

139 FERC ¶ 61,069  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Consumers Energy Company

Docket No. QM12-3-000

ORDER GRANTING APPLICATION TO TERMINATE  
MANDATORY PURCHASE OBLIGATION

(Issued April 24, 2012)

1. On January 25, 2012,<sup>1</sup> Consumers Energy Company (Consumers) submitted an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>2</sup> and section 292.310 of the Commission's regulations<sup>3</sup> to terminate the requirement under section 292.303(a) of the Commission's regulations<sup>4</sup> to enter into new power purchase obligations or contracts to purchase electric energy and capacity from any qualifying cogeneration or small power production facilities (QF) with a net capacity greater than 20 MW in its service territory using transmission service over the facilities of Michigan Electric Transmission Company, LLC (METC) under the control of the Midwest Independent Transmission System Operator, Inc. (MISO).
2. In this order, we grant Consumers' request to terminate the mandatory purchase obligation pursuant to section 210(m) of PURPA and section 292.310 of the Commission's regulations on a service territory-wide basis for QFs that have a net capacity greater than 20 MW effective January 25, 2012.

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<sup>1</sup> On January 26, 2012, Consumers corrected the name of the county associated with one of the potentially affected QFs, namely Scenic Valley Dairy, LLC, which was listed incorrectly on page 6 of Attachment A-1 to the application.

<sup>2</sup> 16 U.S.C. § 824a-3(m) (2006).

<sup>3</sup> 18 C.F.R. § 292.310 (2011).

<sup>4</sup> 18 C.F.R. § 292.303(a) (2011).

## **I. Background**

3. On October 20, 2006, the Commission issued Order No. 688,<sup>5</sup> revising its regulations governing utilities' obligations to purchase electric energy produced by QFs. Order No. 688 implements PURPA section 210(m),<sup>6</sup> 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 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>7</sup> Accordingly, section 292.309(e) of the Commission's regulations established a rebuttable presumption 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>8</sup> The Commission also established a second rebuttable presumption, contained in 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>9</sup>

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

4. Consumers states that, as a member of MISO and a transmission dependent utility, it takes network transmission service from MISO under MISO's Open Access Transmission Tariff (OATT).

5. Consumers requests relief from the mandatory purchase obligation stating it satisfies the condition in section 292.309(a) of the Commission's.<sup>10</sup> Specifically, Consumers states it is relying on the rebuttable presumption contained in section

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<sup>5</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>6</sup> Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005 (EPAAct 2005). *See* Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-69 (2005).

<sup>7</sup> 16 U.S.C. § 842a-3(m)(1)(A) (2006); *see* 18 C.F.R. § 292.309(a)(1) (2011).

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

<sup>9</sup> 18 C.F.R. § 292.309(d)(1) (2011).

<sup>10</sup> 18 C.F.R. § 292.309(a) (2011).

292.309(e) of the regulations for markets administered by MISO.<sup>11</sup> Consumers further claims that it satisfies the requirements of PURPA section 210(m)(1) and sections 292.309 and 292.310 of the Commission's regulations.<sup>12</sup> Moreover, Consumers asserts similar relief has been granted on this basis to other public utilities in MISO.<sup>13</sup>

6. Consumers also requests a blanket waiver of section 292.310(c) of the Commission's regulations<sup>14</sup> to identify in Attachment A-1 any QFs 1 MW or smaller as potentially affected QFs. Consumers states that the number of QFs that are 1 MW or smaller has increased significantly as a result of Michigan's net metering program, and that it is seeking blanket waiver because of the burden associated with identifying and listing the information for these small QFs. Nevertheless, Consumers also states that it has included in Attachment A-1 QFs that are 1 MW or smaller where information was readily available.

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

7. Notice of the application was published in the *Federal Register*, 77 Fed. Reg. 5006 (2012). Interventions and protests were due on or before February 22, 2012. Notice of the application was also mailed by the Commission on January 26, 2012 to each of the potentially-affected QFs identified in the application.

