

124 FERC ¶ 61,045
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.

Virginia Electric and Power Company

Docket Nos. QM08-4-000
QM08-4-001

ORDER GRANTING APPLICATION
TO TERMINATE PURCHASE OBLIGATION

(Issued July 17, 2008)

1. On March 11, 2008, as amended on April 22, 2008, Virginia Electric and Power Company (Dominion Virginia), filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹ and section 292.310 of the Commission's regulations² seeking termination on a service territory-wide basis of the obligation of Dominion Virginia to enter into new obligations or contracts to purchase electric energy from qualifying cogeneration and small power production facilities (QFs) with net capacity in excess of 20 MW. In this order, we grant Dominion Virginia's application.

Background

2. On October 20, 2006, the Commission issued Order No. 688,³ revising its regulations governing utilities' obligations to purchase electric energy produced by QFs. Order No. 688 implements PURPA section 210(m),⁴ which, generally speaking, provides

¹ 16 U.S.C.A. § 824a-3(m) (2006).

² 18 C.F.R. § 292.310 (2008).

³ *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).

⁴ Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005. *See* Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-69 (2005).

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.

3. As relevant here, the Commission found in Order No. 688 that the markets administered by PJM Interconnection, L.L.C. (PJM) satisfy the criteria of PURPA section 210(m)(1)(A).⁵ Accordingly, section 292.309(e) of the Commission's regulations established a rebuttable presumption that PJM 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).⁶

Dominion Virginia's Filing

4. In its application, Dominion Virginia states that it meets the requirements for relief under section 292.309(a)(1) of the Commission's regulations.⁷ Dominion Virginia states that, as a member of PJM, it is relying on the rebuttable presumptions contained in section 292.309(e) and therefore should be relieved of the obligation to purchase electric energy from QFs larger than 20 MW net capacity. Accordingly, Dominion Virginia asks for relief, on a service territory-wide basis from the requirement to enter into new power purchase obligations or contracts with QFs over 20 MW net capacity.

Notices and Responsive Pleadings

5. Notice of Dominion Virginia's filing was mailed by the Commission on March 11, 2008 to each of the eighteen potentially-affected QFs identified in Dominion Virginia's application.⁸ Notices of Dominion Virginia's filing and amended filing were published in the *Federal Register*, 73 Fed. Reg. 14,466 and 73 Fed. Reg. 23,455 (2008), with

⁵ 16 U.S.C. § 842a-3(m)(1)(A) (2006); *see* 18 C.F.R. § 292.309(a)(1) (2008).

⁶ 18 C.F.R. § 292.309(e) (2008).

⁷ 18 C.F.R. § 292.309(a)(1) (2008).

⁸ Dominion Virginia identifies eighteen potentially-affected QFs in its application: Birchwood Power Partners LLP; Cogentrix Virginia Leasing Corporation; Cogentrix of Richmond, Inc., Facility I; Cogentrix of Richmond, Inc., Facility II; Cogentrix of Rocky Mount, Inc.; Covanta Fairfax; Hopewell Cogeneration Inc.; Westmoreland Partners, c/o Westmoreland Coal Company; Roanoke Valley Facility I; Roanoke Valley Facility II, Alex./Arlington Resource Recovery; Demtar Paper Company; Smurfit Stone Container Corporation; Meadwestvace Virginia Corporation; Southeastern Public Service Authority; James River Cogeneration Company; Park 500; and St. Laurent Paper Products Co.

interventions and protests due on or before April 19, 2008. PJM filed a timely motion to intervene. The North Carolina Utilities Commission filed a notice of intervention. Smurfit Stone filed a timely motion to intervene and protest. Dominion Virginia filed an answer in opposition to Smurfit Stone's protest; Smurfit Stone filed a response.

6. Smurfit Stone states that it is a 41.5 MW net capacity cogeneration facility located in Dominion Virginia's service territory.⁹ Smurfit Stone argues that it does not have meaningful access to the market because of its operational characteristics and that it has made a sufficient showing to rebut the rebuttable presumption in Order No. 688 that QFs larger than 20 MW have access to markets. It contends that the Commission specified in Order No. 688 that certain factors were relevant to determining whether a purchase obligation should be terminated, including whether: (1) a QF has certain operational characteristics that effectively prevent the QF's participation in a market; (2) a QF lacks access to a mechanism to schedule transmission service or make sales in advance on a consistent basis, either because of the variability of the QF's electric energy production or because of market rules that prevent the QF from scheduling transmission service or participating in organized markets; or (3) a QF lacks access to markets due to transmission constraints.¹⁰

