

175 FERC ¶ 61,041  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
Neil Chatterjee, James P. Danly,  
Allison Clements, and Mark C. Christie.

Deseret Generation & Transmission Co-operative, Inc.      Docket No. EL20-47-000

ORDER GRANTING REQUEST FOR PARTIAL WAIVER

(Issued April 15, 2021)

1. On May 11, 2020, Deseret Generation & Transmission Co-operative, Inc. (Deseret) on behalf of itself and six distribution cooperative member-owners (collectively, Participating Members)<sup>1</sup> filed a petition (Petition) for partial waiver of certain Commission regulations<sup>2</sup> implementing section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>3</sup> (Petition). Specifically, Deseret seeks waiver of the Participating Members' obligations to purchase energy and capacity from qualifying facilities (QF) and Deseret's obligation to sell energy and capacity to QFs. As discussed below, we grant Deseret's requested waiver, effective May 11, 2020.

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<sup>1</sup> Participating Members are Bridger Valley Electric Association; Dixie-Escalante Rural Electric Association, Inc.; Flowell Electric Association, Inc.; Garkane Energy Cooperative, Inc. (Garkane); Moon Lake Electric Association; and Mt. Wheeler Power, Inc. Petition at n.2. Deseret states that it maintains a service agreement on file with the Commission for each of the six Participating Members, under which Deseret supplies cost-based all requirements service. Petition at 3.

<sup>2</sup> 18 C.F.R. § 292.402 (2020) (“[a] non-regulated electric utility may... apply for a waiver from the application of any of the requirements of subpart C (other than § 292.302 thereof), [with the Commission granting] such a waiver only if an applicant... demonstrates that compliance with any of the requirements of subpart C is not necessary to encourage cogeneration and small power production and is not otherwise required under section 210 of PURPA.”).

<sup>3</sup> 16 U.S.C. § 824a-3.

## I. Background

2. Deseret states that it is a Commission-jurisdictional generation and transmission service (G&T) cooperative that provides wholesale service to its Participating Members pursuant to Commission-approved market-based rate authority.<sup>4</sup> Deseret states that its Participating Members provide retail service to approximately 70,000 retail electric customers in Utah, Nevada, Wyoming, Colorado, and Arizona.<sup>5</sup>

## II. Petition

3. Deseret states that it seeks waiver of its obligation under section 292.303(b) of the Commission's regulations<sup>6</sup> to make sales directly to QFs, and that the Participating Members seek waiver of their obligation under section 292.303(a) of the Commission's regulations<sup>7</sup> to make purchases directly from QFs. Deseret proposes, and the Participating Members agree, that Deseret will assume the obligations of its Participating Members to make purchases from QFs, while the Participating Members will assume the obligation of Deseret to make sales to QFs.<sup>8</sup>

4. Under a PURPA Qualifying Facilities – Joint Implementation Plan, Deseret and the Participating Members agree to interconnect with any QF pursuant to the relevant interconnection rules. Deseret will purchase capacity and energy from QFs at Deseret's avoided cost rate and each Participating Member will sell supplementary, back-up and maintenance power to QFs at rates that comply with PURPA. No QF will be subject to duplicative charges for interconnection or wheeling as a result of selling to Deseret and purchasing from a Participating Member.<sup>9</sup>

5. Deseret contends that waiver of the Participating Members' purchase obligation is consistent with PURPA's mandate because Deseret is willing to stand in the shoes of the Participating Members by paying QFs its full avoided cost for their output. Deseret also states that the Participating Members rely on Deseret to meet their capacity and energy

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<sup>4</sup> See Petition at 3 (citing *MEP Investments, LLC*, 87 FERC ¶ 61,209 (1999)).

<sup>5</sup> *Id.* at 4.

<sup>6</sup> 18 C.F.R. 292.303(b) (2020).

<sup>7</sup> 18 C.F.R. § 292.303(a).

<sup>8</sup> Petition at 6.

<sup>9</sup> *Id.* at 7-8, 10.

requirements and that granting the waiver will allow Deseret to coordinate power supply decisions in a centralized and efficient manner on behalf of the Participating Members.<sup>10</sup>

6. Deseret also requests waiver of its own obligation to sell energy and capacity directly to QFs pursuant to section 292.303(b) of the Commission's regulations. Deseret explains that because the Participating Members are retail utilities, they are in a better position to provide the interconnection and retail service required by QFs. Deseret states that its Participating Members are committed to provide supplementary, back-up and maintenance power to QFs as requested, on either a firm or interruptible basis, at rates that are nondiscriminatory, just and reasonable, and in the public interest.<sup>11</sup>

### **III. Notice**

7. Notice of the Petition was published in the *Federal Register*, 85 Fed. Reg. 29,937 (May 13, 2020), with interventions and protests due on or before June 1, 2020. Garkane and Kanab Solar LLC (Kanab Solar) filed motions to intervene. Kanab Solar filed a protest; Deseret and Garkane filed an answer.