8. On February 14, 2012, Midland Cogeneration Venture Limited Partnership (Midland) filed a motion to intervene. In its intervention, Midland comments that the Commission has yet to rule on the termination of Midland's Facilities Agreement with

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<sup>11</sup> 18 C.F.R. §§ 292.309(a), .309(e) (2011); accord *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 and Paper Ass'n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

<sup>12</sup> 18 C.F.R. § 292.309-.310 (2011).

<sup>13</sup> Consumers' Transmittal Letter at 5 (*citing Detroit Edison Co.*, 131 FERC ¶ 61,039 (2010); *Northern States Power Co.*, 136 FERC ¶ 61,093 (2011); and *Southern Indiana Gas & Electric Co.*, 137 FERC ¶ 62,134 (2011)).

<sup>14</sup> 18 C.F.R. § 292.310(c) (2011) (requiring the application to include a list of all potentially affected QFs).

Consumers in Docket No. ER12-420-000, leaving Midland's access to non-discriminatory interconnection service under the MISO tariff unresolved.<sup>15</sup>

9. On February 21, 2012, Michigan QFs<sup>16</sup> filed a motion to intervene. Subsequently, on February 22, 2012, Michigan QFs filed a response to Consumers' application. Michigan QFs state the wording of the last sentence of Consumers' application differs from that of Section 210(m)(1) of PURPA,<sup>17</sup> and that it is not clear whether Consumers intends to terminate or modify existing QF agreements. Michigan QFs argue that Consumers' requested relief should more closely parallel the language of PURPA, i.e., that Consumers shall no longer be required to enter into any new contracts or obligations to purchase electric energy from qualifying cogeneration or small power production facilities with a generating capacity greater than 20 MW.

10. On February 22, 2012, Fremont Community Digester LLC (Fremont) filed a letter commenting that Fremont's QF generating capacity is 2.85 MW and that Consumers' application is not applicable to Fremont and will not affect the existing Renewable Energy Purchase Agreement between Fremont and Consumers.

11. On February 29, 2012, Consumers filed an answer stating that that the only relief it is seeking is with regard to entering into new contracts or obligations; it does not intend to terminate or modify existing agreements.<sup>18</sup> Additionally, Consumers indicates that because Fremont's capacity falls below the 20 MW threshold, the termination of the mandatory purchase obligation would not apply to Fremont. In response to Midland, Consumers states that a Generation Interconnection Agreement (GIA) has already been accepted by the Commission and will go into effect once the Facilities Agreement is terminated or appropriately amended.<sup>19</sup> Consumers concludes that the termination of the Facilities Agreement will not threaten Midland's access to the transmission system.

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<sup>15</sup> Midland Motion to Intervene at 2. As noted below, the Commission has since acted on that filing.

<sup>16</sup> Michigan QFs include: Cadillac Renewable Energy, LLC, Genesee Power Station Limited Partnership, Grayling Generating Station Limited Partnership, Hillman Power Company, LLC, TES Filer City Station Limited Partnership, Viking Energy of Lincoln, Inc., and Viking Energy of McBain, Inc.

<sup>17</sup> Michigan QFs Response to Consumers at 2.

<sup>18</sup> Consumers' Answer at 1.

<sup>19</sup> *Id.* at 2 (citing *Midwest Indep. Trans. Sys. Operator, Inc.*, 132 FERC ¶ 61,241, at P 35 (2010)).

#### IV. Discussion

##### A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. 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 Consumers' answer because it has provided information that assisted us in our decision-making process.

##### B. Commission Determination

14. Consumers, as a member of MISO, relies upon the rebuttable presumption set forth in section 292.309(e) of the Commission's regulations, namely, 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>20</sup> We find that MISO provides QFs larger than 20 MW non-discriminatory 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. Therefore, we grant Consumers' request to terminate the mandatory purchase obligation pursuant to section 210(m) of PURPA to enter into new contracts or obligations to purchase energy or capacity from QFs that have a net capacity greater than 20 MW net capacity in its service territory.

