

138 FERC ¶ 61,171
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Laramie Range Alliance	Docket Nos. EL11-51-000
Pioneer Wind Park 1, LLC	QF10-649-000
Pioneer Wind Park II, LLC	QF10-687-000

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued March 15, 2012)

1. On July 11, 2011, Northern Laramie Range Alliance (Petitioner) filed a petition for declaratory order¹ requesting the Commission to declare that two Form 556s for self-certification of small power production qualifying facility (QF) status submitted by Pioneer Wind Park 1, LLC (Wind Park 1) and Pioneer Wind Park II, LLC (Wind Park II) are void and without effect.² Petitioner contends the Wind Park 1 and Wind Park II wind facilities³ proposed to be installed in Converse County, WY do not meet the size requirements contained in section 292.204(a) of the Commission's regulations⁴ and in the

¹ Petitioner submitted the filing fee required for a petition of declaratory order under 18 C.F.R. § 381.302(a) (2011) on August 25, 2011. *See Northern Laramie Range Alliance*, 136 FERC ¶ 61,068, at P 4, n.8 (2011). In its petition, Petitioner describes itself as a not-for-profit citizens group based in Casper, Wyoming.

² The Form 556 notice of self-certification applications were filed by: (1) Pioneer Wind Park 1, LLC in Docket No. QF10-649-000 on September 10, 2011, as supplemented on November 4, 2011 and November 24, 2011; and (2) Pioneer Wind Park II, LLC in Docket No. QF10-687-000 on September 10, 2011, as supplemented on November 4, 2011 and November 24, 2011.

³ The Wind Park 1 and Wind Park II facilities are owned by Wasatch Wind Intermountain, LLC (Wasatch).

⁴ 18 C.F.R. § 292.204(a) (2011).

Public Utility Regulatory Policies Act of 1978 (PURPA)⁵ for QF status. Petitioner asks the Commission to revoke the self-certifications of Wind Park 1 and Wind Park II. The Commission denies the petition.

I. Petition

2. Petitioner claims that the Wind Park 1 and Wind Park II facilities constitute a single “non-qualifying facility” with total net capacity that exceeds the 80 MW size limitation for a small power production QF.⁶ Petitioner admits that “under legitimate circumstances” two facilities more than one mile apart, each having a net capacity no greater than the 80 MW, can qualify as separate small power production QFs.⁷ In this regard, according to Petitioner, the Commission has established a “rebuttable presumption” that generating facilities that are located one mile or more apart are not located at the same site and are thus separate facilities.⁸ Petitioners allege that this presumption may be rebutted if “gaming” can be shown.⁹

3. Petitioner alleges that, by filing separate Form 556s to represent Wind Park 1 and Wind Park II are two separate facilities, Wasatch, as the owner, is “gaming.”¹⁰ To support this contention, Petitioner argues that: (1) Wasatch in other contexts has represented the two wind facilities as a single wind energy facility or, alternatively, a single wind farm; (2) the two Wasatch facilities share a common interconnection to the grid; and (3) Wasatch is pursuing a single site permit for the combined facilities.¹¹

⁵ 16 U.S.C. §§ 796, 824a-3 (2006).

⁶ Wind Park 1 and Wind Park II each have a net capacity of approximately 48.6 MW, totaling together to about 97.2 MW.

⁷ Petition at 6 (citing 18 C.F.R. §§ 292.203(a), 292.204(a) and 292.204(a)(2) (2011)).

⁸ *Id.* (citing *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 77 (2006) (Order No. 688)).

⁹ *Id.*

¹⁰ *Id.* at 1, 2, 4, and 6.

¹¹ *Id.* at 4-5.

