

120 FERC ¶ 61,052
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 Services Corporation
Appalachian Power Company
Columbus Southern Power Company
Indiana Michigan Power Company
Kentucky Power Company
Kingsport Power Company
Ohio Power Company
Wheeling Power Company

Docket No. QM07-4-000

ORDER GRANTING APPLICATION TO TERMINATE PURCHASE OBLIGATION

(Issued July 18, 2007)

1. On April 19, 2007, American Electric Power Services Corporation, on behalf of certain operating companies¹ of the American Electric Power System, (collectively AEP) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)² and section 292.310 of the Commission's regulations³ 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 electric energy from qualifying cogeneration and small power production facilities (QFs) with net capacity in excess of 20 MW. In this order, we grant AEP's application.

¹ Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company. In its application, AEP refers to these franchised utility affiliates as the AEP East system.

² 16 U.S.C.A. § 824a-3(m) (West Supp. 2006).

³ 18 C.F.R. § 291.310 (2007).

Background

2. On October 20, 2006, the Commission issued Order No. 688,⁴ 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),⁵ 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 PJM Interconnection, LLC (PJM) satisfy the criteria of PURPA section 210(m)(1)(A).⁶ Accordingly, section 292.309(e) of the Commission's regulations established a rebuttable presumption that PJM 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).⁷

AEP's Filing

4. In its application, AEP states that it meets the requirements for relief under section 292.309(a)(1) of the Commission's regulations.⁸ AEP states that it is a member of PJM. AEP also states that it is relying on the rebuttable presumptions contained in section 292.309(e) that, as a member of PJM, it should be relieved of the obligation to purchase electric energy from QFs larger than 20 MW net capacity. Accordingly, AEP asks for relief, on a service territory-wide basis for the AEP East system, of the requirement to

⁴ 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).

⁵ 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).

⁶ 16 U.S.C.A. § 842a-3(m)(1)(A) (West Supp. 2006); *see* 18 C.F.R. § 292.309(a)(1) (2007).

⁷ 18 C.F.R. § 292.309(e) (2007).

⁸ 18 C.F.R. § 292.309(a)(1) (2007).

enter into new power purchase obligations or contracts⁹ with QFs over 20 MW net capacity.

Notice and Responsive Pleadings

5. Notice of AEP's filing was mailed by the Commission on April 24, 2007 to each of the eleven potentially-affected QFs identified in AEP's application.¹⁰ Notice of AEP's filing was published in the *Federal Register*, 72 Fed. Reg. 23,813 (2007), with interventions and protests due on or before May 17, 2007. PJM, Gauley River Power Partners, LP, and PPG filed timely motions to intervene. The Electricity Consumers Resource Council (ELCON) filed a timely motion to intervene and comments. American Forest & Paper Association (American Forest & Paper) filed a timely motion to intervene and protest.

6. ELCON argues that the Commission should wait until it addresses the requests for rehearing of Order No. 688 before it responds to AEP's application. On rehearing of Order No. 688, ELCON has asked the Commission to adopt different procedures and criteria for the analysis of section 210(m) applications; ELCON asks the Commission to apply those procedures and criteria to AEP's application. ELCON has attached a copy of its request for rehearing of Order No. 688 to its intervention.

⁹ AEP states that it has existing contracts with QFs in its East system territory. AEP states that it is not requesting to terminate these existing QF contracts or to obtain relief from any obligation to purchase energy or capacity from any QF in its East system territory with which AEP has an existing contract.

¹⁰ AEP identifies eleven potentially-affected QFs in its application: AE Operations, LLC; Brookfield Power; Chillicothe Paper Inc.; Eastman Chemical Co.-TN Ops; Gauley River Power Partners, LP; Hoechst Celanese; Waste Management of Indiana; Weyerhaeuser; U.S. Army-Radford; University of Norte Dame and PPG Industries Inc. Natrium and we rely upon this representation. It is not clear that all eleven of these QFs are over 20 MW, however.

AEP states that it served notice of its filing on each of the potentially-affected QFs named in its application on April 18, 2007. AEP also mailed its filing to four affected state commissions. In the April 24 Commission letter notifying the eleven potentially affected QFs of AEP's filing, the Commission explained how to access the filing on line, the comment date, and procedures for intervention and protest.

