

142 FERC ¶ 61,173  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Wisconsin Public Service Corporation  
and Upper Peninsula Power Company

Docket No. QM13-1-000

ORDER GRANTING APPLICATION TO TERMINATE  
MANDATORY PURCHASE OBLIGATION

(Issued March 5, 2013)

1. On November 21, 2012, as amended on December 6, 2012, Wisconsin Public Service Corporation (WPSC) and Upper Peninsula Power Company (collectively, Applicants) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>1</sup> and section 292.310 of the Commission's regulations.<sup>2</sup> Each of the Applicants seeks to terminate the requirement under section 292.303(a) of the Commission's regulations<sup>3</sup> to enter into new power purchase obligations or contracts to purchase electric energy and capacity from qualifying cogeneration or small power production facilities (QF) with a net capacity in excess of 20 MW on a service territory-wide basis for its interconnected system under the control of the Midwest Independent Transmission System Operator, Inc. (MISO). In this order, the Commission grants the Applicants' requests to terminate their mandatory purchase obligations on a service territory-wide basis for QFs that have a net capacity greater than 20 MW, effective November 21, 2012, as requested.

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<sup>1</sup> 16 U.S.C. § 824a-3(m) (2006).

<sup>2</sup> 18 C.F.R. § 292.310 (2012).

<sup>3</sup> 18 C.F.R. § 292.303(a) (2012).

## **I. Background**

2. On October 20, 2006, the Commission issued Order No. 688,<sup>4</sup> revising its regulations governing utilities' obligations to purchase electric energy produced by QFs. Order No. 688 implements PURPA section 210(m),<sup>5</sup> which 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. The Commission found that the markets administered by MISO are one of the markets that satisfy the criteria of PURPA section 210(m)(1)(A).<sup>6</sup> Accordingly, section 292.309(e) of the Commission's regulations established a rebuttable presumption that MISO 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).<sup>7</sup> The Commission also established a second rebuttable presumption contained in section 292.309(d)(1) of the regulations, which provides that a QF with a net capacity at or below 20 MW does not have nondiscriminatory access to markets.<sup>8</sup>

## **II. Application to Terminate Mandatory Purchase Obligation**

3. Applicants assert that they satisfy the requirements of PURPA section 210(m)(1) and sections 292.309 and 292.310 of the Commission's regulations. Applicants state that they are each members of MISO and have transferred their respective transmission facilities to American Transmission Company LLC and that these facilities are functionally controlled and operated by MISO. Applicants further contend that they should be relieved of the mandatory obligation to purchase electric energy and capacity from QFs with a net capacity greater than 20 MW because the Commission has established a rebuttable presumption that those QFs have nondiscriminatory access to the MISO markets.

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<sup>4</sup> *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (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).

<sup>5</sup> Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005 (EPAct 2005). *See* Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-69 (2005).

<sup>6</sup> 16 U.S.C. § 824a-3(m)(1)(A) (2006); *see* 18 C.F.R. § 292.309(a)(1) (2012).

<sup>7</sup> 18 C.F.R. § 292.309(e) (2012).

<sup>8</sup> 18 C.F.R. § 292.309(d)(1) (2012).

4. On December 6, 2012, the Applicants submitted the name and contact information of one additional potentially affected QF that was inadvertently omitted.

### **III. Notice of Filing and Responsive Pleadings**

5. Notice of the Applicants' filing was published in the *Federal Register*, 77 Fed. Reg. 74,652 (2012). Interventions and protests were due on or before January 3, 2013. The Commission served notice of the application on the potentially-affected QFs identified by the Applicants by letters dated November 28, 2012, and December 7, 2012.

6. Timely protests were filed individually by Thomas J. Morel, Helene's Hilltop Orchard LLC, and Richard Stephens and Mary Bratz. Thomas J. Morel requests that the application be denied because renewable energy is still in the early stages of development and needs the money to support growth. Helene's Hilltop Orchard LLC objects to the application because of the hardships it will face if its current contract is altered. Richard Stephens and Mary Bratz protest the application as unfair and not in the best interest of the country, and claim that the termination of the mandatory purchase obligation will cripple the development of private small scale power production.