### **IV. Protest and Answers**

8. In its protest, Kanab Solar states that it does not oppose the Petition but asks that the Commission clarify that the waivers, if granted, would apply prospectively to those QFs that do not have an existing power purchase agreement (PPA) or legally enforceable obligation (LEO)<sup>12</sup> with one of the Participating Members.

9. Kanab Solar explains that, from December 2019 to March 2020, it was negotiating to sell its output to Garkane, a Participating Member. Kanab Solar further explains that the parties disagreed over whether Garkane was a full or partial requirements customer of Deseret and thus whether Garkane's or Deseret's avoided cost should apply to Garkane's

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<sup>10</sup> *Id.* at 6, 8

<sup>11</sup> *Id.* at 7-8, 14.

<sup>12</sup> The Commission has held that a LEO can take effect before a contract is executed and may not necessarily be incorporated into a contract. *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 25 (2009), *reh'g denied*, 130 FERC ¶ 61,127 (2010) (“[A] QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.”).

purchases from Kanab Solar.<sup>13</sup> According to Kanab Solar, Garkane stated that it intended to provide a draft PPA to Kanab Solar around April 1, 2020. Kanab Solar states that later, Garkane stated it would provide a draft PPA, unless Deseret decided to file a waiver request with the Commission.<sup>14</sup> Kanab Solar states that, on April 23, 2020, Deseret notified Kanab Solar that Deseret intended to file the instant Petition and that Kanab Solar would need to negotiate a PPA with Deseret under the requested waiver.

10. Kanab Solar contends that, on April 28, 2020, Kanab Solar provided Garkane a partially executed PPA in which Kanab Solar estimated Garkane's avoided cost and asked Garkane to execute the PPA. Kanab Solar states that, after Deseret and Garkane stated that neither of them would accept the PPA, Deseret filed the Petition. Kanab Solar asserts that Garkane delayed negotiations with Kanab Solar so that Deseret could file the Petition and thereby require Kanab Solar to sell its output to Deseret, instead of Garkane.<sup>15</sup>

11. Kanab Solar explains that the standard for establishing a LEO is that which is adopted by the relevant state utility commission and is consistent with the Commission's regulations implementing PURPA.<sup>16</sup> While Kanab Solar asserts that it is unaware of the Public Service Commission of Utah (Utah Commission) or the state courts adopting a definitive standard for when a LEO is established, Kanab Solar cites a Utah Commission case in which the Utah Commission determined that a QF could establish a LEO by demonstrating that a contract would have been executed "but for" some action or non-action of the purchasing utility.<sup>17</sup> Kanab Solar thus concludes that a QF can establish a

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<sup>13</sup> Kanab Solar states that, even if Garkane is a full requirements customer of Deseret, the Commission should still grant the waiver on a prospective basis in order to allow Kanab Solar to sell to Garkane.

<sup>14</sup> Petition at 7.

<sup>15</sup> Kanab Solar Protest at 4-8. In its protest, Kanab Solar summarizes six months of negotiations between itself, Garkane, and Deseret and includes copies of emails and letters in Attachment A. Kanab Solar asserts that Garkane's avoided cost rate is greater than Deseret's avoided cost rate.

<sup>16</sup> *Id.* at 10 (citing *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 35 (2011)).

<sup>17</sup> *Id.* (referencing *In re the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Thayn Hydro, LLC.*, Docket No. 16-035-04, Order 9-15 (July 20, 2016) (finding that meeting this "but for" standard would be sufficient to demonstrate a LEO exists, but would not be a necessary predicate to establish a LEO)).

LEO once the QF commits to sell, and prior to the “but for” standard of utility acceptance.

12. Kanab Solar states that the Utah Commission also found that a new QF “should expect to satisfy customary standards and diligence requirements” before obtaining a LEO. Kanab Solar states that it met this standard prior to Deseret filing the Petition, arguing that Kanab Solar committed to sell energy and capacity to Garkane and provided all necessary information, made several requests for a PPA, negotiated terms with Garkane, and submitted an executed PPA to Garkane.

