

139 FERC ¶ 61,128
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Service Company of New Mexico

Docket Nos. QM12-2-000
QM12-2-001

ORDER REJECTING APPLICATION TO TERMINATE MANDATORY
PURCHASE OBLIGATION

(Issued May 17, 2012)

1. On November 30, 2011, as amended subsequently,¹ Public Service Company of New Mexico (PNM) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)² and section 292.310(a) of the Commission's regulations³ to be relieved of the requirement to enter into new power purchase contracts or obligations to purchase energy and capacity from the proposed Estancia Basin Biomass Power Generating Plant at Estancia, New Mexico (Estancia Facility).⁴
2. In this order, we reject, without prejudice to refiling, PNM's application because PNM has not provided the necessary list of potentially-affected qualifying facilities (QF).

¹ The application was amended on January 11, 2012, January 26, 2012, and February 22, 2012, as more fully described in this order.

² 16 U.S.C. § 824a-3(m) (2006).

³ 18 C.F.R. § 292.310(a) (2011).

⁴ PNM Application at 1-2.

I. Background

3. On October 20, 2006, the Commission issued Order No. 688,⁵ revising its regulations governing utilities' obligations to purchase electric energy produced by a QF and implementing section 210(m) of PURPA,⁶ 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. Sections 292.309(a)(1), (2), and (3) of the Commission's regulations⁷ codify sections 210(m)(1)(A), (B), and (C) of PURPA.

4. Section 292.309(a) of the regulations states:

(a) After August 8, 2005, an electric utility shall not be required, under this part, to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility production has nondiscriminatory access to:

(1)(i) Independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and
(ii) Wholesale markets for long-term sales of capacity and electric energy;

(2)(i) Transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and
(ii) Competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, and short-term and real-time sales, to buyers other than the utility to which the

⁵ *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).

⁶ Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005. *See* Pub. L. No. 109-58 § 1253, 199 Stat. 594, 967-69 (2005).

⁷ 18 C.F.R. §§ 292.309(a)(1), (2), (3) (2011).

qualifying facility is interconnected. In determining whether a meaningful opportunity exists, the Commission shall consider, among other factors, evidence of transactions with the relevant market; or

(3) Wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described above in paragraphs (a)(1) and (a)(2) of this section.

II. Application to Terminate Purchase Obligation

5. On November 30, 2011, PNM filed an application requesting that the Commission terminate PNM's obligation under PURPA to purchase the output of the Estancia Facility; PNM states that it meets the conditions for relief in section 292.309(a)(3) of the Commission's regulations.⁸

6. PNM states that the Estancia Facility is a small power production QF with a net capacity greater than 20 MW. On March 7, 2007, PNM executed a Large Generation Interconnection Agreement (LGIA) under PNM's Open Access Transmission Tariff (OATT) with Western Water and Power Limited (WWPP), the developer of the Estancia Facility, but PNM states that it never agreed to purchase the QF's output. On December 16, 2009, PNM and WWPP executed a revised and restated LGIA, which changed the anticipated commercial operation date for the QF to December 31, 2011. PNM states that, on January 25, 2011, WWPP advised PNM that the anticipated commercial operation date was revised to June 30, 2013. PNM adds that it is unaware of any significant construction on the QF. PNM also notes, though, that WWPP filed a FERC Form 556 self-certification of QF status for the Estancia Facility in Docket No. QF11-516-000 on September 29, 2011.⁹

7. PNM asserts that, while there is no Independent System Operator (ISO) or Regional Transmission Organization (RTO) in New Mexico, it satisfies the requirements of section 210(m)(1)(C) of PURPA, because the Estancia Facility has "non-discriminatory access to wholesale markets [via the Four Corners Hub] for the sale of

⁸ 18 C.F.R. § 292.309(a)(3) (2011).

⁹ PNM represents that the capacity of the Estancia Facility is 32.4 MW, *see* PNM Application at 2, but the net capacity on line 7g of the WWPP's Form 556 self-certification is listed as 33.9 MW.

capacity and electric energy that are, at a minimum, of comparable competitive quality as the markets described in section 210(m)(1)(A) and (B).”¹⁰

8. PNM amended its application three times in various pleadings. As relevant here, on January 26, 2012, PNM amended its application to state there were no potentially affected QFs other than the Estancia Facility. Finally, on February 22, 2012, PNM amended its application to provide information about QFs that are 20 MW or less in its Balancing Authority Area.

III. Notice of Filing and Responsive Pleadings

9. Notice of PNM’s amended application was published in the *Federal Register*, 77 Fed. Reg. 12,826 (2012), with interventions and protests due on or before March 14, 2012.¹¹ Notice of PNM’s application was mailed by the Commission to each of the potentially affected QFs identified by PNM in the application on January 19, 2011, and as amended on February 28, 2012.

