

130 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

New York State Electric & Gas Corporation and
Rochester Gas and Electric Corporation

Docket No. QM10-3-000

ORDER GRANTING IN PART AND DENYING IN PART THE
APPLICATION TO TERMINATE PURCHASE OBLIGATION

(Issued March 18, 2010)

1. On December 18, 2009, New York State Electric & Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RG&E) (collectively Applicants) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹ and section 292.310 of the Commission's regulations.² Applicants seek termination of the obligation to enter into new power purchase obligations or contracts to purchase electric energy and capacity from qualifying cogeneration and small power production facilities (QFs) with net capacity in excess of 20 MW on a service territory-wide basis for its interconnected system under the control of the New York Independent System Operator, Inc. (NYISO).

2. In this order, we grant in part and deny in part Applicants request to terminate its mandatory purchase obligation pursuant to section 210(m) of PURPA on a service territory-wide basis effective December 18, 2009.

¹ 16 U.S.C. § 824a-3(m) (2006).

² 18 C.F.R. § 292.310 (2009).

Background

3. On October 20, 2006, the Commission issued Order No. 688,³ revising its regulations governing utilities' obligations to purchase electric energy produced by QFs. Order No. 688 implements PURPA section 210(m),⁴ 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 NYISO were one of the markets that satisfy the criteria of PURPA section 210(m)(1)(A).⁵ Accordingly, section 292.309(e) of the Commission's regulations established a rebuttable presumption (for NYISO and other markets) that 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).⁶

NYSEG and RG&E Filing

4. Applicants state that they meet the requirements for relief under section 292.309(a)(1) of the Commission's regulations.⁷ Applicants state that, as members of NYISO, they are relying on the rebuttable presumption contained in section 292.309(e) and therefore should be relieved of the obligation to purchase electric energy from QFs larger than 20 MW net capacity. Accordingly, Applicants ask for relief, on a service territory-wide basis, of the requirement to enter into new power purchase obligations or contracts with QFs over 20 MW net capacity. Applicants request this application be effective as of December 18, 2009, the date of the filing.

Notice and Responsive Pleadings

5. Notice of Applicants' filing was mailed by the Commission on December 22, 2009 to each of the twenty-four potentially-affected QFs identified in Applicants'

³ *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).

⁴ 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).

⁵ 16 U.S.C. § 842a-3(m)(1)(A) (2006); *see* 18 C.F.R. § 292.309(a)(1) (2008).

⁶ 18 C.F.R. § 292.309(e) (2009).

⁷ 18 C.F.R. § 292.309(a)(1) (2009).

application.⁸ Notice of the filing was published in the *Federal Register*, 74 FR 68818 (2009), with interventions and protests due on or before January 15, 2010.

6. Motions to intervene were filed by the Hydro Development Group, Inc., Lower Saranac Hydro Partner, L.P., Allegheny Hydro 8, L.P., and Allegheny Hydro 9, L.P. Cornell University (Cornell) filed a timely intervention and protest. Applicants filed an answer to the protest. A protest also was filed by Edward Kelly of the William A. Kelly Company, but was subsequently withdrawn on January 15, 2010.

A. Cornell University's Protest

7. Cornell is the owner and operator of an approximately 40 MW cogeneration facility located in Ithaca, New York, and states that it self-certified as a QF in Docket No. QF10-13-000.

8. In its protest, Cornell states that the operational characteristics of its facility prevent it from participating in the NYISO wholesale electric market. Cornell's facility serves the campus steam load and is dependent on weather conditions; Cornell states that its excess electrical output is highly variable and unpredictable on a daily basis. As a result, Cornell argues that it is impracticable to make sales on a consistent basis in the NYISO day-ahead market or even the NYISO real-time market because Rate Schedule 3-A of the NYISO Market Services Tariff imposes penalties on generators with variable loads for under-generation, and conversely, it would not be compensated by the NYISO for over-generation (unlike intermittent generators, e.g., wind, landfill gas, and solar, which are exempted from penalties under the NYISO Market Services Tariff).