13. In their answer, Deseret and Garkane dispute Kanab Solar’s allegation that Deseret was unwilling to negotiate with Kanab Solar. Deseret and Garkane state that, as Deseret is a full-requirements supplier, Garkane’s avoided cost rate is Deseret’s avoided cost rate so Kanab Solar should have negotiated the PPA with Deseret, not Garkane, regardless of when the Petition was filed. Deseret and Garkane assert that, in insisting on selling to Garkane, Kanab Solar is seeking an “above avoided cost rate” from Garkane, contrary to the Commission’s regulations, which state “nothing ... requires any electric utility to pay more than the avoided costs for purchases.”<sup>18</sup> Further, Deseret and Garkane note that Garkane has begun interconnection studies to accommodate Kanab Solar’s facility, and that Deseret has offered to purchase Kanab Solar’s output at Deseret’s avoided cost rate. Deseret and Garkane emphasize that, because Garkane’s avoided cost rate is the same as Deseret’s avoided cost rate, Kanab Solar has not established a LEO and Kanab Solar cannot receive a higher avoided cost rate from Garkane.

14. Deseret and Garkane further assert that Deseret has specifically incorporated references to the requirements of Order No. 69 in its requirements contracts on file with the Commission under FPA section 205. Specifically, Deseret and Garkane argue that Deseret’s wholesale power contract’s rate schedule in its contract with Garkane provides that Garkane’s avoided cost rate must be based on Deseret’s avoided cost rate, which is the rate that Deseret develops and reviews from time to time.<sup>19</sup>

## V. Discussion

15. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the timely unopposed motions to intervene serve to make Garkane and Kanab Solar parties to this proceeding. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2020), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept Deseret’s and

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<sup>18</sup> 18 C.F.R. § 292.304(a)(2).

<sup>19</sup> Deseret Answer at 13.

Garkane's answer because it provided information that assisted us in our decision-making process.

16. As discussed below, we grant the Petition, effective May 11, 2020, the date Deseret filed the Petition. Further, we have determined, based on the record before the Commission, and barring any restrictions under state law, that Kanab Solar established a LEO with Garkane prior to Deseret filing the Petition.<sup>20</sup>

17. Under section 292.402(b) of the Commission's regulations, the Commission may grant waivers of sections 292.303(a) and (b), where compliance with these sections is not necessary to encourage cogeneration and small power production and is not otherwise required under PURPA section 210.<sup>21</sup> The Commission has previously granted waivers of sections 292.303(a) and (b) where the generation and transmission cooperative utility agreed to purchase QF power at its avoided cost on behalf of its distribution cooperative utilities, and the distribution cooperative utilities agreed to offer supplementary, interruptible, back-up, and maintenance power to QFs at rates that are nondiscriminatory, just and reasonable.<sup>22</sup>

18. As discussed below, we grant the partial waiver of certain obligations imposed on Deseret and its Participating Members under sections 292.303(a) and 292.303(b) of the Commission's regulations. Specifically, we grant waiver of the Participating Members' obligations to purchase energy and capacity from QFs and Deseret's obligation to sell energy and capacity to QFs. Waiver is appropriate for the utilities that have agreed: (1) to allow Deseret, as their requirements supplier, to purchase power from the QFs interconnecting to their systems; and (2) to sell back-up and other power to such QFs because the QFs will remain in essentially the same position as they currently stand. Granting waiver of the Participating Members' purchase obligation will not frustrate the PURPA mandate to encourage power production by QFs because no QF will be deprived of an avoided cost sale of its power and each QF will receive the full avoided cost rate. Similarly, granting waiver of Deseret's sales obligation will not frustrate the PURPA mandate because each Participating Member will offer supplementary, back-up and

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<sup>20</sup> See *infra* notes 27-28 and accompanying text. We note that whether Garkane is a full-requirements purchaser and whether Garkane's avoided cost rate is equal to Deseret's avoided cost rate are pricing issues and are beyond the scope of this proceeding. This proceeding only addresses the waiver of the respective obligations of Deseret and its Participating Members, and the establishment of a LEO.

<sup>21</sup> 18 C.F.R. § 292.402(b).

<sup>22</sup> See, e.g., *Seminole Electric Cooperative, Inc.*, 39 FERC ¶ 61,354, at 62,112 (1987); *accord Heartland Consumers Power District*, 154 FERC ¶ 61,203, at PP 26, 28 (2016).

maintenance power on a firm or interruptible basis to QFs at rates that are nondiscriminatory, just and reasonable, and in the public interest.

