-97 (1986). In this regard, both American Forest & Paper and ELCON also state that the arguments they make in this proceeding are the same arguments they are making on rehearing of Order No. 688. The appropriate forum for addressing those arguments is the rehearing of Order No. 688, not this proceeding. *Cf. Niagara Mohawk Power Corp. v. Huntley Power LLC*, 105 FERC ¶ 61,321 at P 7 & n.7 (2003) (Commission has broad discretion in managing its proceedings).

¹⁴ 18 C.F.R. §§ 292.309(a)(1), .309(e) (2007).

¹⁵ To the extent that a potentially-affected QF is 20 MW or smaller, this order does not terminate the purchase obligation as to such QF.

the sale of electric energy and to wholesale markets for long-term sales of capacity and electric energy. We, therefore, will grant AEP's request to terminate its obligation under section 292.303(a) of our regulations to enter into new power purchase obligations or contracts with QFs that have a capacity in excess of 20 MW net capacity and that are in the service territories of AEP's operating companies located in PJM.¹⁶

14. With regard to American Forest & Paper's protest, we find that the arguments being raised are not case-specific to AEP's application, and instead are a restatement of arguments made by American Forest & Paper in Docket No. RM06-10-001, the rehearing of Order No. 688. Similarly, we also note that, even if we were to grant the motion to intervene of ELCON, the result we reach here would not change. Like American Forest & Paper, the arguments raised by ELCON are not case-specific to AEP's application, and instead are a reiteration of arguments made on rehearing in Docket No. RM06-10-001. The Commission has recently issued an order denying rehearing of Order No. 688,¹⁷ reaffirming its analysis of section 210(m) insofar as the processing and outcome of this proceeding is concerned.

The Commission orders:

The application of American Electric Power Services Corporation, filed on behalf of certain of its operating companies, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company, for termination on a service-wide basis of the obligation of these franchised utility affiliates

¹⁶ 18 C.F.R. § 292.309(a) (2007). If at any time a QF believes that it does not have nondiscriminatory access to markets that satisfy the criteria for relieving an electric utility of its purchase obligation, the QF may file an application pursuant to section 292.311 of our regulations, 18 C.F.R. § 292.311 (2007), for an order reinstating the electric utility's purchase obligation.

¹⁷ See New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, Order No. 688-A, 72 Fed. Reg. 35,872 (2007), FERC Stats. & Regs. ¶ 31,250 (2007).

to enter into new power purchase obligations or contracts with QFs that have a net capacity in excess of 20 MW is hereby granted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

120 FERC ¶ 61,265

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

American Electric Power Service Corporation
Appalachian Power Company
Columbus Southern Power Company
Indiana Michigan Power Company
Kentucky Power Company
Kingsport Power Company
Wheeling Power Company

Docket No. QM07-4-001

ORDER ON CLARIFICATION

(Issued September 21, 2007)

1. On July 31, 2007, a group of 24 membership organizations¹ (Membership Organizations) sent a letter to the Commission regarding an order issued in this proceeding on July 18, 2007,² which the Membership Organizations contend detrimentally changed the Commission's policy on interventions. In this order, the Commission *sua sponte* clarifies the scope and intent of the July 18 Order.

¹ American Chemistry Council, American Forest & Paper Association (American Forest & Paper), American Iron and Steel Institute, American Public Gas Association, American Public Power Association, American Wind Energy Association, Association of Businesses Advocating Tariff Equity, Carolina Utility Customers Association, Coalition of Midwest Transmission Customers, Council of Industrial Boiler Owners (CIBO), Electricity Consumers Resource Council (ELCON), Electric Power Supply Association, Independent Petroleum Association of America, Industrial Energy Consumers of PA, Industrial Energy Users – Ohio, Louisiana Energy Users Group, National Rural Electric Cooperative Association (NRECA), Natural Gas Supply Association, NEPOOL Industrial Customer Coalition, PJM Industrial Customer Coalition, Process Gas Consumers Group, Southeast Electricity Consumers Association, Steel Manufacturers Association, and West Virginia Energy Users Group.

² *American Electric Power Service Corporation*, 120 FERC ¶ 61,052 (2007) (July 8 Order).

Background

2. On July 18, 2007, the Commission issued an order granting an application filed by certain operating companies³ of the American Electric Power Service Corporation (collectively, AEP) to terminate on a service territory-wide basis the obligation of these franchised electric utility affiliates to enter into new power purchase obligations or contracts to purchase electric energy from qualifying cogeneration and small power production facilities (QFs) with net capacity in excess of 20 MW.⁴

3. As relevant here, ELCON and American Forest & Paper filed timely motions to intervene.⁵ AEP filed an answer opposing the two interventions. Upon examination of the opposed motions to intervene, the Commission applied Rule 214 of the Commission's Rules of Practice and Procedure,⁶ which states that a motion to intervene must state the movant's interest in the proceeding in sufficient detail to demonstrate that the movant has an interest that may be directly affected, including any interest as a consumer, customer, competitor, or security holder of a party, or the movant's participation is in the public interest. The Commission found that American Forest & Paper had demonstrated such an interest, but ELCON had not. The Commission stated that American Forest & Paper had an interest in the proceeding because its member companies own and operate QFs in the PJM region, including specifically in AEP's service territory. By contrast, the Commission stated that ELCON had not shown an interest in the proceeding that warranted granting its motion to intervene. The Commission observed that ELCON did not assert that it has members within AEP's service territory. The Commission stated that ELCON was primarily concerned with the precedential effect of the Commission determination in the July 18 Order, and that precedential effect was not, by itself, normally a basis for intervention.

4. The Commission reminded American Forest & Paper and all membership organizations that, "when seeking to intervene in case-specific adjudications such as this

³ Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, and Wheeling Power Company.

