139 FERC ¶ 61,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

DeWind Novus, LLC
DeWind Novus II, LLC

Docket Nos. QF11-235-001
QF12-99-001

(Not Consolidated)

ORDER GRANTING APPLICATIONS FOR COMMISSION CERTIFICATION

(Issued June 11, 2012)

1. On March 13, 2012, DeWind Novus, LLC (DeWind) and DeWind Novus II, LLC (DeWind II) (collectively, Applicants) each filed an application for Commission certification as a qualifying small power production facility (QF). On April 3, 2012, Xcel Energy Services Inc. (XES), on behalf of its affiliate Southwestern Public Service Company (SPS), protested the applications and asked the Commission to deny the certifications contending the Applicants' wind facilities proposed to be installed in Texas County, Oklahoma exceed the size limit for QF status contained in section 292.204(a) of the Commission's regulations[1] and in the Public Utility Regulatory Policies Act of 1978 (PURPA).[2] For the reasons discussed below, the Commission will grant the applications of DeWind and DeWind II for certification as qualifying small power production facilities.

I. Applications for Certification

2. In its application for Commission certification DeWind states that its wind facility will have a maximum gross power production capacity of 80 MW, and a maximum net power production capacity of 79.92 MW.[3] In its application for Commission

[1] 18 C.F.R. § 292.204(a) (2011).

[2] 16 U.S.C. §§ 796(17) (2006).

[3] Previously, on April 25, 2011, DeWind Co. filed a self-certification for DeWind in Docket No. QF11-235-000.

certification DeWind II states that its facility will have a maximum gross power production capacity of 40 MW, and a maximum net power production capacity of 39.92 MW.[4]

II. Notice and Responsive Pleadings

3. Notices of Applicants' filings were published in the *Federal Register*, 77 Fed. Reg. 16,218 (2012), with interventions and protests due on or before April 3, 2012. XES, on behalf of its affiliate SPS, filed motions to intervene, and protests. On April 17, 2012, Applicants filed motion for leave to answer and answer.

A. XES's Protests

4. XES filed separate motions to intervene, and protests in the DeWind and DeWind II proceedings that, essentially, contain the same arguments and will, therefore, be addressed as one.

5. In its protests, XES argues that a review of the geographic location, operational characteristics, and public statements made in connection with the DeWind and DeWind II demonstrate that the facilities are not separate, but should be viewed as a single facility on a single site. XES argues that the Applicants proposed facilities are best characterized as components of an integrated facility that will consist of at least 120 MW of generation and up to as many as 370 MW of generation.[5] XES asks the Commission determine that the proposed locations of DeWind and DeWind II are located essentially on the same site, thereby, disqualifying them from QF certification despite the one-mile rule.[6]

6. XES states that it is mindful of the Commission's March 15, 2012 ruling in *Northern Laramie*,[7] where the Commission declined to allow a utility to rebut the one-mile rule. However, XES urges the Commission to reconsider its interpretation.[8] XES argues that the Commission's regulations are silent as to whether the one-mile rule is a presumption that may be rebutted. XES further argues that the Commission's regulations

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[4] Previously, on December 14, 2011, DeWind Co. filed a self-certification for DeWind II in Docket No. QF12-99-000.

[5] XES DeWind Protest at 5; XES DeWind II Protest at 5.

[6] 18 C.F.R. § 292.203 (a); XES DeWind Protest at 6; XES DeWind II Protest at 6.

[7] *Northern Laramie Range Alliance*, 138 FERC ¶ 61,171, *reh'g denied*, 139 FERC ¶ 61,190 (2012) (*Northern Laramie*).

[8] XES DeWind Protest at 6; XES DeWind II Protest at 6.

do not specifically address the issue but provide a waiver mechanism whereby the Commission can, "[m]odify the application of [one-mile rule] for good cause."[9]

7. XES argues that recognizing the one-mile rule as a rebuttable presumption would not conflict with prior Commission precedent. XES states that in previous orders the Commission has indicated that the one-mile rule should not be universally applied and may be subject to exception. XES cites to *Vulcan/BN Geothermal Power Co.*[10] where XES argues the Commission acknowledged the one-mile rule as "essentially arbitrary." XES argues that given the Commission's characterization of the one-mile rule as "arbitrary," the Commission is required to treat the one-mile rule as nothing more than a presumption.[11] XES further argues that when the Commission issued Order No. 732, the Commission declined to address a request by the Edison Electric Institute to amend its regulations to change the one-mile rule from a rule to a rebuttable presumption, and to provide that the presumption would be rebuttable upon showing that the facilities are part of a common enterprise that should be considered a single entity.[12] XES argues that while the Commission declined to address this request to amend its regulations, the Commission did not express hostility to the concept of a rebuttable presumption.[13]

8. XES states that the Commission's refusal to treat the one-mile rule for QF certification as a rebuttable presumption is inconsistent with the manner that the Commission treats QFs for the purpose of analyzing waiver requests under Section 210(m)[14] of PURPA,[15] in which it is presumed that a QF 20 MW or less does not have

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[9] XES DeWind Protest at 7 (citing 18 C.F.R. § 292.204(a)(3)); XES DeWind II Protest at 7 (citing 18 C.F.R. § 292.204(a)(3)).