19. In *Cedar Creek*, the Commission explained that a LEO is designed to protect a QF by preventing an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or from delaying the signing of a contract, so that a later and lower avoided cost is applicable.<sup>23</sup>

20. In *East Kentucky*,<sup>24</sup> the Commission found a LEO had been potentially established prior to the electric utility filing an application pursuant to FPA section 210(m) and section 292.310 of the Commission's regulations. In that instance, the electric utility requested to terminate the mandatory purchase obligation from QFs greater than 20 MW and the Commission addressed protests claiming the existence of a LEO prior to the electric utility's filing with the Commission.

21. Here, although Deseret disputes certain Kanab Solar assertions, the following facts are undisputed: Kanab Solar detailed the length of the negotiations between Garkane and Kanab Solar, the level of detail in the negotiations, Garkane's stated intent to provide a PPA and then the delayed negotiations, and Deseret's subsequent direction to Kanab Solar to negotiate with Deseret. These undisputed facts support our determination, based on the facts before us and barring any restriction under state law, that Kanab Solar established a LEO with Garkane prior to the date Deseret filed the Petition, i.e., on May 11, 2020.<sup>25</sup> Consequently, neither Garkane nor Deseret can require Kanab Solar to sell to Deseret.

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<sup>23</sup> *Cedar Creek*, 137 FERC ¶ 61,006 at P 36 (citing *W. Penn Power Co.*, 71 FERC ¶ 61,153 at 61,495) (1995).

<sup>24</sup> *E. Ky. Coop.*, 160 FERC ¶ 61,053, at P 21 (2017) (finding that East Kentucky's waiver request "did not foreclose Bluebird or Blue Jay from having established a legally enforceable obligation under PURPA. Barring any restrictions under state law, Bluebird and Blue Jay would be grandfathered such that Commission approval of this Application would not include Bluebird or Blue Jay QFs."). See also *Neb. Pub. Power Dist.*, 156 FERC ¶ 61,043, at P 20 (2016) (finding "on this record that the Cottonwood QF by virtue of its letter to NPPD requesting an NPPD purchase, has initiated a proceeding to establish a contract or legally enforceable obligation and the Cottonwood QF's application is pending approval before the applicable non-regulated electric utility; that application is thus grandfathered.").

<sup>25</sup> This proceeding pre-dates Order No. 872, which became effective December 31, 2020, and the changes to the LEO process adopted in that rule. *Qualifying Facility Rates and Requirements*, Order No. 872, 172 FERC ¶ 61,041, *order on reh'g*, Order No. 872-A, 173 FERC ¶ 61,158 (2020).

22. In Order No. 688-A we noted that “in the division of responsibilities of administering PURPA between this Commission and state regulatory authorities (and non-regulated utilities), it is the state regulatory authorities (or non-regulated utilities) that determine whether and when a legally enforceable obligation is created.”<sup>26</sup> However, we also stated that “QFs that believe that some other sort of state proceeding has created a legally enforceable obligation under state law may argue their claim before the Commission, and we will make such determinations on a case-by-case basis based on state law.”<sup>27</sup> Here, we have made such a determination, and no party has pointed to any provision of state law that would lead to a different conclusion.<sup>28</sup>

23. Whether or not Garkane’s avoided cost rate is the same as Deseret’s avoided cost rate is not the issue before the Commission. Nothing in this order should be read to address that issue.

24. Finally, we disagree with the argument that, having provided a PPA to Kanab Solar, Deseret voided Kanab Solar’s LEO with Garkane or relieved Garkane from the LEO established prior to the effective date of the Petition. Allowing Deseret to void Kanab Solar’s LEO in this way would largely nullify the effect and purpose of a LEO.

The Commission orders:

Deseret’s Petition is hereby granted, effective May 11, 2020, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>26</sup> *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688-A, 119 FERC ¶ 61,305 at P 139 (2007), *aff’d sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

<sup>27</sup> *Id.*

<sup>28</sup> Although no applicable state law provision has been cited to us, we note that “[w]hile the Commission gives deference to the states in determining the circumstances for when a legal enforceable obligation arises, such deference is subject to the terms of Commission regulations.” *Cedar Creek*, 137 FERC ¶ 61,006 at P 35 & n.57 (citing *West Penn Power Co.*, 71 FERC ¶ 61,495).