105 FERC ¶ 61,004
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

American Ref-Fuel Company,
Covanta Energy Group,
Montenay Power Corporation, and
Wheelabrator Technologies Inc.

Docket No. EL03-133-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued October 1, 2003)

1. On June 13, 2003, American Ref-Fuel Company, Covanta Energy Group, Montenay Power Corporation, and Wheelabrator Technologies Inc. (Petitioners) filed a petition for declaratory order in which they seek an interpretation of the Commission's regulations implementing Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (2000). See 18 C.F.R. Part 292 (2003).

2. Petitioners, through direct and indirect subsidiaries, own and operate waste-to-energy power plants across the United States that are certified as qualifying facilities (QFs). Petitioners seek Commission interpretation of its avoided cost rules under PURPA. Specifically, Petitioners seek an order declaring that avoided cost contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any renewable energy credits or similar tradeable certificates (RECs). They contend that the power purchase price that the utility pays under such a contract compensates a QF only for the energy and capacity produced by that facility and not for any environmental attributes associated with the facility.

3. As discussed below, we grant Petitioners' petition for a declaratory order, to the extent that they ask the Commission to declare that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent express provision in a contract to the contrary). While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.

Background

4. RECs have been created in recent years by State programs typically designed to promote increased reliance on renewable energy resources. These State programs typically are premised on promoting policy goals such as improved air and water quality, reduction of greenhouse gas emissions, broader fuel diversity, enhanced energy security, and hedging against the price volatility of fossil fuels.

5. According to Petitioners, to date such programs have been adopted in 13 States. They require retail sellers of electricity to include in their resource portfolios a certain amount of electricity from renewable energy resources. This obligation can be satisfied by owning renewable energy facilities, by purchasing power from such facilities, or by purchasing tradable certificates, such as RECs, that correspond to a certain amount of renewable energy generated by a third party. Two states have implemented REC trading programs. Some ISOs are also developing markets for REC trading.

6. The development of these programs and trading markets for RECs has given rise to disputes between QFs and their purchasing utilities. These disputes have focused on the underlying PURPA purchase obligation; that is, whether the existence of a long-term contract entered into pursuant to a PURPA purchase obligation determines ownership of the RECs, though the long-term contract may be silent.

7. Petitioners argue that, absent express provisions to the contrary, contracts entered into pursuant to PURPA do not inherently convey RECs to the utility that purchases the QF's power at avoided cost. They argue that, under this Commission's regulations, avoided cost does not reflect or compensate for environmental externalities associated with QF generation. They also argue that, under Commission precedent, environmental attributes of generation are treated as unbundled from the sale of power. Finally, Petitioners argue that utility arguments in support of a finding that the RECs do convey to the utilities as part of the avoided cost sale depend upon a revisitation of the avoided cost determination made at the time of the purchase obligation. Petitioners argue that such a revisitation of the avoided cost determination should not be allowed.

8. Notice of Petitioners' filing was published in the Federal Register, 68 Fed. Reg. 38,321 (2003), with comments, protests, and interventions due on or before July 7, 2003.

9. Timely motions to intervene and comments in support of the Petitioners were filed by Minnesota Methane LLC; Miami-Dade County Department of Solid Waste Management; USA Biomass Power Producers Alliance; Independent Energy Producers of New Jersey; Independent Power Producers of New York, Inc.; County of Olmsted, Minnesota; Solid Waste Association of North America; Decker Energy International, Inc.; Sithe Energies, Inc.; Azure Mountain Power Company, Tannery Island Power Company; Hydro Power, Inc.; and Energy Enterprises, Inc.

