

138 FERC ¶ 61,108  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

ALLETE, Inc.

Docket No. QM12-1-000

ORDER GRANTING APPLICATION TO TERMINATE  
MANDATORY PURCHASE OBLIGATION

(Issued February 14, 2012)

1. On November 16, 2011, ALLETE, Inc. (ALLETE) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>1</sup> and section 292.310 of the Commission's regulations.<sup>2</sup> ALLETE seeks termination of the obligation to enter into new contracts or obligations to purchase energy and capacity from qualifying cogeneration and small power production facilities (QF) with a net capacity in excess of 20 MW on a service territory-wide basis for its interconnected system under the control of Midwest Independent Transmission System Operator, Inc. (MISO). In this order, we grant ALLETE's request to terminate the mandatory purchase obligation effective November 16, 2011.

**I. Background**

2. On October 20, 2006, the Commission issued Order No. 688,<sup>3</sup> revising its regulations governing utilities' obligations to purchase electric energy produced by QFs. Order No. 688 implements PURPA section 210(m),<sup>4</sup> which provides for termination of

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<sup>1</sup> 16 U.S.C. § 824a-3(m) (2006).

<sup>2</sup> 18 C.F.R. § 292.310 (2011).

<sup>3</sup> *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. Am. Forest & Paper Ass'n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

<sup>4</sup> Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005 (EPAct 2005). *See* Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-69 (2005).

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. The Commission found in Order No. 688 that the markets administered by MISO were one of the markets that satisfy the criteria of PURPA section 210(m)(1)(A).<sup>5</sup> Accordingly, section 292.309(e) of the Commission's regulations established a rebuttable presumption (for MISO and other Day 2 markets<sup>6</sup>) that MISO 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).<sup>7</sup> The Commission also established a second rebuttable presumption, contained in PURPA section 292.309(d)(1) of the regulations, that a QF with a net capacity at or below 20 MW does not have nondiscriminatory access to markets.<sup>8</sup>

## **II. Application to Terminate Purchase Obligation**

3. ALLETE asserts that it satisfies the requirements of PURPA section 210(m)(1) and sections 292.309 and 292.310 of the Commission's regulations.<sup>9</sup> ALLETE states that it is a member of MISO, and has transferred operational control over its transmission facilities to MISO. ALLETE contends it should be relieved of the mandatory obligation to purchase electric energy and capacity from QFs with a capacity greater than 20 MW because the Commission has established a rebuttable presumption that those QFs have nondiscriminatory access to the MISO markets. Further, ALLETE asserts the termination of its mandatory purchase obligation would be consistent with similar requests submitted by Xcel Energy, Alliant Energy Corporate Services, Duke Energy Corporation, and MDU Resources Group.<sup>10</sup>

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<sup>5</sup> 16 U.S.C. § 842a-3(m)(1)(A) (2006); *see* 18 C.F.R. § 292.309(a)(1) (2011).

<sup>6</sup> Order No. 688 at P 8, "Day 2" markets are auction based day-ahead and real time markets and include PJM Interconnection, LLC, ISO New England, and the New York Independent System Operator as well as MISO.

<sup>7</sup> 18 C.F.R. § 292.309(e) (2011).

<sup>8</sup> 18 C.F.R. § 292.309(d)(1) (2011).

<sup>9</sup> 18 C.F.R. §§ 292.309-.310 (2011).

<sup>10</sup> *See Northern States Power Co., a Minnesota Corp.*, 136 FERC ¶ 61,093 (2011) (*Northern States*); *Duke Energy Shared Services, Inc., et al.*, 119 FERC ¶ 61,146 (2007); *Alliant Energy Corporate Services, Inc., et al.*, 123 FERC ¶ 61,155 (2008); *Montana-Dakota Utilities Company*, 126 FERC ¶ 61,121 (2009); *accord Detroit Edison Company*, 131 FERC ¶ 61,039 (2010).