⁴ The application was filed pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C.A. § 824a-3(m) (West Supp. 2006), and section 292.310 of the Commission's regulations. 18 C.F.R. § 291.310 (2007).

⁵ ELCON included comments with its motion to intervene; American Forest & Paper included a protest.

⁶ See 18 C.F.R. § 385.214(b)(2)(ii) (2007).

one, they are expected to confine their comments to specific factual and legal arguments raised in the individual proceeding.”⁷ The Commission continued:

We do not intend to encourage, or permit, movants to renew arguments made in a generic proceeding in case-specific dockets. In addition, we expect that membership organizations seeking to intervene in a case-specific proceeding on the basis that they have a member in a relevant geographic area, or are representing a specific member or members, will state that member's identity and comply with section 385.214(b) of our regulations.[⁸]

Comments

5. The Membership Organizations’ letter states that the July 18 Order is “quite troubling” because it singles out a specific class of intervenor – membership organizations – and suggests that their intervention will not be permitted if the intervention raises general policy issues not confined to the facts of the case. The Membership Organizations state that it would be arbitrary and capricious for the Commission to discriminate against membership organizations by attempting to restrict the scope of their participation in such a manner. The Membership Organizations observe that the Commission has the discretion to develop new policy through adjudication rather than rulemakings, and that sometimes adjudication will establish a new policy that is subsequently adopted as generic policy. For that reason, the Membership Organizations argue it is important that they be able to intervene in adjudicatory proceedings where new policy is developed, consistent with Rule 214, so they can offer their views on important policy matters.

6. The Membership Organizations argue that the Commission’s intervention rules allow intervention by membership organizations as well as by individual stakeholders. They note that, under Rule 214(b), intervention is permitted by anyone who “has or *represents* an interest.”⁹ They add that it is appropriate for the Commission to welcome comments from membership organizations because such organizations may represent consensus views of an entire stakeholder sector. The Membership Organizations further add that individual stakeholders may lack the financial resources to present individual comments, and that their intervention rights will be diminished if comments by Membership Organizations addressing precedential implications are disallowed in

⁷ July 18 Order, 120 FERC ¶ 61,052 at P 12.

⁸ *Id.*

⁹ Membership Organizations’ Letter at 1 (citing 18 C.F.R. § 385.214(b) (2007) (emphasis added)).

adjudicatory proceedings. The Membership Organizations further argue that, if the Commission makes policy in a relatively narrow proceeding, there may be no customer, utility, local distribution company or other relevant entity willing to participate, and without the input of membership organizations there could be no meaningful comment from a particular sector.

7. The Membership Organizations state that they appreciate the fact that the Commission may be more likely to reject arguments made in an adjudication that reiterate arguments earlier made by that intervenor in a rulemaking proceeding which the Commission has rejected. But they add that there is no reason to single out membership organizations for the admonition that arguments recently rejected by the Commission are less persuasive than arguments made for the first time, or to deny intervenor status based on the arguments included in the comments. The Membership Organizations contend that there have been numerous instances when membership organizations have filed pleadings in Commission proceedings alerting the Commission to a problem and need for policy change that eventually gained acceptance and led to rule changes.

8. The Membership Organizations argue that, where organizations meet the standard of Rule 214, the Commission should encourage informed pleadings setting out the precedential implications of policy initiatives and their implementation. They argue that this will help the Commission to improve its regulation and encourage stakeholder participation.

Commission Determination

9. In response to the concerns expressed by the Membership Organizations regarding intervention, we clarify that our general intervention policy has not changed. The Commission agrees with the Membership Organizations that “[w]here membership associations meet the standard of Rule 214, [the Commission] should encourage informed pleadings”¹⁰ In this instance, however, ELCON did not meet the standard of Rule 214 because its motion to intervene did not state in “sufficient factual detail” how it represents an interest “that may be directly affected by the outcome of the proceeding,” as required by Rule 214.

10. The Commission acknowledges that it has the discretion to develop new policy by rulemaking or by adjudication, and recognizes the importance of participation of Membership Organizations and individual parties in such proceedings. But in the July 18 Order, the Commission was not developing generic policy through adjudication. Commission policy with respect to termination of the mandatory purchase obligation under PURPA was the subject of a rulemaking.¹¹ The July 18 Order followed rehearing

¹⁰ *Id.* at 3.

¹¹ *New PURPA Section 210(m) Regulations Applicable to Small Power Production*

of the final rule and did not represent development of new policy, but rather application of the Commission's policy established in the rulemaking. And both ELCON and American Forest & Paper participated in the rulemaking, as did several other signatories to the Membership Organizations' letter.¹²

11. The Commission's statements in the July 18 Order regarding intervention also must be read in the context in which they were made. Specifically, we were addressing a situation in which ELCON and American Forest & Paper were making the very same generic arguments in a fact-specific proceeding that they were making at the same time in the then ongoing generic rulemaking proceeding in Docket No. RM06-10-001; ELCON and American Forest & Paper had filed requests for rehearing in that generic rulemaking proceeding and they made the same generic arguments in their requests for rehearing, and the same arguments they have subsequently raised on judicial review in that generic rulemaking proceeding. In fact, the ELCON filing here constituted a copy of their rehearing request in the generic rulemaking proceeding, but with a cover letter.

12. In sum, our intervention policy has not changed, but rather here we simply applied it in a particular circumstance. Thus, membership organizations are free to continue to pursue their concerns as they have in the past as long as they meet the requirements of Rule 214.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.
Acting Deputy Secretary.

and Cogeneration Facilities, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006), *order on reh'g*, Order No. 688-A, 119 FERC ¶ 61,305 (2007).

¹² *E.g.*, CIBO, American Chemistry Council, and NRECA.