

148 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

LoneStar Wind Power Company
NorthStar Wind Power Company
WindStar Power Company

v.

Docket No. EL14-56-000

South Texas Electric Cooperative, Inc.

ORDER DISMISSING PETITION FOR ENFORCEMENT OF THE PUBLIC UTILITY
REGULATORY POLICIES ACT

(Issued August 29, 2014)

1. On May 27, 2014, as amended on June 30, 2014, LoneStar Wind Power Company, NorthStar Wind Power Company, and WindStar Power Company (collectively, Petitioners) filed a petition (respectively, May 27 Petition¹ and June 30 Petition) pursuant to section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA),² against South Texas Electric Cooperative, Inc. (South Texas).³ Specifically, Petitioners assert that they requested South Texas to purchase the future power to be produced by their

¹ The May 27 Petition was not signed and no individuals were identified; however, a protest filed by South Texas on June 17, 2014, in this proceeding identified Mr. Raj Jadhav as the filer, and the June 30 Petition is signed by Mr. Jadhav.

² 16 U.S.C. § 824a-3 (2012).

³ South Texas is a generation and transmission cooperative serving eight distribution cooperatives: Karnes, Wharton County, Victoria, Jackson, San Patricio, Nueces, Magic Valley and Medina electric cooperatives; which, in turn, provide service in 42 counties in southern Texas.

facilities, which they described as small qualifying facilities less than 20 MW.⁴ Petitioners allege that South Texas declined to purchase power, and Petitioners argue that this refusal violates the Commission's PURPA regulations requiring electric utilities (including co-operatives) to purchase power from small power production qualifying facilities (QF).⁵

2. As discussed below, the Petitioners are not QFs, and are not authorized to file petitions for enforcement pursuant to section 210(h) of PURPA.⁶ We will accordingly dismiss the petition to enforce PURPA.

I. Petition

3. Petitioners request a ruling on South Texas's obligation to purchase power from each of the individual (up to 20 MW) proposed wind projects, and for a total of up to 20 MW if the projects are combined together.⁷ Petitioners acknowledge that they "have not completed the QF registration and will proceed once the size/purchase issues etc. are resolved."⁸

4. In the June 30 Petition, Petitioners argue that they are entitled to sell power to South Texas pursuant to a legally enforceable obligation under sections 292.304(d)(1) and (2) of the Commission's regulations.⁹ Petitioners state that previous Commission decisions have recognized that small yet-to-be-built QFs will be unable to finance their facilities without a legally enforceable obligation to purchase power from the yet-to-be-

⁴ May 27 Petition at 1. Petitioners state that it should be noted that even with a total combined aggregate of 45 MW for the three separate renewable wind projects, the net capacity of the combined projects are only 17.1 MW, which is still below the 20 MW small QF purchase obligation limit. Petitioners claim that if the Commission sees the projects as exceeding the total limit of 20 MW in aggregate, the Petitioners will resize the projects to fit within the total limit of 20 MW.

⁵ 18 C.F.R. § 292.303 (2014).

⁶ 16 U.S.C. § 824a-3(h)(2)(B).

⁷ May 27 Petition at 2.

⁸ *Id.* at 3.

⁹ 18 C.F.R. § 292.304(d)(1) - (2) (2014).

built facilities.¹⁰ Petitioners request that the Commission issue a petition for enforcement under section 210(h) of PURPA.¹¹

II. Notice of Filings and Responsive Pleadings

5. Notice of the May 27 Petition was published in the *Federal Register*, 79 Fed. Reg. 32,275 (2014), with interventions and protests due on or before June 17, 2014. On June 17, 2014, South Texas filed the June 17 Protest.

6. Notice of the June 30 Petition was published in the *Federal Register*, 79 Fed. Reg. 40,096 (2014), with interventions and protests due on or before July 21, 2014. On July 21, 2014, South Texas filed the July 21 Protest. On July 25, 2014 Petitioners filed a response to the July 21 Protest (July 25 Response).

7. In its June 17 Protest South Texas states that the allegation does not have merit because there is no power for South Texas to purchase at this time because the generation project has not yet been constructed. South Texas asserts that it is not aware of any requirement that it enter into a power purchase agreement applicable to potential purchases in the future, if and when the project is constructed. It also states that power purchase agreements are not required to create a legally enforceable obligation.¹² South Texas argues that Petitioners have not stated a sufficient claim to grant relief, have not established a *prima facie* case, do not satisfy Commission complaint (or other pleading) requirements, and do not provide any evidentiary support.¹³ South Texas further asserts that the projects may not even qualify as QFs if and when they are constructed, and argues that if it is determined that they exceed 20 MW, South Texas may then file to be relieved of the PURPA mandatory purchase obligation.¹⁴ South Texas requests that the Commission issue a notice of intent not to act or dismiss the proceeding.¹⁵ In its July 21 Protest, South Texas states that while the June 30 Petition attempts to cure certain procedural deficiencies in Petitioners' original filing in this proceeding, it does not address the substantive issues raised by South Texas in its

¹⁰ June 30 Petition at 1.

¹¹ 16 U.S.C. §824a-3(h).

¹² June 17 Protest at 5.

¹³ *Id.* at 2.

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 1.

June 17 Protest to that filing. Petitioners' July 25 Response largely reiterates positions made in earlier filings.

III. Commission Determination

A. Procedural Matters

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the Petitioners' July 25 Response and will therefore reject it.

B. Substantive Matters

9. We dismiss this petition. As Petitioners acknowledge, they have not filed Form 556 notices of self-certification or applications for Commission certification, as is required to obtain QF status pursuant section 292.203(a)(3) of the Commission's regulations.¹⁶ As the Commission recently stated, "[t]he filing requirement is a substantive and important criterion for QF status, which was expressly adopted in Order No. 671 and must be followed."¹⁷ Therefore, Petitioners are not QFs, and are not authorized to file petitions for enforcement pursuant to section 210(h) of PURPA.¹⁸ If Petitioners obtain QF status and the host utility fails to comply with section 292.303, the QF may then file a petition pursuant to section 210(h) of PURPA.

10. We note that Petitioners' facilities do not need to be constructed to file a Form 556 notice of self-certification or application for Commission certification for its facilities.¹⁹ Section 292.204 of the Commission's regulations contains the criteria for qualifying

¹⁶ 18 C.F.R. § 292.203(a)(3). Order No. 671 amended section 292.203 of the Commission's regulations to expressly require that a facility claiming QF status must file either a notice of self-certification or an application for Commission certification. *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, at P 82 (2006).

¹⁷ *OREG 1, Inc., et al.*, 135 FERC ¶ 61,150 (2011), *reh'g denied*, 138 FERC ¶ 61,110, at P 16 (2012).

¹⁸ 16 U.S.C. § 824a-3(h)(2)(B).

¹⁹ E.g., *DeWind Novus, LLC*, 139 FERC ¶ 61,201 (2012).

small power production facilities.²⁰ We further note that Petitioners may seek recertification to the extent that the facts or representations which form the basis for a previous certification change.²¹

11. Moreover, South Texas contends that Petitioners may not qualify as QFs²² even when they file for QF status. After Petitioners file their Form 556 notices of self-certification or applications for Commission certification, South Texas may then challenge Petitioners' QF status.

The Commission orders:

The Petition is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁰ 18 C.F.R. § 292.204 (2014). A small power production facility must 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. Section 292.204(a)(2) establishes the method of calculating the size of a small power production facility. 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. Facilities that are not located within one mile of the facility for which qualification is sought are considered to be located at separate sites.

²¹ To the extent that the facts or representations which form the basis for 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.

²² June 17 Protest at 5.