9. Cornell also claims that under New York Public Service Law § 2 (2-a) the facility is designated as a cogeneration facility, and that § 66-c (1) requires NYSEG to purchase excess energy. Cornell asks the Commission to find that the state law obligation to purchase from its QF is independent of the PURPA obligation to purchase and will not be affected by the Commission's action in this proceeding. In addition, Cornell asserts that the NYSEG tariff on file with the New York Public Service Commission obligates NYSEG to purchase the excess electrical output from Cornell. Cornell further cites *Consolidated Edison Company of New York, Inc. v. Public Service Commission of State*

⁸ The potentially-affected QFs are: Alice Falls; Allegheny Hydro 8, L.P.; Allegheny Hydro 9, L.P.; Auburn Hydro Mill Street; Auburn Hydro North Division; Aurora Home LLC; Broome Energy Resources, LLC; Catskill Mts. Energy Corp; Chasm Hydro Partnership; Lower Saranac Hydro Partners; Croton Falls; Finger Lakes Energy Corp.; Goodyear Lake Power Co.; Renovus Energy Inc.; Seneca Falls; Waterloo; Cornell University; Sunnyside Farms; Central Hudson Cogen; Steuben REC Landfill; Delaware County Landfill; Clinton County; Hyland County; and Ontario County.

of New York, 63 N.Y. 2d 424, 433 (1984), which Cornell states holds that PURPA does not preempt New York State regulation requiring electric utilities to purchase power from Federal QFs.

B. NYSEG's and RG&E's Answer to Cornell's Protest

10. In their answer, Applicants contend that the weather in Ithaca, New York is not a sufficient reason to warrant an exception to the termination of the mandatory purchase requirement for Cornell. Applicants argue that Cornell provides no evidence quantifying or demonstrating the variability of steam demand and associated electricity production, nor does it attempt to compare such data to the functional requirements of operating in the NYISO.

11. In addition, Applicants argue that Cornell does not provide evidence that its electric generation is so closely tied to steam production that it could not be independently run to accommodate the NYISO's scheduling requirements. Instead, Applicants claim that the facility could be run independently to meet Cornell University's electric requirements, as evidenced by a State Environmental Quality Review submission made to the New York State Department of Environmental Conservation. Applicants allege the submission indicates that during a regional power outage, Cornell's steam generation does not necessarily dictate electric generation and that Cornell does not have unusual operating characteristics.

12. Applicants also maintain that, under Order No. 688-A, Cornell carries the burden to provide evidence against terminating the purchase requirement, and further that requiring evidence of a QF's lack of nondiscriminatory access is reasonable. Applicants claim that Cornell has not provided sufficient evidence that its QF operates in a manner that prevents access to the NYISO markets. Applicants contend that granting Cornell's request that will undercut the rebuttable presumption of access to markets established in Order No. 688.

13. Applicants also argue that, while Cornell has not provided any information regarding the historic variability of the Cornell campus requirements, such information is actually unnecessary because weather is always variable and this is not a distinguishing or unique characteristic for Cornell. Applicants contend that the Commission has already determined that the NYISO market provides QFs with nondiscriminatory access to competitive so-called Day 2 markets. Applicants maintain that a Commission finding that variable weather constitutes a valid operational characteristic sufficient to overcome the presumption of access to markets renders section 210(m) of PURPA meaningless. Applicants also request that the Commission refrain from making findings concerning the effect of New York state law on Applicants' obligation to purchase from QFs.

Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answer filed by Applicants because it was useful in the Commission's decision-making process.

Discussion

16. NYSEG and RG&E, as members of NYISO, rely upon the rebuttable presumption set forth in section 292.309(e) of the Commission's regulations, i.e., that NYISO 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.⁹ The potentially-affected QFs identified by Applicants were provided notice of Applicants' application.¹⁰ Only Cornell protested. As explained below, we grant, in part, the 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, with the exception of Cornell.

17. In Order No. 688, the Commission explained that there can be factors unique to individual QFs, including operational characteristics and transmission limitations, that prevent such QFs from having nondiscriminatory access to the markets described in section 210(m)(1) of PURPA.¹¹ Thus, the Commission expressly provided the opportunity for QFs larger than 20 MW to rebut the presumption that such QFs have

⁹ 18 C.F.R. §§ 292.309(a)(1), 292.309(e) (2009).

¹⁰ 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.