7. On January 3, 2013, the Applicants filed an answer to the protests of Thomas J. Morel, Helene's Hilltop Orchard LLC, and Richard Stephens and Mary Bratz. In the answer, Applicants assert that the 15 kW facility of Thomas J. Morel, the 0.24 kW facility of Helene's Hilltop Orchard, LLC, and the 2.5 kW facility of Richard Stephens and Mary Bratz will not be affected by the application because each of the facilities are less than or equal to 20 MW and the application does not seek to terminate the mandatory purchase obligation for QFs less than or equal to 20 MW.

8. On February 15, 2013, Georgia-Pacific Consumer Products LP (Georgia-Pacific), also known as Green Bay (Green Bay), filed a motion to intervene out-of-time and protest. In its protest, Green Bay requests that the Commission permit Green Bay to retain its rights to sell excess energy to its interconnected public utility under PURPA.

9. Initially, Green Bay states that the Applicants allege that the cogeneration facility that Green Bay owns and operates in Green Bay, Wisconsin<sup>9</sup> has a maximum electric

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<sup>9</sup> Fort James Operating Company, Docket No. QF90-127-004, FERC Form No. 556, *Certification of Qualifying Facility Status for an Existing or a Proposed Small Power Production or Cogeneration Facility* (Feb. 27, 2006).

The FERC Form No. 556 (Part A, 1a) states that Fort James Operating Company is a direct, wholly-owned subsidiary of Georgia-Pacific, a wholly owned subsidiary of Koch Forest Products, Inc., a wholly-owned subsidiary of Koch Industries.

deliverability of 53 MW. Green Bay argues, however, that the maximum electric deliverability is 28 MW, not 53 MW. Green Bay explains that it presently has two main electrical interconnections with WPSC, i.e., at the Liberty Street and South Broadway Substations. Green Bay states that the Liberty Street Substation is set up only to deliver power to the mill and cannot be used to export energy to WPSC or the wholesale market; the South Broadway Substation is the only connection to WPSC that the Green Bay mill can use to export energy. Therefore, Green Bay claims that its export capability is erroneously listed by Applicants as 53 MW, when it is actually limited to 28 MW.

10. Green Bay also states that the mill is a net purchaser of electricity from WPSC and not a net exporter of energy to WPSC. Green Bay explains that it tries to maximize self-generation during on-peak hours when the price of purchased electricity is high and minimize self-generation during off-peak hours when the price of purchased electricity is low, effectively becoming a net exporter of power during on-peak hours and a net purchaser of power during off-peak periods. In this regard, Green Bay provides two years of hourly data showing that, during the 17,544 hours in 2011 and 2012, “Green Bay’s energy exports exceeded 20 MWs/hour in only 104 hours, or less than 1% of the time,”<sup>10</sup> and that anticipated changes should reduce its net capacity to “significantly less than 20 MWs in 2014/2015 timeframe.”<sup>11</sup>

11. Green Bay avers that anticipated changes to the mill<sup>12</sup> for environmental compliance and fuel efficiency are expected to reduce Green Bay’s capability to export to significantly less than 20 MW in the 2014 and 2015 timeframe. With these changes, Green Bay says the QF will only rarely be able to export energy to the wholesale market, e.g., during unplanned plant curtailments when exports are required to maintain plant stability.

12. Green Bay also argues that it has rebutted the presumption that it has non-discriminatory access to MISO’s wholesale markets pursuant to section 292.309(e)(1) of

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<sup>10</sup> Green Bay Protest at 3. Green Bay claims that during those 104 hours the average export was 20.35 MW. The Commission’s analysis of the data submitted by Green Bay indicates that Green Bay exported greater than 20 MW in 362 hours instead of 104 hours.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> The FERC Form No. 556 (Part C, 12) states that Fort James Operating Company’s Green Bay mill uses the steam and heat from the QF to meet thermal load requirements. The thermal energy is used for process or heating and cooling purposes, including paper drying, pulping, and steam absorption chillers.

the Commission's rules and regulations.<sup>13</sup> Green Bay cites to *New York State Electric & Gas Corporation*<sup>14</sup> in which the Commission allowed a QF operated by Cornell University (Cornell QF) to retain its right to sell its energy to its host facility because a qualifying facility with “high variability in the need for its thermal output . . . does not effectively have nondiscriminatory access to” the wholesale market.<sup>15</sup> Green Bay contends that its electrical load, and the mill's purchase or sale of electricity, is similarly extremely variable. Green Bay has attached to its protest data that it contends show the extreme variability of its electrical load, and the mill's purchase or sale of electricity.

