

119 FERC ¶ 61,146  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Shared Services, Inc.,  
Duke Energy Ohio, Inc.,  
Duke Energy Indiana, Inc., and  
Duke Energy Kentucky, Inc.

Docket No. QM07-2-000

ORDER GRANTING APPLICATION TO TERMINATE PURCHASE OBLIGATION  
AND DENYING LATE INTERVENTION

(Issued May 17, 2007)

1. On March 21, 2007, Duke Energy Shared Services, Inc., on behalf of its franchised utility affiliates, Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc. (collectively Duke Midwest) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978<sup>1</sup> (PURPA) and section 292.310 of the Commission's regulations<sup>2</sup> 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 energy and capacity from qualifying cogeneration and small power production facilities (QFs) with net capacity in excess of 20 MW. In this order, we grant Duke Midwest's application.

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

<sup>2</sup> 18 C.F.R. § 292.310 (2007).

## **Background**

2. On October 20, 2006, the Commission issued Order No. 688,<sup>3</sup> 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),<sup>4</sup> 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 the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) 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 that the Midwest ISO 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>6</sup>

## **Duke Midwest's Filing**

4. In its application, Duke Midwest states that it meets the requirements for relief under section 292.309(a)(1) of the Commission's regulations.<sup>7</sup> Duke Midwest states that it is a member of the Midwest ISO. Duke Midwest also states that it is relying on the rebuttable presumptions contained in section 292.309(e) that, as a member of the Midwest ISO, it should be relieved of the obligation to purchase electric energy from QFs larger than 20 MW net capacity. Accordingly, Duke Midwest asks for relief, on a service territory-wide basis, of the requirement to enter into new power purchase obligations or contracts with QFs that have a capacity greater than 20 MW net capacity.

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<sup>3</sup> *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).

<sup>4</sup> 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).

<sup>5</sup> 16 U.S.C.A. § 842a-3(m)(1)(A) (West Supp. 2006); see 18 C.F.R. § 292.309(a)(1) (2007).

<sup>6</sup> 18 C.F.R. § 292.309(e) (2007).

<sup>7</sup> 18 C.F.R. § 292.309(a)(1) (2007).

### **Notice, Interventions and Protests and Answer**

5. Notice of Duke Midwest's filing was mailed on March 23, 2007 to each of the four potentially-affected QFs identified in Duke Midwest's application.<sup>8</sup> Notice of Duke Midwest's filing also was published in the *Federal Register*, 72 Fed. Reg. 14786 (March 29, 2007), with interventions and protests due on or before April 18, 2007. On May 1, 2007, American Forest & Paper Association (American Forest & Paper) filed a motion for leave to file out-of-time and a protest.

6. American Forest & Paper explains that it filed its protest late because it did not receive actual notice of the proceeding until April 27, 2007, nine days following the expiration of the comment period and it moved swiftly to respond immediately thereafter. American Forest & Paper notes the early stage of the proceeding and states that its intervention at this time will not prejudice any party because the issues it seeks to raise in this matter are not novel and were most likely anticipated by Duke Midwest and the Commission. American Forest & Paper argues that Duke Midwest makes no factual showing in support of its filing and instead relies on the rebuttable presumptions established in Order No. 688, a Final Rule that is still subject to outstanding requests for rehearing.<sup>9</sup> American Forest & Paper goes on to argue that reliance on rebuttable presumptions, as opposed to case-specific evidentiary demonstrations, is not permissible.

7. On May 14, 2007, Duke Midwest filed an answer opposing American Forest & Paper's intervention.

### **Discussion**

#### **Procedural Matters**

8. Under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), an untimely motion to intervene must show good cause for failing to file within the time prescribed. American Forest & Paper explains that it did not know about this proceeding until nine days after the notice period had run, and filed as expeditiously as possible once it learned of Duke Midwest's filing. Yet this proceeding

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<sup>8</sup> Duke Midwest identifies four potentially affected QFs in its application: LaFarge North America; BGT Green Valley Energy Project, LLC; Smart Papers, LLC; and Benton County Wind Farm LLC and we rely upon this representation. It is not clear that all four QFs are over 20 MW, however.

<sup>9</sup> 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, e.g.*, American Forest & Paper Intervention at 4-5, 6.

was noticed in the *Federal Register* on March 29, 2007, which gave American Forest & Paper notice of this proceeding with ample time to file a timely intervention. Moreover, American Forest & Paper does not explain why it did not timely file beyond noting that it was not aware of the filing until too late. That is not a reason, let alone a sufficient reason.<sup>10</sup> We accordingly find that American Forest & Paper has not shown good cause for its failure to file a timely intervention.

9. Rule 214 also states that a movant must demonstrate that it has an interest that may be directly affected by a proceeding.<sup>11</sup> Neither American Forest & Paper nor any of its members has demonstrated such an interest. American Forest & Paper's stated interest is that it fears that it will be adversely affected by the precedential effect of any decision the Commission may make in this case. The possible precedential effect of a Commission determination normally is not, by itself, a basis for intervention, and Commission precedent on this question is longstanding.<sup>12</sup> Accordingly, we find that American Forest & Paper has not shown an interest in this proceeding that warrants granting its untimely motion to intervene.

### **Commission Determination**

10. Duke Midwest, as a member of the Midwest ISO, relies upon the rebuttable presumptions set forth in section 292.309(e) of our regulations, *i.e.*, that Midwest ISO 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>13</sup> The potentially-affected QFs identified by Duke Midwest were provided notice

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<sup>10</sup> *E.g.*, *Ameren Services Co.*, 87 FERC ¶ 61,125 at 61,497 & n.4 (1999) (*Federal Register* notice is adequate notice); *Northern Electric Power Co., L.P.*, 61 FERC ¶ 61,188 at 61,700 & n.33 (1992) (*Federal Register* notice is adequate notice).

<sup>11</sup> *See* 18 C.F.R. § 385.214(b)(2)(ii) (2007).

<sup>12</sup> *E.g.*, *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, American Forest & Paper also states that the arguments it makes in this proceeding are the same arguments it is 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).

<sup>13</sup> 18 C.F.R. §§ 292.309(a)(1), .309(e) (2007). The pending rehearing of Order No. 688 does not stay Order No. 688. *See* 18 C.F.R. § 385.713(e) (2007).

of Duke Midwest's application and none protested.<sup>14</sup> Accordingly, we find, based on the unrebutted statements by Duke Midwest in its application, that Duke Midwest 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. We, therefore, will grant Duke Midwest'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 Duke Midwest's franchised utility affiliates located in the Midwest ISO.<sup>15</sup>

11. We also note that, even if we were to grant American Forest & Paper's late intervention, the result we reach here would not change. The arguments raised in American Forest & Paper's protest are pending before the Commission in Docket No. RM06-10-001, on rehearing of Order No. 688, and will not be addressed here.<sup>16</sup> Furthermore, as noted above, unless and until the Commission grants rehearing of Order No. 688, which it has not, Duke Midwest has the right to rely upon and apply the rebuttable presumptions adopted in Order No. 688.

The Commission orders:

The application of Duke Energy Shared Services, Inc., filed on behalf of its franchised utility affiliates, Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc., for termination on a service territory-wide basis of the

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<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> American Forest & Paper filed a timely rehearing request of Order No. 688. *See supra* note 9.

obligation of these franchised utility affiliates 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.