15. We also note that Consumers has affirmed that it is only seeking to terminate the obligation to enter into new power purchase obligations or contracts to purchase electric energy and capacity from any qualifying cogeneration or small power production facilities (QF) with a net capacity greater than 20 MW, and that it is not seeking to terminate or modify existing agreements.

16. Consumers' answer also states that the termination of the mandatory purchase obligation would not apply to Fremont because its 2.85 MW QF is below the 20 MW threshold, and we note that Consumers has not sought to rebut, and has not rebutted, the

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<sup>20</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 PP 17-22 (2010), *reh'g denied*, 134 FERC ¶ 61,041 (2011) (*PSNH*).

presumption contained in 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>21</sup>

17. With regard to Midland's arguments that there are unresolved issues relating to access to nondiscriminatory interconnection service, Consumers correctly points out that a GIA has already been filed and accepted by the Commission,<sup>22</sup> and that terminating the Facilities Agreement will not affect access because there is thus a successor GIA that will go into effect. In short, Midland's continued access to interconnection service is not threatened.<sup>23</sup>

18. Finally, Consumers requests a blanket waiver of section 292.310(c) of the Commission's regulations with respect to the need to identify in Attachment A-1 of its application any QFs that are 1 MW or smaller as potentially affected QFs. Consumers states that the number of QFs that are 1 MW or smaller has increased because of a Michigan net metering program. Consumers also claims there is a burden associated with identifying and listing the information for these small QFs that are 1 MW or less because Consumers may not possess the information required by section 292.310 of the regulations.

19. Even though QFs 1 MW or less are no longer required to file self-certifications with the Commission,<sup>24</sup> we explained in *Commonwealth Edison Company*,<sup>25</sup> that our regulations regarding notice do not draw size-based distinctions as to which QFs should be considered potentially affected QFs and which should not, and do not draw distinctions based on whether they are self-certified as QFs, Commission-certified as QFs, or not yet certified as QFs. In *ComEd*, we further stated that applying utilities should err on the side of broader identification and inclusion in, rather than exclusion from, the list of potentially affected QFs. Here Consumers sought to identify all QFs

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<sup>21</sup> 18 C.F.R. § 292.309(d)(1) (2011).

<sup>22</sup> *Midwest Indep. Trans. Sys. Operator, Inc.*, 132 FERC ¶ 61,241 (2010).

<sup>23</sup> Moreover, we note that we have since acted in Docket No. ER12-420-000. *Consumers Energy Company*, 139 FERC ¶ 61,014 (2012). The Commission accepted the cancellation filing effective January 15, 2012.

<sup>24</sup> 18 C.F.R. § 292.203(d)(1)(2011); see *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, Order No. 732, FERC Stats. & Regs. ¶ 31,306, at P 15, 35-40 (2010).

<sup>25</sup> *Commonwealth Edison Co.*, 135 FERC ¶ 61,005 (2011) at PP 41-44 (*ComEd*).

smaller than 1 MW. The only QFs not identified are those QFs smaller than 1 MW that participate in a net metering program and for which Consumers does not have the required information. Under these circumstances, we find Consumers' listing of potentially affected QFs sufficient and we will not require Consumers to do more. Our finding does not constitute a waiver of the notice requirements of section 292.310, though, but rather a determination that Consumers has complied; we will not grant a blanket waiver of the notice requirements in section 292.310 of the Commission's regulations.

The Commission orders:

(A) Consumers' request to terminate the mandatory purchase obligation, pursuant to section 210(m) of PURPA and section 292.310 of the Commission's regulations, on a service territory-wide basis to enter into new contracts or obligations to purchase energy or capacity from QFs with a net capacity larger than 20 MW is hereby granted, effective January 25, 2012, as discussed in the body of this order.

(B) Consumers' request for blanket waiver of section 292.310(c) of the Commission's regulations as it relates to QFs that are 1 MW or smaller is hereby denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.