13. Therefore, Green Bay claims it should retain its right, as a QF, to sell its energy to WPSC under PURPA.

#### **IV. Discussion**

##### **A. Procedural Matters**

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding

15. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2012), the Commission will grant Green Bay's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the Applicants' answer because it has provided information that assisted us in our decision-making process.

##### **B. Commission Determination**

17. Applicants, as members of MISO, rely upon the rebuttable presumption set forth in section 292.309(e) of the Commission's regulations, namely, that MISO provides QFs

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<sup>13</sup> Citing 18 C.F.R. § 292.309(e) (2012). (“The qualifying facility may seek to rebut this presumption by demonstrating, *inter alia*, that: (1) The qualifying facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market;....”).

<sup>14</sup> *New York State Electric & Gas Corp.*, 130 FERC ¶ 61,216 (2010) (*NYSEG*).

<sup>15</sup> *Id.* P 21.

larger than 20 MW net capacity with nondiscriminatory access to independently administered, auction-based day-ahead and real-time wholesale markets for the sale of electric energy and to wholesale markets for long-term sales of capacity and electric energy.<sup>16</sup> As explained below, we find, based on the unrebutted statements in the Applicants' application, that the Applicants provide QFs larger than 20 MW nondiscriminatory access to independently administered, auction-based day-ahead and real-time wholesale markets for the sale of electric energy and to wholesale markets for long-term-sales of capacity and electric energy. Accordingly, we grant the Applicants' request to terminate the mandatory purchase obligation pursuant to section 210(m) of PURPA to enter into new contracts or obligations to purchase electric energy or capacity from QFs larger than 20 MW net capacity that are located in the Applicants' service territory.<sup>17</sup> As discussed below, we also find that the protests do not warrant our denying the Applicants' request.

18. As noted above, the protests of Thomas J. Morel, Helene's Hilltop Orchard, LLC, and Richard Stephens and Mary Bratz request that the Commission deny the Applicants' application. Attachment A-2 of the application and the Applicants' answer list the size of these protestors' facilities as: 0.24 kW for Thomas J. Morel, 15 kW for Helene's Hilltop Orchard, LLC, and 2.5 kW for Richard Stephens and Mary Bratz. Because each of these facilities is below the 20 MW threshold, none of them will be adversely affected by the granting of Applicants' application and so these protests do not provide a basis for denying the Applicants' request. To the extent that the protest of Richard Stephens and Mary Bratz argues for policy changes, it is outside the scope of this proceeding.

19. Green Bay argues in its protest that the export capability of its QF is less than 20 MW, and therefore the Commission should retain the mandatory purchase obligation as it relates to Green Bay. Order 688-A states that, "a QF is required to state its size in terms of 'net capacity' when certifying its status as a QF" and it is this amount, not present export capability, that "determine[s] whether the QF qualifies for the 'small size' rebuttable presumption."<sup>18</sup> A review of Green Bay's latest self recertification in Docket No. QF90-127-004 indicates it has a net capacity of 110.34 MW. The Commission relies

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<sup>16</sup> 18 C.F.R. §§ 292.309(a)(1), 292.309(e) (2012); Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 117; *see generally Public Service Company of New Hampshire*, 131 FERC ¶ 61,027, at PP 17-22 (2010), *reh'g denied*, 134 FERC ¶ 61,041 (2011) (*PSNH*).

<sup>17</sup> To the extent that a potentially-affected QF's net capacity is 20 MW or smaller this order does not terminate the mandatory purchase obligation for that QF.

<sup>18</sup> Order 688-A, FERC Stats. & Regs. ¶ 31,250 at P 104.

on the representations made in the Form 556 applications made to date, and here the filing shows a net capacity of 110.34 MW.<sup>19</sup>

20. Additionally, the termination of the mandatory purchase obligation only applies to the Applicants' entering *new* power purchase obligations or contracts to purchase electric energy and capacity from QFs with net capacity in excess of 20 MW. Stated differently, the mandatory purchase obligation remains unaffected with respect to the Applicants' *existing* obligations and contracts with QFs greater than 20 MW, and this would apply to Green Bay to the extent Green Bay has an existing contract obligating the Applicants to purchase the output of its facility. Attachment A-1 of the application indicates that the expiration date of the Green Bay agreement is December 31, 2013.