10. These parties request the Commission to grant the Petitioners' petition for declaratory order. They primarily argue that, under existing rules, the avoided cost paid by the purchasing utility compensates the QF for the capacity and the energy generated; and that the sale of RECs, in contrast, compensates the QF for the facility's environmental attributes and rewards the risks associated with the investment in and the design and operation of a renewable energy resource plant. They argue that QF developers face risks in designing and constructing a plant that will be a viable long-term investment -- meeting rigorous environmental standards that include generating technologies that meet environmental and reliability standards and Commission policy. Therefore, RECs need to remain an incentive for QF developers. They largely agree that allowing QFs to trade the RECs associated with a renewable facility will facilitate the development of liquid and efficient markets for RECs, which will in turn create incentives for the development and use of renewable energy resources for the generation of power.

11. Timely motions to intervene, comments and protests in opposition were filed by purchasing utilities, including: Public Service Electric and Gas Company; PacifiCorp; Southern California Edison Company and Pacific Gas & Electric Company; Edison Electric Institute; Xcel Energy Services Inc.; Jersey Central Power & Light Company; Metropolitan Edison Company and Pennsylvania Electric Company (collectively, the FirstEnergy Companies); Ridgewood Renewable Power, LLC.; Central Maine Power Company; Northeast Utilities Service Company, on behalf of Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, and the United Illuminating Company; and Bangor Hydro–Electric Company.

12. The parties that oppose the petition for declaratory order request that the Commission either: (1) find that PURPA contracts, unless stated to the contrary, include the transfer of RECs; (2) decline to issue an order; or (3) defer the Petitioners' petition for declaratory order to the states. They largely contend that QFs are fairly compensated. They further argue that PURPA contracts that require a utility to purchase a QF's entire output are bundled contracts and include renewable attributes, which are not separable from the capacity and energy. Some argue that granting the Petitioners request would increase the returns to the QFs at the expense of utilities, other retail suppliers and their customers, and ultimately would discourage REC trading programs.

13. Central Maine Power Company (Central Maine) argues that the Petitioners' request is a matter of private contract interpretation and not suited for generic decision-making by the Commission. Central Maine believes that the grant of the declaratory order would directly affect its rights under each Power Purchase Agreement with a QF, by improperly determining Central Maine's contractual rights to tradable certificates.

14. The following state commissions filed notices of intervention, comments or protests: Maine Public Utilities Commission (Maine Commission), New Hampshire Public Utilities Commission (New Hampshire Commission), New York State Public Service Commission (New York Commission), and California Public Utilities Commission (California Commission). The state commissions generally argue that the implementation and interpretation of QF contract issues should be left to the states. They also argue the Petitioners' request interferes with state initiatives and request the Commission to deny the relief requested, as a matter of policy. The Maine Commission argues that RECs are an element of PURPA contracts and should be viewed as part of a bundled product transferred to the purchaser with the capacity and energy. They request the Commission determine that Maine utilities own the renewable attributes of power sold to them through QF contracts entered into prior to the date of electric restructuring in Maine. The New Hampshire Commission argues that the Petitioners' argument that PURPA contracts compensate QFs only for capacity and energy, not for any environmental attributes, is a fallacy.

15. Motions to intervene with no position were filed by New York State Electric & Gas Corporation; New England Power Pool; Rochester Gas and Electric Corporation; Constellation Power Source, Inc. and Constellation Power, Inc.; California Energy Commission; and CHI Energy, Inc.

16. Untimely motions to intervene in support of the petition were filed by Northeast Maryland Waste Disposal Authority; Craven County Wood Energy; Electric Power Supply Association; California Biomass Energy Alliance, LLC.; City of Alexandria, Virginia; Florida Partnership for Affordable Competitive Energy; and Arlington County, Virginia, Department of Environmental Services. An untimely motion to intervene in opposition to the petition was filed by Atlantic City Electric Company. Untimely motions to intervene with no position were filed by Pennsylvania Public Utility Commission; and PPL EnergyPlus, LLC and PPL Electric Utilities Corporation.

Discussion

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notices of intervention and the timely, unopposed motions to intervene serve to make those who filed them parties to this proceeding. Furthermore, given their interest and the absence of undue prejudice or delay, we find good cause to grant the untimely motions to intervene.