[10] 52 FERC ¶ 60,095 (1990).

[11] XES DeWind Protest at 8; XES DeWind II Protest at 8.

[12] XES DeWind Protest at 9 (citing *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, Order No. 732, FERC Stats. & Regs. ¶ 31,306, at P 44-45 (2010)); XES DeWind II Protest at 9 (citing Order No. 732, FERC Stats. & Regs. ¶ 31,306 P 44-45).

[13] XES DeWind Protest at 9; XES DeWind II Protest at 9.

[14] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 77 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *aff'd sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

nondiscriminatory access to markets.[16] XES states that with PURPA Section 210(m) waiver requests, the Commission would not be bound by the one-mile rule for allegations that a QF is engaging in gaming.[17]

9. XES argues that the Commission's refusal to treat the one-mile rule as a rebuttable presumption results in an inconsistency in how the Commission treats QF applicants seeking certification vis-à-vis those utilities that might oppose such certification. XES states that when the Commission promulgated Part 292 of the Commission's regulations the Commission created a specific waiver provision that allows a QF applicant to request waiver of the one-mile rule that would allow two QF applicants to be located within one mile of each other.[18]

10. XES argues that Applicants proposed turbines, DeWind and DeWind II, are located at the same site and should be considered a component to a larger integrated facility.[19]

11. XES also maintains that the one-mile rule is illogical given the geographical configuration of Applicants' facilities. XES argues that the proposed configuration of the DeWind II turbines shows that some of the turbines at the proposed facility are closer to turbines at DeWind's proposed facility than they are to each other.[20]

12. XES further argues that a single interconnection request made by DeWind and DeWind II and the use of a radial transmission line to be shared between DeWind and DeWind II are further proof that the Applicants projects are part of a larger project. XES concedes that the Commission has previously held that the line used to deliver energy is not considered when determining whether the one-mile rule is satisfied. However, XES

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[15] 16 U.S.C. §§ 796, 824a-3 (2006).

[16] XES DeWind Protest at 9; XES DeWind II Protest at 9.

[17] XES DeWind Protest at 10; XES DeWind II Protest at 10.

[18] XES DeWind Protest at 10. *See Small Power Production and Cogeneration Facilities – Qualifying Status*, FERC Stats. & Regs., Order No. 70, FERC Stats. & Regs., Regulations Preambles 1977-1981 ¶ 30,134, at 30,943-33 (1980).

[19] XES DeWind Protest at 11; XES DeWind II Protest at 11.

[20] XES DeWind Protest at 12; XES DeWind II Protest at 12.

believes that the use of a common facility and operational characteristics demonstrate DeWind and DeWind II were developed as one large project.[21]

13. XES states that public statements made be Novus Windpower's President, Jay Lobit, support XES's assertion that the Applicants' projects should be characterized as one project.[22] XES argues that given this characterization by Applicants, and the Commission's acknowledgement of the arbitrary nature of the one-mile rule, the QFs should not be certified. XES further argues that the description of Applicants' projects make clear that DeWind and DeWind II were intended to operate as a single facility and the Commission should view the one-mile rule as a rebuttable presumption given the single-project nature of these facilities.[23]

14. XES also argues that it is unclear that DeWind and DeWind II are one mile apart. XES claims that, pursuant to the Uniform System of Accounts, collector systems are booked in Account 345, Accessory electric equipment. XES states that Account 345 is designated for, *inter alia*, "generating apparatus." XES explains that Item 5 of Account 345 relates to station buses and argues that collector systems for a wind turbine is part of the bus that connects the generator to the step-up transformer. XES argues that this production account relates to generation about the collection system and should be considered part of the generating facilities. As such, XES asserts that the Applicants have failed to identify the location of the collector system for DeWind and DeWind II, so that the Commission cannot properly analyze Applicants certification.[24]

B. Applicants' Answers

15. Applicants argue that XES's protests make arguments substantively similar to those XES made, and the Commission rejected, in *Northern Laramie*. Applicants point to the Commission's statement in *Northern Laramie*, "the fact that the facilities will use the same single line to deliver power to the grid is not part of the analysis the Commission uses in determining whether the one-mile rule has been violated."[25] Applicants further state that XES's request, that the one-mile rule be interpreted to

[21] XES DeWind Protest at 12-13; XES DeWind II Protest at 12-13.