### **III. Notice of Filing and Responsive Pleadings**

4. Notice of ALLETE's filing was published in the *Federal Register*, 76 Fed. Reg. 72,695 (2011), with interventions or protests due on or before December 14, 2011. The Commission served notice of the application on the potentially-affected QFs identified by ALLETE's application by letter dated November 18, 2011.
5. On December 14, 2011, Highwater Wind LLC<sup>11</sup> (Highwater) and Gadwall Wind LLC<sup>12</sup> (Gadwall) (together Joint Protestors) jointly filed a motion to intervene and protest. On December 27, 2011, ALLETE filed an answer to the protest.
6. Highwater and Gadwall contend that ALLETE's application should be denied with respect to their QFs because they claim a legally enforceable obligation was established on February 15, 2011, when both Highwater and Gadwall provided notice to ALLETE along with a draft power purchase agreement based upon an existing negotiated PPA together with full details of the projects. Highwater and Gadwall argue that legally enforceable obligations preceded ALLETE's request to terminate the mandatory purchase obligation and should be grandfathered by the Commission.
7. Joint Protestors state that they have filed a complaint with the Minnesota commission seeking to enforce their rights under PURPA, and contend that, if the Commission approves ALLETE's application, it should exclude the Gadwall and Highwater QF projects. Joint Protestors additionally argue that, if the Commission does not exclude their respective QFs, the Commission would be encouraging and rewarding ALLETE's delay tactics and race to the courthouse strategy to avoid its PURPA obligations. Joint Protestors further argue that, if such behavior is rewarded, then QFs should file a complaint with the relevant state commission almost immediately after providing notice to the utility.
8. Finally, Joint Protestors dispute ALLETE's assertion that Minnesota Power, its Minnesota operating division, has no PURPA obligation to either Highwater or Gadwall because they interconnect with ITC Midwest LLC (ITC) and Northern States Power Company (Northern States), respectively, because ITC and Northern States no longer have PURPA obligations with respect to QFs greater than 20 MW.<sup>13</sup> Joint Protestors request that the Commission determine that the lack of obligations of the utilities

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<sup>11</sup> Highwater states that it self-certified a 33 MW wind QF in Cottonwood County, Minnesota in Docket QF11-138-000 on February 15, 2011.

<sup>12</sup> Gadwall states it self-certified a 51 MW wind QF located in Lyon County, Minnesota in Docket QF11-141-000 on February 15, 2011.

<sup>13</sup> Joint Protest at 8-11.

interconnecting with the QFs has no effect on ALLETE's obligation to Highwater and Gadwall.

#### **IV. Discussion**

##### **A. Procedural Matters**

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motion to intervene serve to make the Joint Protestors parties to this proceeding.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept ALLETE's answer because it has provided information that assisted us in our decision-making process.

##### **B. Commission Determination**

11. ALLETE's request to terminate the requirement to enter into new contracts or obligations to purchase energy or capacity from QFs that have a net capacity greater than 20 MW is premised upon the rebuttable presumption set forth in section 292.309(e) of the Commission's regulations, i.e., that MISO 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 and to wholesale markets for long-term sales of capacity and electric energy.<sup>14</sup> The potentially-affected QFs identified by ALLETE were provided notice of ALLETE's application. Highwater and Gadwall protested. As explained below, we find, based on the unrebutted statements in ALLETE's application, that ALLETE provides QFs larger than 20 MW nondiscriminatory access to independently administered, auction-based day-ahead and real-time wholesale markets for the sale of electric energy and to wholesale markets for long-term-sales of capacity and electric energy. As discussed, below, we find that the protest of Highwater and Gadwall may lack merit. Accordingly, we grant ALLETE's request to terminate the mandatory purchase obligation pursuant to section 210(m) of PURPA; we grant the request with respect to all QFs larger than 20 MW, including Highwater and Gadwell, unless the Minnesota commission should find that Highwater and Gadwell initiated a proceeding to establish, or has established, a legally enforceable obligation prior to May 12, 2011 as explained below.

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<sup>14</sup> 18 C.F.R. §§ 292.309(a)(1), 292.309(e) (2011); Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 117; *see generally Public Service Company of New Hampshire*, 131 FERC ¶ 61,027, at P 17-22 (2010), *reh'g denied*, 134 FERC ¶ 61,041 (2011) (*PSNH*).

