

131 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Public Service Company of New Hampshire	Docket Nos. QM10-4-000
	QM10-4-001
	QM10-4-002
	QM10-4-003

ORDER GRANTING IN PART AND DENYING IN PART THE APPLICATION
TO TERMINATE MANDATORY PURCHASE OBLIGATION

(Issued April 15, 2010)

1. On January 7, 2010, as amended on January 12, 2010, January 15, 2010, and January 22, 2010, Public Service Company of New Hampshire (PSNH) 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 regulations.² PSNH seeks termination of the obligation to enter into new power purchase obligations or contracts to purchase electric energy and capacity from qualifying cogeneration and small power production facilities (QFs) with net capacity in excess of 20 MW on a service territory-wide basis for its interconnected system under the control of ISO New England, Inc. (ISO-NE). In addition, PSNH seeks to terminate the mandatory purchase obligation for all QFs with a net capacity of 5 MW through 20 MW.

2. In this order, we largely grant PSNH's request to terminate its mandatory purchase obligation pursuant to section 210(m) of PURPA on a service territory-wide basis for QFs with a net capacity in excess of 20 MW effective January 7, 2010, and deny without prejudice the request for QFs with a net capacity of 5 MW through 20 MW.

¹ 16 U.S.C. § 824a-3(m) (2006).

² 18 C.F.R. § 292.310 (2009).

I. Background

3. 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 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 in Order No. 688 that the markets administered by ISO-NE were one of the markets that satisfy the criteria of PURPA section 210(m)(1)(A).⁵ Accordingly, section 292.309(e) of the Commission's regulations⁶ established a rebuttable presumption (for ISO-NE and other markets) that 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). 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.⁷

II. PSNH's Application

4. PSNH is the State of New Hampshire's largest utility, and is a wholly-owned subsidiary of Northeast Utilities. PSNH states that it meets the requirements for relief under section 292.309(a)(1) of the Commission's regulations,⁸ and that, as a member of ISO-NE, it is relying on the rebuttable presumption contained in section 292.309(e) and should be relieved of the obligation to purchase electric energy from QFs larger than 20 MW net capacity (large QFs). Accordingly, PSNH asks for relief, on a service

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), *aff'd sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

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) (EPAAct 2005).

⁵ 16 U.S.C. § 842a-3(m)(1)(A) (2006); *see* 18 C.F.R. § 292.309(a)(1) (2009).

⁶ 18 C.F.R. § 292.309(e) (2009).

⁷ *Id.* § 292.309(d)(1).

⁸ *Id.* § 292.309(a)(1).

territory-wide basis, of the requirement to enter into new power purchase obligations or contracts with QFs over 20 MW net capacity on a service territory-wide basis, i.e., the State of New Hampshire.⁹

5. PSNH further states that it can overcome the rebuttable presumption set forth in section 292.309(d)(1) of the Commission's regulations for those QFs that are 5 MW to 20 MW net capacity (small QFs).

6. PSNH claims that electric utilities may rebut the small QF presumption by demonstrating the opposite of what QFs need to demonstrate to rebut the large QF presumption. PSNH states that it can rebut the presumption of lack of nondiscriminatory access for small QFs by demonstrating: (1) there are not operational characteristics or transmission limitations preventing small QFs from effectively participating in the wholesale energy and capacity markets on the same basis as any other resource; (2) small and intermittent generators have access to a mechanism to schedule transmission service and make sales in advance on a consistent basis; (3) transmission constraints do not prevent small generators from accessing markets; (4) small QFs have nondiscriminatory access to distribution facilities for the purpose of selling power in the wholesale market; (5) small QFs do not have to pay unreasonable interconnection, transmission, or distribution charges to deliver their power to customers, and (6) there are no jurisdictional differences, pancaked delivery rates, or other administrative burdens that prevent small QFs from obtaining access to buyers other than the interconnected utility.

7. PSNH claims that small QFs are eligible to participate in ISO-NE's markets and that there is no size threshold for entry, e.g., ISO-NE allows small intermittent power resources to schedule and sell energy and capacity in advance on a consistent basis, while avoiding penalties for their intermittent output. Moreover, PSNH says that small QFs and other small generators in New Hampshire (or their respective parent companies/affiliates) fully participate in ISO-NE's market, and that there are no meaningful barriers to small QFs participating in the ISO-NE forward capacity market. PSNH alleges that nondiscriminatory interconnection services and nondiscriminatory transmission and distribution services are also available to small QFs.