[22] XES DeWind Protest at 13; XES DeWind II Protest at 13.

[23] XES DeWind Protest at 14; XES DeWind II Protest at 14.

[24] *Id.*

[25] Applicants Answer at 6 (citing *Northern Laramie* 138 FERC ¶ 61,171 at P 16).

establish a rebuttable presumption as opposed to a bright line test, was explicitly rejected by the Commission in *Northern Laramie*.[26]

16. Applicants further argue that XES's protests are an impermissible collateral attack on the Commission's QF regulations which were affirmed by the Supreme Court. According to the Applicants, if XES wishes to challenge the one-mile rule it should have done so during the rulemaking process, not in an individual proceeding.[27] Applicants further argue that, should the Commission allow this approach, it would create substantial regulatory uncertainty for new and existing QFs. Applicants state the PURPA regulatory regime has been stable for 30 years and XES's request, if adopted, would allow challenges to any existing QF with a mere allegation of gaming.[28]

17. Applicants argue that XES, in its protest, is incorrect in its assertions as to the DeWind facilities, and that there are in fact legitimate business reasons for the separate development of the two projects.[29] First, DeWind and DeWind II projects will have different ownership structures, investors, and lenders. Second, the two projects are being constructed separately and will start generating test power and enter service at different times. Third, there are a number of relevant legal and physical differences between the sites for the two projects. [30]

18. Applicants further argue that the assertions regarding DeWind and DeWind II made by XES are factually incorrect, inconsistent with Commission precedent, and are irrelevant. First, Applicants assert that XES's argument concerning the distance between the DeWind and DeWind II does not support a finding that the two projects are one.[31] Second, Applicants argue that in *Northern Laramie*, the Commission declined to consider statements made by the developer, in other contexts, describing those facilities as constituting a single project.[32] Third, Applicants argue that XES's claims that the Commission's Uniform System of Accounts should be considered in identifying

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[26] *Id.* at 8.

[27] *Id.* at 11.

[28] *Id.* at 12.

[29] *Id.* at 13.

[30] *Id.*

[31] *Id.* at 14.

[32] *Id.*

generating facilities is irrelevant as neither DeWind nor DeWind II are subject to the Commission's Uniform System of Accounts.[33]

19. Applicants state that, while there are some similar factual and legal issues, the two proceedings involve separate Applications by different legal entities for certification of different facilities.[34]

III. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make XES a party to both proceedings. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that assisted us in our decision-making process.

B. Determination

21. Applicants seek certification of two QFs. When the Commission acts on an application for certification or recertification of QF status, it acts on the information presented in the application and the responsive pleadings.[35] The Commission renders what is essentially a declaratory order deciding whether the facility, as described in the application and the pleadings, meets the statutory and regulatory requirements for QF status set forth in PURPA and the Commission's implementing regulations. What we have before us today is a petition to certify as QFs two as-yet unbuilt wind generation facilities. The Applicants, in essence, rely on the representations made in the Commission-certifications they have filed. We thus are called to analyze the representations contained in the applications for certification, consider the arguments

[33] *Id.* at 15.

[34] *Id.* at 16.

[35] *Calpine King City Cogen, LLC*, 111 FERC ¶ 61,174, at P 17 (2005); *Arroyo Energy, Limited Partnership,* 62 FERC ¶ 61,257, *reh'g denied*, 63 FERC ¶ 61,198 (1993); *Cogentrix of Mayaguez, Inc.*, 59 FERC ¶ 61,159, *reh'g denied*, 59 FERC ¶ 61,392 (1992); *Inter-Power of New York, Inc.*, 55 FERC ¶ 61,387 (1991); *CMS Midland, Inc.*, 50 FERC ¶ 61,098, at 61,277 (1990), *reh'g denied*, 56 FERC ¶ 61,177 (1991), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 990 (1993).

made by XES protesting the applications for certification, the answer filed by Applicants, and render a decision on whether the DeWind and DeWind II facilities, if built as described, satisfy the requirements for small power production QF status contained in PURPA and our implementing regulations.

22. Section 292.204 of the Commission's regulations contains the criteria for qualifying small power production facilities.[36] A small power production facility must meet certain fuel use criterion, i.e., the primary fuel source of the facility must be biomass, waste, renewable resources, geothermal resources or any combination thereof.[37] There is no question that DeWind and DeWind II satisfy the fuel use criterion.

