

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.

Colstrip Energy Limited Partnership

Docket No. QF84-377-011

ORDER CONDITIONALLY GRANTING APPLICATION FOR RECERTIFICATION
AS A QUALIFYING SMALL POWER PRODUCTION FACILITY

(Issued December 5, 2006)

1. This order addresses an application submitted by Colstrip Energy Limited Partnership (Colstrip) for Commission recertification as a qualifying small power production facility. Colstrip filed for recertification in order to obtain Commission approval of an additional waste fuel.¹ As discussed below, we will conditionally grant Colstrip's application for recertification.

Background

2. Colstrip owns a 42 megawatt coal-fueled small power production facility (Facility) located in Rosebud County near Colstrip, Montana. The Facility was originally certified as a qualifying cogeneration facility on December 11, 1984.² On October 9, 1987, the Commission certified the Facility as a qualifying small power production facility.³ The primary energy source of the Facility continues to be "waste" in the form of subbituminous coal refuse. Colstrip receives subbituminous coal refuse from the Western Energy Company (Western) pursuant to a long-term supply contract. Western produces

¹ Section 292.204(b) of the Commission's regulations state that the primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.

² *AEM Corp.*, 29 FERC ¶ 62,254 (1984).

³ *AEM Corp.*, 41 FERC ¶ 62,031 (1987). The Facility was last certified on March 18, 1998 in 82 FERC ¶ 62,195 (1998). The purpose for the recertification application was to ensure that the Facility will retain its qualifying status following a change in ownership and in the fuel supply for the Facility.

the subbituminous coal refuse from the Rosebud mine located in the Powder River Basin in Rosebud County, Montana. The Commission has determined subbituminous coal refuse produced at Western's Rosebud mine to be "waste" material.⁴

3. On May 3, 2006, Colstrip submitted an application for recertification as a qualifying small power production facility. Colstrip states that the primary purpose for the recertification application is to obtain Commission approval of an additional "waste" fuel for the Facility.⁵ Colstrip seeks Commission certification of Rib Coal from the Rosebud mine as an additional form of waste to be used as a primary input in the Facility.⁶

4. Rib Coal is also known as a fender of coal or a safety wedge. According to Colstrip, Rib Coal is produced as a result of Western's surface mining operations. To ensure the stability of the spoil⁷ and the safety of the mining seam, Western leaves a safety wedge of coal (Rib Coal)⁸ along the spoil side of the pit. When all the marketable coal has been mined from a strip, and before starting to fill the pit with the overburden from the next strip, Western determines whether the safety wedge of coal or Rib Coal can be safely recovered. Western mines as much of the Rib Coal as is feasible. However, according to Colstrip, if the spoil is too wet or shows signs of sloughing, the Rib Coal is not mined and is buried under the overburden from the next strip. The Rib Coal that is recovered is placed in the bottom of the pit, where Western makes a visual inspection to determine whether the Rib Coal is saleable by Western to its utility customers. Any Rib Coal that is determined to be too dirty for resale is not recovered and left in the pit. It is this "too dirty" Rib Coal that is left in the pit that Colstrip seeks a Commission determination of "waste" as set forth in 18 C.F.R. § 292.202(b) (2006).

5. Colstrip argues the Rib Coal satisfies two categories of "waste" as set forth in section 292.202(b) of the Commission's regulations. First, Colstrip contends that Rib

⁴ See *Big Horn Energy Partners*, 38 FERC ¶ 61,265 (1987); *order on reh'g*, 40 FERC ¶ 61,305 (1987).

⁵ The recertification application also updates the Commission regarding the operator and current upstream ownership of the Facility.

⁶ Colstrip states that the primary energy input to the Facility will continue to be "waste" in the form of subbituminous coal refuse produced by Western.

⁷ Spoil is the overburden and the top soil that is removed in order to expose the commercial quality subbituminous coal seam.

⁸ This safety wedge of coal is typically 10 feet across at its base and about 20 feet high at its top.

Coal has been determined by the U.S. Bureau of Land Management (BLM) to be waste, and therefore, Rib Coal meets the criteria of section 292.202(b)(5) of the Commission's regulations. Western mines coal under the BLM leases pursuant to the terms of a BLM-approved Resource Recovery and Protection Plan (R2P2). Colstrip contends that Western's practice of not recovering all of the Rib Coal is included in the R2P2. Colstrip argues that since the BLM allows Western to waste (*i.e.* not recover) the Rib Coal for a variety of reasons, including the quality of the coal, that Rib Coal qualifies as "waste" under section 292.202(b)(5) of the Commission's regulations.

6. Second, Colstrip argues that Rib Coal also satisfies the two-part test set forth in section 292.202(b) of the Commission's regulations.⁹ Colstrip contends that Rib Coal is produced as a result of Western's normal surface mining practices and, therefore, exists in the absence of the qualifying facility industry. Colstrip states that Rib Coal has little or no commercial value. According to Colstrip, because Rib Coal has poor quality characteristics, it is not saleable by Western to its utility customers. The Rib Coal that is not marketable is either buried in the mine pit or is used as hauling road material. Thus, Colstrip concludes that Rib Coal has no commercial value other than as an additional fuel in Colstrip's Facility.