12. As noted above, Highwater and Gadwall filed a protest urging the Commission to deny ALLETE's application with respect to their two projects; they allege that the Highwater and Gadwall QFs have satisfied the requirements to create a legally enforceable obligation with ALLETE and have filed a complaint against ALLETE with the Minnesota commission so that ALLETE's obligation to purchase from the two QFs has been "grandfathered" pursuant to 18 C.F.R. § 292.314 (2011).<sup>15</sup>

13. While the Commission's regulations provide for the grandfathering of rights in certain circumstances, it is unclear whether those circumstances are applicable here and thus whether grandfathering is applicable here. Highwater and Gadwall are QFs that are in the service territory of Northern States and, in fact, Gadwall is interconnected with Northern States. Northern States has been relieved, effective May 12, 2011, of the obligation to enter into new contracts or obligations with QFs larger than 20 MW based on a finding that QFs larger than 20 MW in Northern States' service territory have nondiscriminatory access to independently administered, auction-based day-ahead and real-time wholesale markets for the sale of electric energy and to wholesale markets for long-term-sales of capacity and electric energy.<sup>16</sup> It appears that Highwater and Gadwall thus may be covered by the termination of Northern States' mandatory purchase obligation. That is because, once the Commission makes a finding that a particular QF located in the service territory of an electric utility has nondiscriminatory access to markets and relieved that electric utility of the mandatory purchase obligation, no electric utility --including no adjacent electric utility -- shall be required to enter into a new contract or obligation with that QF.<sup>17</sup> It thus appears that Highwater and Gadwall may be covered by the Northern States termination order and ALLETE would not be obligated to enter into a new contract or obligation with those QFs. However, to the extent that Highwater and Gadwall established an obligation or contract with ALLETE prior to the effective date of the Northern States order, that is, prior to May 12, 2011,<sup>18</sup> their rights to take advantage of the mandatory purchase obligation would be grandfathered.

14. In this regard, Highwater and Gadwall filed a complaint on November 1, 2011, with the Minnesota commission, seeking a determination that each had established a legally enforceable obligation effective February 15, 2011. The Commission has 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

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<sup>15</sup> Joint Protest at 1-6.

<sup>16</sup> *Northern States*, 136 FERC ¶ 61,093 at P 14.

<sup>17</sup> Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 83.

<sup>18</sup> *Northern States*, 136 FERC ¶ 61,093 at P 1.

petition for relief pursuant to section 292.310 of the Commission's regulations will be entitled to have any contract or obligation that may be established by state law grandfathered.<sup>19</sup> While it appears, on its face, that the November 1, 2011 filing by Highwater and Gadwell with the Minnesota commission to initiate a proceeding to establish a legally enforceable obligation post-dated the effective date of the *Northern States* order, May 12, 2011, Highwater and Gadwell argue that an earlier event, the sending of a letter to ALLETE on February 15, 2011, established legally enforceable obligations.<sup>20</sup> Whether this earlier event satisfies the Minnesota commission's process for creating a legally enforceable obligation, and thus whether there is a contract or obligation that should be grandfathered, is a matter of state law to be determined by the Minnesota commission.<sup>21</sup>

The Commission orders:

We grant ALLETE's request to terminate the mandatory purchase obligation pursuant to section 210(m) of PURPA with respect to QFs larger than 20 MW, effective November 16, 2011, as discussed above.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>19</sup> *PSNH*, 134 FERC ¶ 61,041 at P 8-11; *PSNH*, 131 FERC ¶ 61,027 at P 24; *accord* Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 213; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 137-40.

<sup>20</sup> We note that two other QFs, with the same upstream owner developer (Allco Renewable Energy Limited) as Highwater and Gadwell, protested the Northern States application. Among other things, the Allco-associated QFs in *Northern States* similarly claimed that they had established legally enforceable obligations based on sending letters to Northern States on February 15, 2011. *Northern States*, 136 FERC ¶ 61,093 at P 24.

<sup>21</sup> *See Northern States*, 136 FERC ¶ 61,093 at P 24; *PSNH*, 134 FERC ¶ 61,041 at P 10 .