7. Smurfit Stone argues that all three of the above factors apply to its facility. It states that the first factor applies because the timing and quantity of electric output from the Smurfit Stone facility is dependent upon its thermal host;¹¹ electrical production by the Smurfit Stone facility is dictated by the operating schedule of its thermal host. Smurfit Stone argues that factor two is relevant because the lack of control over the timing and amount of power production means that advance transmission scheduling will be difficult and that penalties will be incurred when actual output differs from scheduled output.¹² It contends that factor three is relevant because of the physical constraints associated with Smurfit Stone's interconnection point.¹³ Smurfit Stone explains that, even if the facility could find a buyer for its highly variable output and could schedule such output in advance, its interconnection has a practical limitation of 14 MW to 14.5 MW and thus is unable to accommodate Smurfit Stones full output. Smurfit Stone argues

⁹ Smurfit Stone April 7, 2008 Protest at 6.

¹⁰ See Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 83.

¹¹ Smurfit Stone April 7, 2008 Protest at 3.

¹² *Id.*

¹³ *Id.*

that, because of the size of its interconnection, it should be treated as a 20 MW or smaller QF and thus subject to the rebuttable presumption that it does not have access to the PJM market.¹⁴

8. Dominion Virginia responds that it is not legally relevant that the timing and output of the Smurfit Stone QF is dependent on the operating schedule of its thermal host. Dominion Virginia argues that the PJM market has a pricing vehicle for addressing such issues, and that, if Smurfit Stone wants a different market design or believes that PJM's market design is no longer just and reasonable when applied to a QF that has variable output, Smurfit Stone should file a complaint against PJM seeking a change in market design, or should modify its own operations and those of its host to better accommodate the requirements of the PJM markets.

9. In its answer, Dominion Virginia also argues that Smurfit Stone's protest as to its size and capacity is at odds with the Commission's regulations and Order No. 688. Dominion Virginia states that the Commission-certified or self-certified net capacity requirement determines whether the QF qualifies for the small-size, rebuttable presumption that a market does not exist for the QF. It contends that the Smurfit Stone self-certified 41.5 MW net capacity rating is the appropriate net capacity rating to be used in determining whether or not the over-20 MW net capacity distinction is met.

10. Dominion Virginia argues that Smurfit Stone's claim that its facility's interconnection tie of 20 MVA, allegedly limiting the facility's physical export capacity to 14-14.5 MW, is not relevant to a determination whether Smurfit Stone qualifies for the small-size rebuttable presumption. It argues that Smurfit Stone's interconnection is a matter under Smurfit Stone's control, and that, if Smurfit Stone is correct about its facility's limited export capacity, Smurfit Stone can seek to modify its interconnection.

11. Smurfit Stone filed an answer reiterating that it has overcome the rebuttable presumptions provided by Order Nos. 688 and 688-A.

Discussion

Procedural Matters

12. Pursuant to Rule 214 of the Commission's rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notice of intervention and timely, unopposed motions to

¹⁴ *Id.* P 5. In addition, Smurfit Stone contends that Dominion Virginia's filing is incomplete because of a failure to provide the net capacity of each potentially-affected QF as required by Commission regulations. Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 72, n.41. In its answer, Dominion Virginia revised its exhibit to show net capacity. Dominion Virginia April 22, 2008 Answer at revised Attachment A.

intervene serve to make the entities that filed them 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) (2008), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that has assisted us in our decision-making process.

Commission Determination

13. Dominion Virginia, as a member of PJM, relies upon the rebuttable presumptions set forth in section 292.309(a) of our regulations, i.e., that PJM provides QFs larger than 20 MW net capacity 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.¹⁵ The potentially-affected QFs identified by Dominion Virginia were provided notice of Dominion Virginia's application and only Smurfit Stone, discussed below, protested.¹⁶ We find that PJM provides 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.¹⁷ We, therefore, will grant Dominion Virginia's request to terminate its obligation under section 292.303(a)¹⁸ of our regulations to enter into new power purchase obligations or contracts with QFs that have a capacity in excess of 20 MW net capacity and that are in Dominion Virginia's service territory in PJM.¹⁹

14. With regard to Smurfit Stone's argument that it has overcome the rebuttable presumptions discussed above, in Order No. 688, the Commission explained that a QF larger than 20 MW may seek to rebut the presumption of access to markets in their

¹⁵ 18 C.F.R. §§ 292.309(a)(1), .309(e) (2008).

¹⁶ To the extent that a potentially-affected QF is 20 MW or smaller, this order does not terminate the purchase obligation as to such QF.

¹⁷ See *PECO Energy Co.*, 122 FERC ¶ 61,022, at P 8 (2008).

¹⁸ 18 C.F.R. § 292.303(a) (2008).