23. A small power production facility must also satisfy the size criterion contained in section 292.204(a). The maximum size of a qualifying small power production facility, as provided for in section 292.204(a)(1), is 80 MW, including the capacity of any other small power production facilities that use the same energy resource, are located at the same site and are owned by the same person(s) or its affiliates.[38] Section 292.204(a)(2) establishes the method of calculating the size of a small power production facility.[39] Pursuant to section 292.204(a)(2)(i), facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought.[40] Facilities that are not located within one mile of the facility for which qualification is sought are considered to be located at separate sites.

24. It is undisputed that DeWind and DeWind II use the same energy resource, and are both owned by DeWind Novus. They must therefore be located more than a mile apart to be considered located at separate sites and thus to be considered separate facilities. Pursuant to section 292(a)(2)(ii), the distance between facilities is measured from the electrical generating equipment of a facility for purposes of making the one-mile determination, and here DeWind's and DeWind II's respective electrical generating

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[36] 18 C.F.R. § 292.204 (2011).

[37] 18 C.F.R. § 292.204(b) (2011).

[38] 18 C.F.R. § 292.204(a)(1) (2011). There is an exemption from the size criteria. That exemption, contained in section 292.204(a)(4), is for facilities meeting the criteria of section 3(17)(E) of the Federal Power Act (FPA). Facilities meeting those criteria have no size limit. *See* 16 U.S.C. § 796(17)(E) (2006); 18 C.F.R. § 292.204(a)(4) (2011). DeWind and DeWind II do not meet the criteria of section 3(17)(E) of the FPA.

[39] 18 C.F.R. § 292(a)(2) (2011).

[40] *Id.*

equipment are more than one mile apart.[41] DeWind and DeWind II thus each meet the criteria for qualifying small power production facilities.

25. XES acknowledges that DeWind and DeWind II meet the literal requirements for being considered separate facilities at separate sites under our regulations. XES nonetheless asks the Commission to read the one-mile rule as a rebuttable presumption rather than as a rule. We have recently addressed XES's arguments in *Northern Laramie*.[42] In its protest XES acknowledges that the Commission rejected the same argument it makes in these proceedings in *Northern Laramie*.[43] We addressed those arguments thoroughly in *Northern Laramie* and see no reason to further address them in this proceeding other than to say that it is well-established that: (1) the one-mile rule for determining whether small power generation facilities are "at the same site" is a rule and not a rebuttable presumption;[44] and (2) the distance between facilities is measured from the electrical generating equipment, and not other equipment associated with the generating facilities.[45] As discussed above, DeWind and DeWind II each satisfy the criteria for certification as qualifying small power facilities.

26. Accordingly, the Commission will grant certification of DeWind and DeWind II as qualifying small power production facilities pursuant to 18 C.F.R. § 292.207(b)(2), provided that each facility is built as described in each application.[46] To the extent that

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[41] 18 C.F.R. § 292(a)(2)(ii) (2011). Our analysis of the QF Commission-certifications filed by DeWind and DeWind II confirms that the generating equipment of each facility is located more than a mile from the generating equipment of the other facility. We compared the geographic coordinates of each facility, contained in Line 3c of Form 556 of each facility. The comparison shows that the electrical generating equipment of each facility is located more than 5 miles apart. XES concedes as much in its protest.

[42] *See Northern Laramie*, 138 FERC ¶ 61,171, *reh'g denied*, 139 FERC ¶ 61,190 at PP 22-25. XES was a party to the *Northern Laramie* proceeding and made the same arguments in that proceeding as it makes in this proceeding.

[43] XES DeWind Protest at 6; XES DeWind II Protest at 6.

[44] *Northern Laramie*, 139 FERC ¶ 61,190 at PP 22-25.

[45] 18 C.F.R. § 292.204(a)(2)(ii) (2011); *Northern Laramie*, 139 FERC ¶ 61,190 at P 26.

[46] Certification as a QF serves only to establish eligibility for benefits provided by PURPA, as implemented by the Commission's regulations, 18 C.F.R. Part 292. It does not relieve a facility of any other requirements of local, state, or federal law, including

(continued…)

the facts or representations which form the basis for this certification change, the facility might still be a QF under the changed circumstances. However, self-recertification or Commission-recertification at that point will be necessary to assure QF status.

The Commission orders:

Certification of DeWind and DeWind II as qualifying small power production facilities is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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those regarding siting, construction, operation, licensing and pollution abatement. Certification does not establish any property rights, resolve competing claims for a site, or authorize construction.