Notice and Interventions

7. Notice of the application was published in the *Federal Register*, 71 *Fed. Reg.* 29,328 (2006), with comments, protests or motions to intervene due on or before June 2, 2006. On June 2, 2006, NorthWestern Corporation d\b\ a NorthWestern Energy (NorthWestern) filed a motion to intervene and protest.

8. NorthWestern argues that Colstrip has not made a sufficient showing to support the determination that Rib Coal should be deemed "waste." Specifically, NorthWestern contends that Colstrip fails to provide any evidence that (1) the BLM has made a determination that Rib Coal is "waste" and (2) that Rib Coal does not have a commercial value contrary to Colstrip's claims. NorthWestern requests that the Commission deny Colstrip's application or, alternatively, set the application for hearing.

9. NorthWestern questions Colstrip's claim that the BLM has determined Rib Coal to be waste for qualifying facility purposes. NorthWestern argues that Colstrip has not provided any citation, reference or other documentation to BLM's determination. NorthWestern also argues that BLM's R2P2 does not support Colstrip's conclusion that the BLM has found Rib Coal to be waste.

⁹ Section 292.202(b) of the Commission's regulations define "waste" as any energy input that has little or no current commercial value and exists in the absence of the qualifying facility industry.

10. NorthWestern also objects to Colstrip's claim that Rib Coal has little or no commercial value. Rib Coal in the ground, NorthWestern argues, is physically identical to seam coal and thus cannot be distinguished from the highly marketable seam coal. NorthWestern concedes that Rib Coal could potentially have lower quality characteristics, but only in certain situations. NorthWestern argues that since as much of the Rib Coal is mined as possible, there is a value to Rib Coal. Therefore, NorthWestern argues that the Commission cannot grant Colstrip's request that Rib Coal be deemed as "waste."

11. On June 13, 2006, Colstrip submitted a notice of intent to supplement its application for recertification. Colstrip requested that the Commission take no substantive action on its application until Colstrip files an amended recertification application. On July 19, 2006, NorthWestern filed a motion for action requesting that the Commission either deem Colstrip's application deficient or issue an order denying it. Colstrip responded in their July 27, 2006 answer in opposition to NorthWestern's motion for action.

12. Colstrip supplemented its application on September 6, 2006. In its supplement, Colstrip included a written determination from the United States Department of the Interior's Bureau of Land Management (BLM) stating that the additional waste coal that Colstrip proposes to use as an additional primary energy input in its Facility is "waste" pursuant to the Commission's regulations.¹⁰ In its supplement, Colstrip is specifically addressing NorthWestern's argument that it did not make a sufficient showing to support the determination that the Rib Coal was waste.

13. NorthWestern filed a protest to Colstrip's supplement, arguing that the Commission should either find the supplement deficient or institute an evidentiary hearing. In its protest, NorthWestern renewed its June 2006 protest, and stated that the supplement failed to address the underlying shortcomings of the original recertification application and that the record still fails to provide a basis on which Rib Coal can be declared a waste. More specifically, NorthWestern's protest states that the BLM determination is faulty and cannot be relied upon and that due process is violated by the Commission's un rebuttable acceptance of the BLM determination. NorthWestern argues that the BLM determination does not establish that the Rib Coal supplied to Colstrip is waste coal, nor does it establish that any percentage of the Rib Coal is in fact so contaminated as to be waste. NorthWestern also states that, because there was no involvement of other interested parties in the process before BLM, and because NorthWestern did not receive notice of the request for the determination, the Commission cannot accept the determination without violating NorthWestern's due process rights. NorthWestern argues that it should be allowed to rebut the BLM determination.

¹⁰ 18 C.F.R. § 292.202(b)(4) and (5) (2006).

14. On October 18, 2006, Colstrip filed an answer to NorthWestern's protest. First, Colstrip argues that NorthWestern's contention that the Commission should disregard BLM's determination in this case constitutes an impermissible collateral attack on the Commission's regulations and the precedent that created those regulations, and their argument is best suited for a petition for rulemaking in which it could suggest its revisions to the regulation. Second, Colstrip responds to NorthWestern's argument that the BLM determination is too vague to be relied upon because it does not articulate a governing standard for when wedge coal has become so contaminated as to constitute waste. Colstrip argues that in *Big Horn*, the Commission stated that "BLM's determinations are specific to each mining site as to geology, mining conditions, and economics" ¹¹ Further, Colstrip notes that BLM's determination specifically refers to the R2P2 for the Rosebud Mine, describes an identifiable waste material, the manner in which it is recovered, and the basis for qualifying as waste. Lastly, in its answer, Colstrip states that the Commission should reject NorthWestern's due process argument for two reasons. The first reason is that NorthWestern's attempt to expand the regulations governing BLM's determination by suggesting that there should be notice requirements and an opportunity to rebut the determination is an impermissible collateral attack. The second reason Colstrip states NorthWestern's due process argument should be rejected is that an evidentiary hearing is only appropriate when there are issues of material fact to be resolved, and there are no such issues left in this proceeding.

