

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Adrian Energy Associates, LLC
Cadillac Renewable Energy, LLC
Genesee Power Station, LP
Grayling Generating Station, LP
Hillman Power Company, LLC
T.E.S Filer City Station, LP
Viking Energy of Lincoln, Inc.
Viking Energy of McBain, Inc.

Docket No. EL05-85-000

v.

Michigan Public Service Commission
Commissioner J. Peter Lark
Commissioner Robert B. Nelson
Commissioner Laura Chapelle

NOTICE OF INTENT NOT TO ACT

(June 1, 2005)

1. In this notice we decline to initiate an enforcement action pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA).¹ As a result, Adrian Energy Associates, LLC, Cadillac Renewable Energy, LLC, Genesee Power Station, LP, Grayling Generating Station, LP, Hillman Power Company, LLC, T.E.S Filer City Station, LP, Viking Energy of Lincoln, Inc., and Viking Energy of McBain, Inc. (collectively, Petitioners) may bring an enforcement action directly in the appropriate court.

¹ 16 U.S.C. § 824a-3 (2000).

Background

2. Petitioners own and operate electric generation facilities that are certified as qualifying facilities (QFs) under PURPA. Petitioners entered into long term purchase power agreements (PPAs) with Consumers Energy Company (Consumers) during the mid-1980's through the early 1990's. At the time the PPAs were entered into, Consumers' avoided costs were based on coal plants that burned high sulfur or bituminous coal. According to the complaint, Petitioners elected to have Consumers' avoided costs calculated at the time the obligation was incurred. Therefore, Petitioners contend that Consumers' avoided costs should always be based on coal plants burning bituminous coal. Subsequent to the signing of the PPAs, Consumers rebuilt its coal plants to burn sub-bituminous coal and now Consumers calculates its payment to Petitioners based on the cost of sub-bituminous coal. Petitioners contend that this results in a lower payment than they are entitled to under PURPA.

3. On October 14, 2004, Petitioners filed a suit against Consumers in Michigan state court, Ingham County Circuit Court. The Ingham County Circuit Court deferred the matter to the Michigan Public Service Commission (MPSC). On February, 28, 2005, the MPSC issued a decision in favor of Consumers.

4. On March 30, 2005, Petitioners filed a complaint pursuant to section 210 of PURPA and Rules 206 and 207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 285.206 and 285.207 (2004), against the MPSC and Commissioners J. Peter Lark, Robert B. Nelson and Laura Chapelle. Petitioners argue that the MPSC's decision unlawfully: (1) revises the MPSC's previous determination of avoided costs in violation of the Commission's regulations implementing PURPA; (2) nullifies Petitioners' election to have their avoided costs calculated "up front" for the entire term of the contract contrary to the Commission's regulations implementing PURPA; (3) subjects the Petitioners to utility-type regulation in violation of PURPA; and (4) discriminates against Petitioners in violation of PURPA. Petitioners request that the Commission overturn the MPSC's finding that Consumers' avoided cost payment to Petitioners should be based on the cost of coal actually burned in the coal plants, not a specific type of coal (*i.e.*, bituminous coal), as asserted by Petitioners.

Notice of Filing, Answer and Interventions

5. Notice of Petitioners' complaint was published in the *Federal Register*, 70 Fed. Reg. 17,682 (2005), with the answer, comments, protests and motions to intervene due on or before April 20, 2005.

6. MPSC filed a timely answer to Petitioners' complaint. MPSC argues that the Commission should dismiss the complaint under PURPA and implementing precedent.

In addition, MPSC asserts that it is the Commission's policy not to entertain complaints that involve a state's application of its implementation of the Commission's regulatory directive for PURPA. In any event, MPSC argues that it was well within its authority under PURPA to find that Petitioners' position on energy payments is not consistent with the avoided costs provision of the PPAs.

7. Consumers filed a timely motion to intervene and protest. Electric Power Supply Association (EPSA) filed a timely motion to intervene and comments in support of the complaint.

8. Petitioners filed an answer to MPSC's answer and Consumers' protest. MPSC filed an answer to EPSA's comments.

Discussion

Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them 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) (2004), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Petitioners' answer to MPSC and Consumers or MPSC's answer to EPSA and will, therefore, reject them.

PURPA Claims

11. Petitioners' filing is fundamentally a challenge to MPSC's implementation of the Commission's PURPA regulations. Accordingly, we will treat the complaint as a petition for enforcement under section 210(h) of PURPA. Section 210(h)(2)(A) of PURPA provides that the Commission may undertake an enforcement action to require a "State regulatory authority" to implement the Commission's regulations under PURPA.

12. The Commission's enforcement authority under section 210(h)(2)(A) of PURPA, 16 U.S.C. § 824a-3(h)(2)(A) (2000), is discretionary. As the Commission pointed out in its 1983 Policy Statement, "the Commission is not required to undertake enforcement

action.”² If the Commission chooses not to undertake enforcement action within 60 days of the filing of the petition, the petitioner may then bring an enforcement action directly against the MPSC in the appropriate court.³

13. Notice is hereby given that the Commission declines to initiate an enforcement action under section 210(h)(2)(A) of PURPA.

By direction of the Commission.

Magalie R. Salas,
Secretary.

² Policy Statement Regarding the Commission’s Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978, 23 FERC ¶ 61,304 at 61,545 (1983) (Policy Statement). We note that the Commission has granted petitions for enforcement of PURPA on only two occasions. The Commission later vacated one of those actions. In the more recent grant of a petition for enforcement of PURPA, in *Gregory Swecker v. Midland Power Cooperative*, 105 FERC ¶ 61,238 (2003), 108 FERC ¶ 61,268 (2004) (*Swecker*), the Commission found after years of litigation that Midland Power Cooperative had abused its role as a “nonregulated electric utility” to frustrate the rights under PURPA of a small wind-powered QF that is owned by a farmer and his wife.

³ *Id.*; 16 U.S.C. § 824a-3(h)(2) (2000). The Commission may intervene in such a proceeding as a matter of right.