8. PSNH identifies a number of small QFs that it claims are ISO-NE market participants, some of which have parents/affiliates that are ISO-NE market participants, and some have market-based rate authority. PSNH asserts that Electric Quarterly Report (EQR) data shows that generators less than 20 MW have been parties to power and

⁹ PSNH states that it has five long-term power purchase contracts with QFs outside of its service territory.

energy transactions in ISO-NE's market and have successfully bid into the ISO-NE forward capacity market.

III. Notice and Responsive Pleadings

9. Notices of PSNH's application and amended applications were mailed by the Commission on January 21, 2010 and January 27, 2010 to each of the potentially-affected QFs identified in PSNH's application. Notices of the application and amended applications were published in the *Federal Register*, 75 Fed. Reg. 3458 (2010), 75 Fed. Reg. 4369 (2010), and 75 Fed. Reg. 6197 (2010), with interventions and protests due on or before February 12, 2010.

10. Timely motions to intervene were filed by Sweetwater Hydroelectric, Inc.; Mascoma Hydro Corporation; Consolidated Hydro New Hampshire, Inc.; Somersworth Hydro Co., Inc.; Brookfield Energy Marketing Inc.; and WM Renewable Energy, L.L.C. A motion to intervene out-of-time was filed by Gestamp Biotermica, Inc. (Gestamp). Timely motions to intervene and comments and/or protests were filed by Clean Power Development, LLC (Clean Power); Indeck Energy-Alexandria, LLC (Indeck); and Granite State Hydropower Association, LLC (Granite State). PSNH filed an answer to the protests on February 18, 2010.

11. Clean Power argues that PSNH's request should be denied with respect to Clean Power because, on April 7, 2009, Clean Power initiated the process with the New Hampshire Public Utilities Commission (New Hampshire Commission) to establish a legally enforceable obligation. Clean Power argues that any obligation established should be grandfathered.

12. Indeck argues that there are significant costs associated with participating in day-ahead energy markets for small QFs. Indeck states that these administrative costs are associated with the trading and settlement of energy and capacity in the relevant market as well as the further integration with ISO-NE. Indeck argues that this represents a significant encumbrance on small QFs, and is even more significant for stand-alone QFs, such as Indeck. For these reasons, Indeck protests PSNH's request to terminate the mandatory purchase obligation with respect to QFs 5 MW through 20 MW.

13. Granite State comments that it takes no position on whether the application should be approved or denied, but does argue that, if it is approved, the "cut off" should be over 5 MW, and not 5 MW and over, as proposed by PSNH, to maintain consistency with 18 C.F.R. § 4.60, which defines a project of 5 MW or less as a minor license project, and makes these projects eligible for exemption from licensing requirements under 18 C.F.R. § 4.101.

IV. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2009), we will grant Gestamp's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest or an answer to an answer unless otherwise order by the decisional authority. We are not persuaded to accept PSNH's answer to the protests.

B. Determination

16. PSNH, as a member of ISO-NE, relies upon the rebuttable presumption set forth in section 292.309(e) of the Commission's regulations, i.e., that ISO-NE 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.¹⁰ The potentially-affected QFs identified by PSNH were provided notice of PSNH's application. Clean Power, Indeck, and Granite State protested. As explained below, we grant the request to terminate the mandatory purchase obligation pursuant to section 210(m) of PURPA with respect to all QFs larger than 20 MW. However, as discussed below, we will deny the request to terminate the mandatory purchase obligation with respect to all QFs with a net capacity at or below 20 MW, and, more specifically, from 5 MW through 20 MW as proposed by PSNH.

17. In Order No. 688,¹¹ the Commission implemented section 210(m) of PURPA, which provides for the termination of the requirement to enter into a new obligation or contract to purchase from a QF if the QF has nondiscriminatory access to certain types of markets specified in section 210(m). In Order No. 688, the Commission found that the markets run by ISO-NE, as well as PJM Interconnection, LLC, Midwest Independent Transmission System Operator, Inc. and New York Independent System Operator, Inc.,

¹⁰ 18 C.F.R. §§ 292.309(a)(1), 292.309(e) (2009).