¹¹ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 82. For example, the Commission noted that a QF's operational characteristics could "effectively prevent the QF's participation in a market." *Id.* And such operational characteristics might include "highly variable thermal and electrical demand (from the QF host) on a daily basis, such that the QF cannot participate in a market" or "highly variable and unpredictable wholesale sales on a daily basis. *Id.*

nondiscriminatory access to the markets described in section 210(m)(1) of PURPA.¹² In Order No. 688-A, the Commission reiterated that the presumptions were not final determinations, and that they were rebuttable; the Commission stated that there may be circumstances unique to a particular QF that interfere with that QF's nondiscriminatory access, and reiterated that it would allow QFs to rebut the presumption of access to the markets; the Commission noted, as an example, that "a QF might have operational characteristics that effectively prevent its participation in a market."¹³ The Commission therefore, in section 292.309(e) of its regulations, expressly provided QFs the opportunity to rebut the presumption that a QF larger than 20 MW has nondiscriminatory access to markets, including NYISO's markets, and thus the opportunity to demonstrate that electric utilities that are members of, as relevant here, NYISO should not be relieved of the obligation to purchase from QFs larger than 20 MW, "by demonstrating *inter alia*, that:

The qualifying facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market.[¹⁴]

The Commission held that the determination of whether a QF, seeking to rebut the presumption of access to markets, actually has nondiscriminatory access or not would be made on a case-by-case basis.¹⁵

18. Cornell's cogeneration facility serves its campus steam load, which is "highly variable,"¹⁶ depending on local weather conditions, resulting in electric output that similarly is, "on a daily basis, highly variable and unpredictable."¹⁷ Applicants do not disagree that this is the case. While Applicants argue that Cornell has not quantified the variability, and also challenge the implications of the variability (i.e., they argue that this fact does not warrant granting Cornell relief), Applicants neither disagree that the electric output is highly variable nor provide any demonstration of their own that it is not highly

¹² Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 83.

¹³ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 66.

¹⁴ 18 C.F.R. § 292.309(e) (2009).

¹⁵ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 84; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 66-68, 100.

¹⁶ Cornell Protest at 6.

¹⁷ *Id.* at 5; *accord id.* at 6.

variable.¹⁸ Indeed, Applicants go so far as to state that, while Cornell has not quantified the variability, “such information is actually unnecessary.”¹⁹

19. Moreover, the tie between the highly variable need for thermal output and the resulting variability in the production of electric output is what we would expect based on the description of Cornell’s cogeneration facility in its QF self-certification.²⁰ Cornell’s facility is certified as a “new cogeneration facility.” As such it is required to meet additional requirements, added to PURPA by EPAct 2005,²¹ for QF status. One of those requirements, which the Commission codified in its regulations, is that “the electrical, thermal, chemical and mechanical output of the cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility.”²² Thus, Cornell has certified that its output is intended fundamentally for its own use, and not fundamentally for sale to an electric utility.²³ Additionally, in its self-certification Cornell has calculated its operating value, the percentage of the cogeneration facility’s total output that is useful thermal output as 68%. The Commission’s regulations require that a cogeneration facility’s useful thermal output must be no less than 5 percent of its total energy output measured on a calendar year basis.²⁴ In sum, because the need for the thermal output of the Cornell facility is highly variable depending on weather conditions, and produces 68% useful thermal energy, by its very nature the Cornell facility has highly variable electric output.

20. Cornell also persuasively explains that the tie of its electric output to its variable useful thermal output affects its ability to access NYISO’s markets. While certain intermittent resources such as wind and solar facilities are exempted from penalties for under-generation and compensated for over-generation, this is not available to Cornell – exposing Cornell to penalties for its under-generation compared to its bids in the day-ahead market and not compensating it for over-generation. Given the high variability in its electric output due to its variable useful thermal output, and given that NYISO’s

¹⁸ See Applicants’ Answer at 2-3.

¹⁹ *Id.* at 3.

²⁰ Docket No. QF10-13-000, Self-Certification, October 8, 2009.

²¹ See 16 U.S.C. § 824a-3(n) (2006).

²² 18 C.F.R. § 292.205(d)(2) (2009).