Petitioner argues that the Commission “cannot be bound by the one-mile standard in the face of such blatant attempted abuse by Wasatch.”¹²

4. Petitioner further argues that, based on Wind Park 1 and Wind Park II’s self certifications as separate QFs, Wasatch induced Rocky Mountain Power (RMP),¹³ the power utility, to enter into two power purchase agreements granting preferential access to RMP’s transmission queue over other power producers, and establishing pricing terms that may have the effect of increasing costs to RMP and ratepayers, including Petitioner’s members.

II. Notice and Responsive Pleadings

5. Notice of Petitioner’s filing was published in the *Federal Register*, 76 Fed. Reg. 56,749 (Sept. 14, 2011).

6. Alliant Energy Corporate Services, Inc., Exelon Corporation and PacifiCorp each filed timely motions to intervene. Xcel Energy Services Inc. (XES) filed a motion to intervene and comments stating that it is not fully familiar with the facts underlying the petition, and takes no position on the request for relief. However, XES states the general circumstances noted in the petition are consistent with a pattern that XES has observed and are not isolated. Accordingly, XES believes the petition merits careful consideration.¹⁴

7. Wasatch filed an intervention and protest arguing that Wind Park 1 and Wind Park II satisfy the one-mile rule of section 292.204(a)(2) of the Commission’s regulations and are legitimately separate small power production QFs. Wasatch contends that the one-mile rule is a bright-line test that the Commission has established and that Wind Park 1 and Wind Park II pass. Wasatch disputes Petitioner’s claim that the Commission has provided a rebuttable presumption of the one-mile rule as it pertains to the small power production QFs that meet the 80 MW size limitation. Rather, Wasatch argues that in the order cited by Petitioners,¹⁵ the rebuttable presumption discussed by the Commission was that a QF with 20 MW or less net power capacity lacks non-discriminatory access to sell its power. According to Wasatch, the Commission there

¹² *Id.* at 5.

¹³ PacifiCorp does business as RMP to serve retail customers in Wyoming, Utah, and Idaho. PacifiCorp provides wholesale transmission service pursuant to the terms of its Open Access Transmission Tariff on file at the Commission.

¹⁴ XES’ Comments at 2.

¹⁵ Wasatch’s Protest at 7 (citing Order No. 688 at P 72).

was addressing “whether the capacity of QFs in some circumstances may be aggregated in considering whether the QFs had non-discriminatory access,” and not dealing with or questioning the legitimacy of QF status for facilities separated by one mile.¹⁶

8. Wasatch contends that Wind Park 1 and Wind Park II satisfy all requirements for being two separate QFs, including all electrical generating equipment of the two being separated by more than one mile. Wasatch also states that the two QFs have “exploited areas around distinct ridgelines that themselves were separated by more than a mile.”¹⁷

9. On February 8, 2012, Allco Renewable Energy Limited (Allco) filed an untimely motion to intervene and protest. On February 28, 2012, Petitioner filed an answer to Allco’s protest. On February 29, 2012, Wasatch filed a motion to strike Allco’s protest and Petitioner’s February 28 answer to the protest.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding. Given the early stage of this proceeding, its interest and the absence of undue prejudice or delay, we will grant Allco’s untimely motion to intervene. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority. We will accept all answers because they have provided information that assisted us in our decision-making process.

B. Determination

11. Petitioners seek decertification of two QFs owned by Wasatch. When the Commission acts on a petition seeking to decertify a facility’s QF status, it performs essentially the same function as when it acts on an application for certification – it issues what is essentially a declaratory order on a facility’s QF status.¹⁸ When the Commission acts on an application for certification or recertification, it acts on the information

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 5-6.

¹⁸ See *Chugach Electric Association, Inc.*, 121 FERC ¶ 61,287 (2007); *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 94 FERC ¶ 61,207 (2001), *reh’g denied*, 95 FERC ¶ 61,120 (2001).

presented in the application and the responsive pleadings.¹⁹ The Commission renders what is essentially a declaratory order deciding whether the facility, as described in the application and the pleadings, meets the statutory and regulatory requirements set forth in PURPA and the Commission's implementing regulations. What we have before us today is a petition to decertify the QF status of two as-yet unbuilt QFs. The QFs, in essence, rely on the representations made in the self-certifications they have filed. We thus are called to analyze the representations contained in the self-certifications, consider the arguments made by the Petitioner seeking decertification, and render a decision on whether the Wind Park 1 and Wind Park II facilities, if built as described, satisfy the requirements for small power production QF status contained in PURPA and our implementing regulations.

