

120 FERC ¶ 61,265  
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.

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 organizations<sup>1</sup> (Membership Organizations) sent a letter to the Commission regarding an order issued in this proceeding on July 18, 2007,<sup>2</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> *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 companies<sup>3</sup> 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.<sup>4</sup>

3. As relevant here, ELCON and American Forest & Paper filed timely motions to intervene.<sup>5</sup> 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,<sup>6</sup> 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

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<sup>3</sup> Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, and Wheeling Power Company.

<sup>4</sup> 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).

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

<sup>6</sup> 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.”<sup>7</sup> 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.<sup>8</sup>

### **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.”<sup>9</sup> 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

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<sup>7</sup> July 18 Order, 120 FERC ¶ 61,052 at P 12.

<sup>8</sup> *Id.*

<sup>9</sup> 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 ...”<sup>10</sup> 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.<sup>11</sup> The July 18 Order followed rehearing

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<sup>10</sup> *Id.* at 3.

<sup>11</sup> *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.<sup>12</sup>

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.

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*and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006), *order on reh'g*, Order No. 688-A, FERC Statutes and Regulations ¶ 31,250 (2007).

<sup>12</sup> *E.g.*, CIBO, American Chemistry Council, and NRECA.