21. Green Bay also argues that, similar to the Cornell QF in *NYSEG*, Green Bay has operational characteristics that restrict its access to the MISO markets. In *NYSEG*, the Commission determined that the Cornell QF was effectively denied nondiscriminatory access to the New York Independent System Operator's (NYISO) markets. The Cornell QF was operated fundamentally to serve the steam needs of the host facility, a campus steam load, and not electric generation needs, and the steam load was highly variable depending on local weather conditions.<sup>20</sup> As a result of the highly variable need for thermal output, the Cornell QF's production of electric output was also highly variable. In *NYSEG*, in fact, the Commission stated that "[w]e are not finding that . . . variable electric output warrants a denial of relief. Rather we are finding that, on the facts before us, given the high variability in the need for its thermal output . . . Cornell does not effectively have nondiscriminatory access to NYISO's markets."<sup>21</sup> It was thus the fact-specific "tie between the highly variable need for thermal output and the resulting variability in the production of electric output" that led to the determination that the Cornell QF had operational characteristics that effectively denied nondiscriminatory access to NYISO's market.

22. The Commission has been clear "that the determination of whether a QF, seeking to rebut the presumption of access to markets, actually has nondiscriminatory access or not [is] made on a case-by-case basis."<sup>22</sup> Here, the variability in Green Bay's electrical

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<sup>19</sup> If any of the circumstances involving Green Bay's QF have significantly changed since it last recertified its facility in 2006, including the net capacity of the facility, it is incumbent on Green Bay to recertify its QF.

<sup>20</sup> *NYSEG*, 130 FERC ¶ 61,216 at PP 18-19.

<sup>21</sup> *Id.* P 18 (emphasis added).

<sup>22</sup> *Id.* P 17.

load is not caused by *operational characteristics* similar to those in *NYSEG*, but rather, as Green Bay admits, by *economic decisions* made by Green Bay to “maximize self-generation during on-peak hours when the price of purchased electricity is high and minimize self-generation during off-peak hours when the price of purchased electricity is low.”<sup>23</sup> Thus, the variability in electric energy available for sale is the result of Green Bay’s economic strategy, not the result of the needs of its thermal host for thermal output.

23. Furthermore, unlike the Cornell QF in *NYSEG*,<sup>24</sup> Green Bay’s variable production of electric energy does not preclude it from participation in the market. In fact, nowhere in its protest does Green Bay make the claim that it is currently prevented from participation in the market. It only claims that an expected environmentally and fuel efficiency driven reduction in the QF’s capability will mean that the QF will only “rarely be able to export energy to the wholesale market after its current agreement with the Applicants expires on December 31, 2013.”<sup>25</sup>

24. For all of the above explained reasons, Green Bay has not provided sufficient grounds to rebut the presumption that QFs exceeding 20 MW net capacity have nondiscriminatory access to markets in MISO; Green Bay thus has presented no reason in its protest to deny the Applicants’ application to terminate the mandatory purchase obligation.

25. Finally, the Applicants request waiver of the procedures in section 292.310(c) of the Commission’s regulations<sup>26</sup> requiring electric utilities to submit with the application certain information specific to each potentially-affected QF because certain information is not available. Applicants also request waiver of section 292.310(c) requirements if they have failed to identify any potentially affected QF. Applicants state that they have exercised due diligence and have engaged in extensive efforts to gather all the information required by the regulations for each potentially-affected QF in each of their service areas. Under these circumstances, we find the Applicants’ listing of potentially-affected QFs sufficient and we will not require the Applicants to do more. Our finding does not constitute a waiver of the notice requirements of section 292.310, but rather a determination that the Applicants have complied with section 292.310; we will not grant a blanket waiver of the notice requirements in section 292.310 of the Commission’s regulations.

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<sup>23</sup> Green Bay Protest at 3.

<sup>24</sup> *NYSEG*, 130 FERC ¶ 61,216 at P 8.

<sup>25</sup> Green Bay Protest at 4.

<sup>26</sup> 18 C.F.R. § 292.310(c) (2012).

The Commission orders:

(A) The Applicants' request, pursuant to section 210(m) of PURPA and section 292.310 of the Commission's regulations, to terminate on a service territory-wide basis their mandatory purchase obligations to enter into new contracts or obligations to purchase electric energy or capacity from QFs over 20 MW net capacity is hereby granted, effective November 21, 2012, as discussed in the body of this order.

(B) The Applicants' request for waiver of section 292.310(c) of the Commission's regulations is hereby denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.