7. American Forest & Paper argues that AEP has made no factual demonstration that there is a meaningful competitive market for long term sales of energy and capacity in its footprint, and notes that AEP instead relies on the rebuttable presumptions established in Order No. 688, a Final Rule that is still subject to outstanding request for rehearing.¹¹

8. On May 31, 2007, AEP filed an answer opposing the interventions of American Forest & Paper and ELCON.

Discussion

Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

10. With regard to the opposed motions to intervene of American Forest & Paper and ELCON, Rule 214 states that a movant must demonstrate that it has an interest that may be directly affected by a proceeding.¹² We find that American Forest & Paper has demonstrated such an interest, but ELCON has not. American Forest & Paper states that its member companies own and operate QFs in the PJM region, including specifically in AEP's service territory. These American Forest & Paper members have an interest that may be directly affected by this proceeding, and, accordingly, we will grant American Forest and Paper intervenor status.

11. By contrast, ELCON states that many ELCON members operate major facilities within the footprint of PJM and at least one ELCON member operates a QF in the region and therefore will be affected by the outcome of the proceeding. However, ELCON does not assert that it has any members within the AEP service territory. ELCON is primarily concerned with the precedential effect of the Commission determination in this proceeding. However, the possible precedential effect of a Commission determination

¹¹ 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* American Forest & Paper Intervention at 4-5.

¹² *See* 18 C.F.R. § 385.214(b)(2)(ii) (2006).

normally is not, by itself, a basis for intervention.¹³ Accordingly, we find that ELCON has not shown an interest in this proceeding that warrants granting its motion to intervene.

12. While we are permitting American Forest & Paper to intervene in this proceeding because it has a member in the affected AEP service territory, we remind American Forest & Paper and all membership organizations that going forward, when seeking to intervene in case-specific adjudications such as this one, they are expected to confine their comments to specific factual and legal arguments raised in the individual proceeding. 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.

Commission Determination

13. AEP, as a member of PJM, relies upon the rebuttable presumptions set forth in section 292.309(e) of our regulations, *i.e.*, that PJM 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.¹⁴ The potentially affected QFs identified by AEP were provided notice of AEP's application and none protested.¹⁵ Accordingly, we find, based on the un rebutted statements by AEP in its application, that AEP provides QFs larger than 20 MW nondiscriminatory access to independently administered, auction-based day ahead and real time wholesale markets for

¹³ *E.g.*, *Duke Energy Shared Services, Inc.*, 119 FERC ¶ 61,146 (May 17, 2007); *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, both American Forest & Paper and ELCON also state that the arguments they make in this proceeding are the same arguments they are 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).

¹⁴ 18 C.F.R. §§ 292.309(a)(1), .309(e) (2007).

¹⁵ 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.

the sale of electric energy and to wholesale markets for long-term sales of capacity and electric energy. We, therefore, will grant AEP'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 AEP's operating companies located in PJM.¹⁶

14. With regard to American Forest & Paper's protest, we find that the arguments being raised are not case-specific to AEP's application, and instead are a restatement of arguments made by American Forest & Paper in Docket No. RM06-10-001, the rehearing of Order No. 688. Similarly, we also note that, even if we were to grant the motion to intervene of ELCON, the result we reach here would not change. Like American Forest & Paper, the arguments raised by ELCON are not case-specific to AEP's application, and instead are a reiteration of arguments made on rehearing in Docket No. RM06-10-001. The Commission has recently issued an order denying rehearing of Order No. 688,¹⁷ reaffirming its analysis of section 210(m) insofar as the processing and outcome of this proceeding is concerned.

The Commission orders:

The application of American Electric Power Services Corporation, filed on behalf of certain of its operating companies, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company, for termination on a service-wide basis of the obligation of these franchised utility affiliates

¹⁶ 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.

¹⁷ See New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, Order No. 688-A, 72 Fed. Reg. 35,872 (2007), FERC Stats. & Regs. ¶ 31,250 (2007).

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.