¹¹ *See supra* note 3.

qualify as markets that justify relief from the mandatory purchase obligation provided that QFs, in fact, have nondiscriminatory access to such markets.¹² Because section 210(m) of PURPA requires the Commission to make a final determination on applications to terminate the requirement to enter into new obligations or contracts to purchase from QFs within 90 days of the application, the Commission established certain rebuttable presumptions to make the processing of the applications possible given the 90-day clock.

18. The Commission established two rebuttable presumptions that are relevant here. The first rebuttable presumption, contained in section 292.309(e) of the Commission's regulations,¹³ is that for ISO-NE (and the other so-called Day 2 RTOs named in the regulation), i.e., the markets described in 292.309(a)(1)(i) as a category of markets that warrant relief from the mandatory purchase obligation, QFs with a net capacity greater than 20 MW have nondiscriminatory access to those markets. Thus, the electric utilities that are members of ISO-NE (and the other so-called Day 2 RTOs) may be relieved of the requirement to enter into new contracts of obligations to purchase from those QFs with over 20 MW net capacity. PSNH, in its application, relies on the rebuttable presumption contained in section 292.309(e) of the regulations that it provides large QFs nondiscriminatory access to ISO-NE's markets, and thus we grant its application with respect to QFs with a net capacity greater than 20 MW (with one possible exception described below).

19. The second rebuttable presumption, contained in section 292.309(d)(1) of the regulations,¹⁴ is that a QF with a capacity at or below 20 MW does *not* have nondiscriminatory access to markets. PSNH attempts to rebut the presumption, contained in section 292.309(d)(1), that it does not provide nondiscriminatory access to markets to QFs 5 MW to 20 MW.

20. PSNH attempts to rebut the presumption that the small QFs do not have nondiscriminatory access to markets in three ways. First, PSNH states that the Commission has listed factors that a large QF can use to rebut the presumption of access to markets, and states that "presumably, electric utilities can rebut the small QF presumption by demonstrating the opposite of what QFs need to demonstrate to rebut the large QF presumption."¹⁵ PSNH then lists those factors in the opposite and states that

¹²Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 117.

¹³ 18 C.F.R. § 292.309(e) (2009).

¹⁴ *Id.* § 292.309(d)(1).

¹⁵ PSNH application at 12.

those factors indicate that small QFs have access to the ISO-NE's markets. Second, PSNH attempts to show that small QFs are eligible to participate in ISO-NE's markets and that there is no size threshold for entry. Finally, PSNH identifies a number of small QFs that it claims are ISO-NE market participants, some of which have parents/affiliates that are ISO-NE market participants, and some of which have market-based rate authority. PSNH asserts that EQR data and data from other sources show that generators smaller than 20 MW net capacity have been parties to power and energy transactions in the ISO-NE market and have successfully bid into ISO-NE's forward capacity market.

21. We find that PSNH's attempt to rebut the presumption that QFs with a net capacity of 5 MW through 20 MW do not have nondiscriminatory access to markets does not meet the standards outlined in Order No. 688. To rebut the small QF presumption and be relieved of the requirement to enter into a new contract or obligation to purchase electric energy from QFs at or below 20 MW, an electric utility must "demonstrate, *with regard to each small QF* that it, in fact, has nondiscriminatory access to the market."¹⁶ The Commission further noted that this procedural process contemplated a "facility-specific determination" by the Commission that a particular QF has nondiscriminatory access to the markets covered by sections 210(m)(1)(A), (B), or (C).¹⁷ Rather than make a facility-specific showing as to individual QFs, PSNH has attempted to show generally that all QFs 5 MW and larger have access to ISO-NE's markets.¹⁸ The Commission expressly declined to make such a generic finding in Order No. 688.¹⁹

22. Under the standards the Commission outlined in Order No. 688, the burden in this proceeding to rebut the presumption, on a QF-by-QF basis, that QFs with a net capacity

¹⁶ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 72 (emphasis added), P 78 ("...relevant evidence may include the extent to which the QF has been participating in the market or is owned by, or is an affiliate of, an entity that has been participating in the relevant market").