²³ Cornell certifies that its electric output will first be used on campus and only the excess will be sold.

²⁴ 18 C.F.R. § 292.205(a) (2009).

markets tie participation to power offered into the market the day before, in conjunction with penalties for under-generation and no compensation for over-generation for QFs like Cornell, we conclude that Cornell is effectively denied nondiscriminatory access to NYISO's markets. This tie, we also note, can affect whether it qualifies for QF status.²⁵

21. While Applicants also suggest that a ruling in Cornell's favor would amount to a generic finding that variable weather or variable electric output warrants, in and of itself, a denial of relief from the mandatory purchase obligation,²⁶ we disagree. We are not finding that variable weather or even variable electric output warrants a denial of relief. Rather we are finding that, on the facts before us, given the high variability in the need for its thermal output and given how NYISO's markets operate (particularly the penalties for under generation associated with variability from bids in the day-ahead market, which are waived for some resources but would not be waived for Cornell), Cornell does not effectively have nondiscriminatory access to NYISO's markets, and therefore, with respect to Cornell, Applicants are not entitled to relief from the mandatory purchase obligation.

22. Applicants' answer to Cornell's protest suggests that Cornell can and should alter the operations of its cogeneration facility so that its production of electric output is no longer dependent on the production of thermal output.²⁷ Applicants, in essence, acknowledge that, because of the operating characteristics of Cornell's facility, it currently lacks nondiscriminatory access to NYISO's markets, and then, in effect, suggest that Cornell surrender QF status and become a merchant generator and so obtain access. We do not believe that Cornell has any obligation to abandon its QF status. We did not,

²⁵ For QFs that are cogeneration facilities, like Cornell, the electric output is tied to the thermal output, and must meet certain criteria in order to continue to be QFs. *See* 18 C.F.R. §§ 292.203(b), 292.205 (2009).

²⁶ Applicants' Answer at 1, 3.

²⁷ *See Id.* at 2 (Cornell provides no evidence that its facility "could not be independently run to accommodate NYISO scheduling requirements" and, in fact, the facility "could be run independently"). Applicants point to nothing in our regulations or in our precedent, however, that finds that, so long as a QF can change the way it operates, an interconnected electric utility is entitled to relief from the mandatory purchase obligation with respect to that QF. *See id.*

Because, as noted above, Cornell's cogeneration facility is a "new cogeneration facility" it must meet heightened standards for QF status; such a facility's QF status would be more likely to be adversely affected by changes in operations such as those suggested by Applicants.

in Order No. 688 or subsequently, find that if a QF could obtain access by no longer operating as a QF then it must do so. To the contrary, the language of EPAct 2005,²⁸ and our regulations contemplate that the mandatory purchase obligation be lifted only if QFs, while still continuing to be QFs, have nondiscriminatory access to the markets described in section 210(m)(1) of PURPA.²⁹ The regulations do not provide that the mandatory purchase obligation will be lifted so long as a QF can operate as a merchant generator instead.

23. We find that Cornell has rebutted the presumption of nondiscriminatory access to NYISO's markets, and therefore we will deny, in part, Applicants' petition but only with respect to the Cornell QF.³⁰

24. Applicants have requested an effective date of the filing date, December 18, 2009. The Commission has established the date of filing as temporarily suspending a utility's obligation to enter into a new contract or obligation, pending the Commission decision on the petition to terminate the obligation. If the Commission finds that section 210(m)(1) of PURPA has been met, then the mandatory purchase requirement for that electric utility ends as of the date of the filing of PURPA 210(m) petition.³¹

²⁸ 16 U.S.C. § 842a-3(m)(1) (2006).

²⁹ See 18 C.F.R. § 292.309 (2009).

³⁰ Because we are deciding that Cornell has rebutted the presumption of access to NYISO markets, we see no need to address its contentions concerning any independent obligation under State law that NYSEG may have to purchase from Cornell.

³¹ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 228; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 137. However, any contract or obligation pending approval before the State regulatory authority or non-regulated utility at the time of filing would be grandfathered. *Id.*

The Commission orders:

Applicants are relieved on a service territory-wide basis of the requirement to enter into new power purchase obligations or contracts with QFs that have a net capacity in excess of 20 MW, except as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.