18. We will grant Petitioners' request for declaratory order, to the extent that the petition asks that the Commission declare that the Commission's avoided cost regulations did not contemplate the existence of RECs and that the avoided cost rates for capacity and energy sold under contracts entered into pursuant to PURPA do not convey the RECs, in the absence of an express contractual provision.

19. Section 210(a) of PURPA requires the Commission to prescribe rules imposing on electric utilities the obligation to offer to purchase electric energy from QFs. Under Section 210(b) of PURPA, such purchases must be at rates that are: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of the incremental cost to the electric utility of alternative electric energy. Section 210(d) of PURPA, in turn, defines "incremental cost of alternative electric energy" as "the cost to the electric utility of the electric energy which, but for the purchase from [the QF] such utility would generate or purchase from another source."[1]

20. The Commission implemented the purchase obligation set forth in PURPA in Section 292.303 of its regulations, 18 C.F.R. § 292.303(a) (2003), which provides:

> Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility . . . .

Section 292.304, in turn, requires that rates for purchases shall: (1) be just and reasonable to the electric customer of the electric utility and in the public interest; and (2) not discriminate against qualifying cogeneration and small power production facilities. 18 C.F.R. § 292.304(a)(1) (2003). The regulation further provides that nothing in the regulation requires any electric utility to pay more than the avoided costs for purchases. 18 C.F.R. § 292.304(a)(2) (2003).[2] "Avoided costs" is defined as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6) (2003).

21. Section 292.304 sets forth what factors are to be considered in determining avoided costs. See 18 C.F.R. § 292.304(e) (2003). The factors to be considered include:

> (1) the utility's system cost data;
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> (2) the availability of capacity or energy from a QF during the system daily and season peak periods;
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> (3) the relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and

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[1] See, e.g., Connecticut Light and Power Company, 70 FERC ¶ 61,012 at 61,023, 61,028, reconsideration denied, 71 FERC ¶ 61,035 at 61,151 (1995), appeal dismissed, 117 F. 3d 1485 (D.C. Cir. 1997).

[2] See, e.g., id., 70 FERC at 61,023-24, 61,028-030, and 71 FERC at 61,151-53.

(4) the costs or saving resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.

22. Significantly, what factor is not mentioned in the Commission's regulations is the environmental attributes of the QF selling to the utility. This is because avoided costs were intended to put the utility into the same position when purchasing QF capacity and energy as if the utility generated the energy itself or purchased the energy from another source. In this regard, the avoided cost that a utility pays a QF does not depend on the type of QF, i.e., whether it is a fossil-fuel-cogeneration facility or a renewable-energy small power production facility. The avoided cost rates, in short, are not intended to compensate the QF for more than capacity and energy.

23. As noted above, RECs are relatively recent creations of the States. Seven States have adopted Renewable Portfolio Standards that use unbundled RECs. What is relevant here is that the RECs are created by the States. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. And the contracts for sales of QF capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of the RECs (absent an express provision in the contract). States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.

24. We thus grant Petitioners' petition for a declaratory order, to the extent that they ask the Commission to declare that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent an express provision in a contract to the contrary). While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.

The Commission orders:

The Commission hereby grants Petitioners' petition for declaratory order, as discussed in the body of this order.

By the Commission. Commissioner Brownell dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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(Issued October 1, 2003)

BROWNELL, Commissioner, dissenting:

1. The logic of this order escapes me. The order states, and I agree, that RECs are creations of the States, and that PURPA does not address the ownership of RECs. Given that, the logical conclusion ought to be that whether a particular contract conveys RECs is purely a matter of the particular state law creating the RECs. This order, however, grants the petition with the blanket declaration that PURPA avoided-cost contracts do not convey RECs to the purchasing utility unless they include an express provision doing so. I would have dismissed the petition and left the issue of ownership of RECs to be resolved in the appropriate state fora.

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Nora Mead Brownell
Commissioner