¹⁹ 18 C.F.R. § 292.309(a) (2008). If at any time a QF believes that it does not have nondiscriminatory access to markets that satisfy the criteria for relieving an electric utility of its purchase obligation, the QF may file an application pursuant to section 292.311 of our regulations, 18 C.F.R. § 292.311 (2008), for an order reinstating the electric utility's purchase obligation.

response to applications pursuant to section 210(m)(3) of PURPA.²⁰ Smurfit Stone, relying on the opportunity contained in section 292.309(e)²¹ to rebut the presumption of access contained in section 292.309(a),²² contends that the timing and quantity of electric output from its facility is dependent upon its thermal host, and that its electrical production is dictated by the operating schedule of its thermal host.²³ Dominion Virginia acknowledges these operational characteristics,²⁴ but argues that “the PJM market has a pricing vehicle for addressing such issues – including the penalties Smurfit speaks of – and PJM is operating under a Commission-approved market design.”²⁵ In Order No. 688 and again in Order No. 688-A, the Commission specifically listed variable output as a factor that may be relevant to a demonstration of a lack of market access.²⁶ The QF, however, is obligated “to submit evidence of its lack of nondiscriminatory access.”²⁷ While Smurfit Stone has claimed variability,²⁸ this allegation, is not sufficient to show it lacks access to PJM’s markets in this case. Nor is this allegation, by itself, sufficient to rebut the presumption in this case. Smurfit Stone also never demonstrates that this variability is either “highly variable . . . on a daily basis” or “highly variable and unpredictable” as Order No. 688 indicates would be relevant to the question of whether the purchase obligation should be terminated.²⁹

²⁰ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 83.

²¹ 18 C.F.R. § 292.309(e) (2008).

²² 18. C.F.R. § 292.309(a) (2008).

²³ However, Smurfit Stone has not shown, for example, how often these changes occur, to what extent these changes may be predicted, nor the size of these changes.

²⁴ Dominion Virginia states that it “has no reason to dispute the facts raised” in the Smurfit Stone protest. Dominion Virginia April 22 Answer at 2.

²⁵ Dominion Virginia April 22 Answer at 6. Dominion Virginia goes on to argue that to the extent Smurfit Stone has a concern about the design of PJM’s market, it should complain to the Commission. We do not view this argument as valid in the context of a PURPA section 210(m) application. In its analysis of contested issues, such as this, the Commission will take the market as it is, not entertain speculation about what it could be.

²⁶ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 83; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 66.

²⁷ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 66.

²⁸ *But see supra* note 23.

²⁹ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 83.

15. In this regard, we emphasize that any QF's reliance on section 292.309(e)(1) of our regulations, i.e., that a QF "has certain operational characteristics that effectively prevent the qualifying facility's participation in a market,"³⁰ is QF-specific. We expect a QF to provide a detailed explanation, and actual data on past experience, of how the QF's operational characteristics effectively prevent the QF's participation in the market. As part of that demonstration, as in this case, it is not adequate to merely claim that the electrical output of a facility may vary over time or with changes in the operation of the thermal host. Thus, here, as noted above, Smurfit Stone has failed to demonstrate, for example, how often these changes occur, to what extent these changes may be predicted, or the size of these changes. Information about the nature, degree, volatility, unpredictability, suddenness, frequency and/or other characteristics of site-specific operational conditions also should be coupled with an explanation as to how these circumstances prevent effective participation in the particular market at issue, citing to relevant market design features. Moreover, the Commission has not indicated that it is relevant whether potential revenues would be different from those received before termination of a mandatory purchase obligation;³¹ the protesting QF must show that it would be functionally unable to participate.

16. Smurfit Stone also attempted to show that the size of its interconnection with Dominion Virginia affects its ability to access markets. However, the size of its interconnection is within its own control and therefore is not a basis to deny the application.³²

17. Accordingly, we grant Dominion Virginia's application.

³⁰ 18 C.F.R. § 292.309(e)(1) (2008).

³¹ See Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 83 (revenue is not one of the factors listed by the Commission as relevant).

³² The fact that Smurfit Stone's interconnection is 20 MW or smaller does not mean that Smurfit Stone should be treated by the Commission as having a net capacity of 20 MW or smaller for purposes of the presumption contained in 18 C.F.R. § 292.309(d)(1) (2008). In Order No. 688-A, the Commission explained that eligibility for the small-size presumption would be based on "net capacity" of the QF as certified by the Commission or self-certified by the QF. Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 104. The Commission recognized that factors that could affect the ability of a QF larger than 20 MW to access the market could be presented to the Commission for case-specific determinations, but that a 20 MW net capacity standard would nevertheless remain. See Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 100.

The Commission orders:

The application of Dominion Virginia for termination on a service territory-wide basis of the obligation to enter into new power purchase obligations or contracts with QFs that have a net capacity in excess of 20 MW is hereby granted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.