¹⁷ *Id.* P 104; *accord supra* note 16. Order No. 688-A is to a like effect. Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 94, 103.

¹⁸ While Order No. 688 draws a line at 20 MW, *see* 18 C.F.R. §§ 292.309(d)(1), (e) (2009), it does not draw any line at 5 MW; the 5 MW line that PSNH proposes to draw is one of PSNH's own making.

¹⁹ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 66, 72 (parties argued that NYISO and ISO-NE provide nondiscriminatory access to smaller QFs, but the Commission opted to draw the line between larger and smaller QFs at 20 MW).

of 20 MW and smaller do not have nondiscriminatory access, is PSNH's burden.²⁰ PSNH did not, however, seek to show that particular individual QFs have access to ISO-NE's markets such that it should be relieved of the requirement to enter into new contracts or obligation to purchase electric energy from those particular individual QFs. Rather, PSNH submitted data with regard to certain existing QFs in an effort to show that *all* small QFs have that access; PSNH was not, however, attempting to rebut on a QF-by-QF basis the presumption that those small QFs lack access to ISO-NE's markets, as Order No. 688 requires. Given the 90-day period within which the Commission must act, when a utility seeks to rebut the presumption that small QFs do not have access to markets, the utility must explain clearly how the evidence presented demonstrates that an individual small QF has nondiscriminatory access to markets that justify relief from the mandatory purchase obligation as to that QF. PSNH did not do so here and, accordingly, we deny without prejudice PSNH's application for relief from the mandatory purchase obligation with respect to QFs 5 MW through 20 MW.

23. Finally, Clean Power asserts that it has the right to a legally enforceable obligation for the sale of energy and capacity at rates determined at the time the obligation is incurred, pursuant to section 292.304(d) of the Commission's regulations,²¹ and that it has filed a complaint with the New Hampshire Commission seeking a legally enforceable obligation. Clean Power asserts that any legally enforceable obligation that results from the complaint should not be subject to termination in this proceeding.

24. The Commission's regulations provide, in certain circumstances, for the grandfathering of rights.²² The Commission has determined that a QF that has initiated a state PURPA proceeding that may result in a legally enforceable contract or obligation

²⁰ "In order to rebut the 20 MW presumption, an electric utility will have the full burden to show that small QFs have nondiscriminatory access to the market of which the electric utility is a member." Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 78.

²¹ 18 C.F.R. § 292.304(d) (2009). Each QF has the option to sell either pursuant to a legally enforceable obligation, or to sell "as available" energy. If the QF chooses to sell pursuant to a legally enforceable obligation, it may choose to have its rates based on either the utility's avoided costs calculated at the time of delivery, or the utility's avoided costs calculated at the time the obligation is incurred. *See JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 25-29 (2009), *order denying requests for rehearing, reconsideration or clarification*, 130 FERC ¶ 61,127, at P 16 (2010).

²² 18 C.F.R. § 292.314 (2009). *See Alliant Energy Corporate Services, Inc.*, 123 FERC ¶ 61,155, at P 11 (2008); *Midwest Renewable Energy Projects, LLC*, 116 FERC ¶ 61,017, at P 17 (2006).

prior to the applicable electric utility filing its petition for relief pursuant to section 292.310 of the Commission's regulations will be entitled to have any contract or obligation that may be established by state law grandfathered.²³ Clean Power initiated its proceeding with the New Hampshire Commission before PSNH filed its petition to terminate its purchase obligation. Thus, any contract or legally enforceable obligation that results from the New Hampshire Commission's action on Clean Power's petition will be grandfathered and not subject to this termination order.

The Commission orders:

(A) PSNH's application is granted in part, and PSNH is relieved on a service territory-wide basis of the requirement to enter into new power purchase obligations or contracts with QFs that have a net capacity in excess of 20 MW effective January 7, 2010 (with the exception of any contract or legally enforceable obligation that results from the New Hampshire Commission's action on Clean Power's petition).

(B) PSNH's application to be relieved of the obligation to enter into new power purchase obligations or contracts with QFs that have a net capacity from 5 MW through 20 MW is hereby denied without prejudice.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²³ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 213; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 137-40.