12. Section 292.204 of the Commission's regulations contains the criteria for qualifying small power production facilities.²⁰ A small power production facility must meet certain fuel use criteria, i.e., the primary fuel source of the facility must be biomass, waste, renewable resources, geothermal resources or any combination thereof.²¹ There is no question that Wind Park 1 and Wind Park II satisfy the fuel use criteria.

13. A small power production facility must also satisfy size criteria contained in section 292.204(a). The maximum size of a qualifying small power production facility, as provided for in section 292.204(a)(1) is 80 MW, including the capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site.²² Section 292.204(a)(2)

¹⁹ *Calpine King City Cogen, LLC*, 111 FERC ¶ 61,174, at P 17 (2005); *Arroyo Energy, Limited Partnership*, 62 FERC ¶ 61,257, *reh'g denied*, 63 FERC ¶ 61,198 (1993); *Cogentrix of Mayaguez, Inc.*, 59 FERC ¶ 61,159, *reh'g denied*, 59 FERC ¶ 61,392 (1992); *Inter-Power of New York, Inc.*, 55 FERC ¶ 61,387 (1991); *CMS Midland, Inc.*, 50 FERC ¶ 61,098, at 61,277 (1990), *reh'g denied*, 56 FERC ¶ 61,177 (1991), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 990 (1993).

²⁰ 18 C.F.R. § 292.204 (2011).

²¹ 18 C.F.R. § 292.204(b) (2011).

²² 18 C.F.R. § 292.204(a)(1) (2011). There is an exemption from the size criteria. That exemption, contained in section 292.204(a)(4), is for facilities meeting the criteria of section 3(17)(E) of the Federal Power Act (FPA). Facilities meeting those criteria have no size limit. *See* 16 U.S.C. § 796(17)(E) (2006); 18 C.F.R. § 292.204(a)(4) (2011). Wind Park 1 and Wind Park II do not meet the criteria of section 3(17)(E) of the FPA.

establishes the method of calculating the size of a small power production facility.²³ Pursuant to section 292.204(a)(2)(i) facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought.²⁴

14. It is undisputed that Wind Park 1 and Wind Park II use the same energy resource, and are both owned by Wasatch. They must therefore be located more than a mile apart to be considered separate facilities. Pursuant to section 292(a)(2)(ii), the distance between facilities is measured from the electrical generating equipment of a facility for purposes of making the one-mile determination, and their respective equipment is more than a mile apart.²⁵ Wind Park 1 and Wind Park II thus each meet the criteria for qualifying small power production facilities.

15. Petitioner nonetheless argues that the Wind Park 1 and Wind Park II facilities should be considered one facility. Petitioner argues that, because the Wind Park 1 and Wind Park II facilities will both use the same single line to deliver energy from their facilities to a single point on the grid, the facilities should be viewed a single facility. Petitioner also argues that the one-mile rule contained in section 292.204(a)(2) should be viewed as a rebuttable presumption and that the fact that the developer of Wind Park 1 and Wind Park II has described those facilities as constituting a single project in other contexts is sufficient to rebut the presumption. Finally Petitioner points to language in the Commission rulemaking implementing section 210(m) of PURPA as suggesting that the Commission will not be bound by the one-mile rule where there is evidence of gaming.

16. The fact that the facilities will use the same single line to deliver power to the grid is not a part of the analysis the Commission uses in determining whether the one-mile rule has been violated. Pursuant to section 292.204(a)(2)(ii), the Commission measures the distance between the electric generating equipment of facilities to determine whether the one-mile rule has been satisfied; the line used to deliver the electric energy to the grid

²³ 18 C.F.R. § 292(a)(2) (2011).