Discussion

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motion to intervene makes the entity that filed it a party to the proceeding.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Colstrip's answer because it has provided information that assisted us in our decision-making process.

17. A small power production facility must satisfy the fuel use criteria set forth in section 292.204(b) of the Commission's regulations to obtain qualifying status. Pursuant to section 292.204(b) of the Commission's regulations, the primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof. Colstrip seeks a Commission determination that Rib Coal is a "waste" fuel to be used as an additional primary energy source in its Facility. The Commission defines "waste" as:

¹¹ *Big Horn Energy Partners*, 40 FERC ¶ 61,305 at 61,951-52 (1987).

[A]n energy input that is listed below in this subsection, or any energy input that has little or no current commercial value and exists in the absence of the qualifying facility industry....¹²

18. One of the energy inputs specifically listed in 292.202(b) is coal refuse produced on federal or Indian lands that has been determined to be waste by BLM.¹³ In order to avoid possible conflicts between this agency and BLM, the Commission accepts waste coal determinations made by BLM for coal produced on federal or Indian lands.¹⁴ The dispute in this proceeding concerns whether or not BLM has made a determination that Rib Coal at the Rosebud mine produced by Western is waste.

19. Colstrip argues that the BLM has determined that Rib Coal produced at the Rosebud mine is waste and offered a letter dated August 14, 2006 from BLM (BLM Letter) as support for its contention. The BLM Letter states, in relevant part:

Under the approved Resource Recovery and Protection Plan (R2P2), the Rosebud Mine routinely recovers wedge coal where spoil and pit conditions allow. The wedge coal is then delivered along with other conventionally mined coal to the Colstrip power generating facilities or to Minnesota Power and Light. On occasion some wedge coal is salvaged but in the removal process it becomes so contaminated with dirt that it can not be economically upgraded for the existing markets. It is the opinion of this office that federal coal so contaminated with dirt that it can not be economically upgraded for existing coal markets is waste coal. As opportunity to salvage contaminated coal which otherwise would be left buried in the pit furthers the principle of Maximum Economic Recovery and should be encouraged.

NorthWestern disagrees with Colstrip's interpretation and argues that the BLM Letter does not find that the Rib Coal produced at the Rosebud mine is in fact waste, nor does it establish a standard by which such a determination could be objectively made.

20. The Commission finds that the BLM Letter supports a determination that sometimes Rib Coal is waste coal and sometimes it is not. The BLM Letter acknowledges that Rib Coal is recovered and delivered to utilities "where spoil and pit

¹² See 18 C.F.R. § 292.202(b) (2006).

¹³ BLM is the principle agency regulating and supervising the mining of coal owned by the federal government and by Indian tribes.

¹⁴ See 18 C.F.R. § 292.202(b)(5) (2006); See also *Big Horn Energy Partners*, 40 FERC ¶ 61,305 (1987).

conditions allow.” Where pit conditions exist such that Rib Coal can be salvaged, cleaned and upgraded for existing coal markets, BLM has not determined Rib Coal to be waste. The BLM Letter also acknowledges that Rib Coal, during the removal process, may become “so contaminated with dirt that it can not be economically upgraded for the existing markets.” Only when Rib Coal is “so contaminated with dirt,” has BLM made a determination that Rib Coal is waste coal.

21. We find that the BLM Letter supports a determination that only Rib Coal “so contaminated with dirt” is waste pursuant to section 292.204(b)(5) of the Commission’s regulation. However, Colstrip has not shown that the Rib Coal it intends to burn in its Facility as a primary fuel source will be the “so contaminated with dirt” Rib Coal (*i.e.*, waste coal). Without such a showing, the Commission cannot be certain that the Facility is burning at least 75 percent waste material pursuant to our regulations. Accordingly, the Commission will condition recertification of the Facility, based on its use of Rib Coal as fuel, upon a showing that the Rib Coal Colstrip receives from Western and burns as a primary fuel source in its Facility is in fact “so contaminated with dirt” that it is “waste.” Colstrip may satisfy this condition, for example, by receiving a written verification from Western that the Rib Coal Western delivers to Colstrip is “waste” Rib Coal. If Colstrip wishes to pursue recertification based on the use of Rib Coal, it should submit such a written verification to the Commission and NorthWestern within 30 days of the date of this order.

The Commission orders:

(A) Colstrip’s application for recertification, based on its use of Rib Coal as fuel for the facility, is conditionally granted as discussed in the body of the order.

(B) Within 30 days of the date of this order, if Colstrip wishes to pursue recertification based on the use of Rib Coal, Colstrip shall submit a written verification from Western that the Rib Coal Western delivers to Colstrip is “waste” as certified by BLM.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.