²⁴ 18 C.F.R. § 292(a)(2)(i) (2011).

²⁵ 18 C.F.R. § 292(a)(2)(ii) (2011). Our analysis of the QF self-certifications filed by Wind Park 1 and Wind II confirms that the generating equipment of each facility is located more than a mile from the generating equipment of the other facility. We compared the geographic coordinates of each facility, contained in Line 3c of Form 556 of each facility. The comparison shows that the electrical generating equipment of each facility is located 2.5 miles apart.

is not considered part of the facility's electric generating equipment and is not relevant for purposes of the one-mile rule.²⁶

17. Contrary to Petitioner's characterization of our regulations, the Commission does not consider the one-mile rule to be a rebuttable presumption. In a case where an applicant had treated three electric generating facilities as a single project for purposes of receiving a hydroelectric license from the Commission, the Commission found that the treatment of the facilities as one project for hydroelectric licensing purposes was not relevant for PURPA purposes and the Commission read the one-mile rule strictly and certified the three electric generating facilities as three QFs.²⁷ Indeed, the Commission indicated that the purpose of the waiver provision contained in section 292.204(a)(3) of the Commission's regulations,²⁸ was designed to lessen the otherwise applicable requirements, including the one-mile rule, on small power producers where good cause is shown to do so.²⁹ The Commission stated that the intervenor in that case, by asking the Commission to impose additional requirements beyond the rule's one-mile requirement was arguing for a change to the regulation itself.³⁰ Here, by arguing that the one-mile rule establishes only a rebuttable presumption that can be rebutted even where rebuttal would impose additional requirements, Petitioners -- like the intervenors in *El Dorado* -- are asking the Commission to act inconsistently with the regulations. We decline to do so.

18. Finally, Petitioner argues that the language of Order No. 688 can be read to say the Commission will disregard the one-mile rule where there is evidence of "gaming."³¹ The language that Petitioner points to concerns the rebuttable presumption that certain QFs

²⁶ *Coso Energy Developers*, 45 FERC ¶ 61,003, at 61,005 (1988).

²⁷ *El Dorado County Water Agency and El Dorado Irrigation District*, 24 FERC ¶ 61,280, at 61,577-78 (1983), *reh'g denied*, 26 FERC ¶ 61,185 (1984) (*El Dorado*).

²⁸ 18 C.F.R. § 292.204(a)(3) (2011) (providing for waiver of the one-mile rule for good cause).

²⁹ *El Dorado*, 24 FERC ¶ 61,280 at 61,577-78.

³⁰ *Id.*

³¹ *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 77 (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).

may not have nondiscriminatory access to markets because of their small size (20 MW or smaller).³² The Commission stated that it would not allow gaming of the presumption that QFs 20 MW or smaller do not have nondiscriminatory transmission access and that, for purposes of satisfying that rebuttable presumption, the Commission would look to see if there was gaming. The Commission explained that, for purposes of evaluating gaming of the presumption that QFs 20 MW or smaller do not have nondiscriminatory transmission access, it would not be bound by the absolute language of the one-mile rule set forth in 18 C.F.R. § 292.204(a)(2).³³ The language of Order No. 688 thus does not support Petitioners argument that we should evaluate gaming in the context of determining whether facilities satisfy the requirements for QF status in the first place. Indeed, the Commission’s use of the phrase “one-mile standard set forth in 18 C.F.R. § 292.204(a)(2)” acknowledges that, for purposes of certification of small power production facilities as QFs, section 292.204(a)(2) establishes a standard and not a rebuttable presumption.

19. Accordingly, the Commission denies the petition.

The Commission orders:

Petitioner’s petition for declaratory order is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³² *Id.* PP 72-78.

³³ *Id.* P 77.