10. On December 28, 2011, WWPP filed a motion to intervene and a protest (WWPP Protest) urging the Commission to deny PNM’s application citing, among other reasons, the application is not complete because it does not provide all the information required by 18 C.F.R. § 292.310.

11. PNM filed a response to WWPP’s protest on January 11, 2012 (PNM’s First Amendment).

12. On January 19, 2012, Commission staff sent a letter advising PNM that PNM’s first amendment was deficient (Deficiency Letter) and requiring the following information:

Please provide the names and addresses of all potentially affected QFs, including the Estancia Facility, and including those 20 MW and smaller, as well as the information required by 18 C.F.R. § 292.310. *See Commonwealth Edison Company*, 135 FERC ¶ 61,005 at P 41-44 (2011) [(ComEd)].

¹⁰ *Id.* at 4-5.

¹¹ Notices of the application and earlier amendments were also published in the *Federal Register*, 76 Fed. Reg. 79,961 (2011), 76 Fed. Reg. 3470 (2012), 77 Fed. Reg. 6105 (2012).

13. On January 26, 2012, PNM filed a response to the Deficiency Letter stating that there were no potentially affected QFs other than the Estancia Facility (PNM's Second Amendment).

14. On February 16, 2012, WWPP filed an answer (WWPP Answer) claiming among other things that PNM's Second Amendment failed to provide the information required by the Deficiency Letter. In Attachment 1 to the WWPP Answer, WWPP provides a list of six entities from PNM's Open Access Same-time Information System (OASIS) that WWPP asserts are "other potentially affected QFs greater than and less than 20 MW," that were not identified in PNM's Second Amendment.¹² WWPP states that given the New Mexico Renewable Portfolio Standard that is currently in place, there are likely to be other QFs that would need to be noticed as well.

15. Subsequently, on February 22, 2012, PNM submitted a supplemental filing (PNM's Third Amendment) providing the names of two potentially affected QFs, namely, the City of Santa Fe in Docket No. QF10-325 and City of Albuquerque in Docket No. QF05-139, both less than 1 MW, in addition to the Estancia Facility.

16. WWPP filed a response to PNM's Third Amendment on March 14, 2012, renewing its protest, and asserting that PNM has still failed to provide the information required by the Deficiency Letter and the Commission's holding in *ComEd*.

III. Discussion

Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), timely, unopposed motion to intervene serves to make WWPP a party to this proceeding. 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 answer otherwise ordered by the decisional authority. We will accept PNM's and WWPP's answers because they have provided information that assisted us in our decision-making process.

Commission Determination

18. The Commission finds that PNM's application for relief from the PURPA mandatory purchase obligation, as subsequently amended, fails to provide the necessary list of potentially-affected QFs. The Commission accordingly rejects the application

¹² WWPP Answer at 3.

without prejudice to PNM resubmitting a new application with the information required to be a complete application.

19. The Deficiency Letter pointed PNM to the Commission's decision in *ComEd*, where the Commission explained what it considered to be potentially affected QFs. The Commission stated:

ComEd would have the Commission read section 292.310(c)(3) of the regulations as a basis to disavow inclusion of Minonk Stewardship as a potentially affected QF. We disagree with such a reading. Minonk Stewardship's 40 MW wind project is, in fact, the type of project that should be informed of the possibility that the mandatory purchase obligation might be terminated; a 40 MW wind facility would, in all likelihood, be a QF upon filing a notice of self-certification of QF status, or upon the grant of an application for Commission certification of QF status. Notice to a facility like Minonk Stewardship's facility is the kind of notice contemplated by the notice requirements of PURPA section 210; the fact that Minonk Stewardship is not yet self-certified as a QF thus does not render Minonk Stewardship ineligible to be treated as a potentially affected QF. Moreover, because ComEd had a pending request from Minonk Stewardship to interconnect its facility, ComEd should have reasonably expected that Minonk Stewardship could be potentially affected by the application. ComEd thus should reasonably have known that Minonk Stewardship was or could be affected by the termination of the mandatory purchase obligation, and ComEd should have reasonably considered Minonk Stewardship to be a potentially affected QF.

ComEd also argues that QFs 20 MW or less are not potentially affected QFs when a utility is seeking termination of the mandatory purchase obligation for QFs larger than 20 MW, but not for the QFs 20 MW and smaller. We disagree. As noted above, the regulations regarding notice draw no size-based distinction as to which QFs should be considered potentially affected QFs and which should not. Moreover, when the Commission is making findings that a particular utility provides access to markets which meet the statutory and regulatory standards for relief from the mandatory purchase obligation, even when a utility seeks to terminate the obligation only with respect to QFs larger than 20 MW, that utility may later seek to be relieved, on a QF-by-QF basis, of the mandatory purchase obligation for the smaller QFs; that is, where the Commission makes a finding with respect to the markets that a utility provides access to, those findings may form the basis of a later application to be relieved of the obligation to purchase from smaller utilities. In addition, small QFs may expand capacity at a later date so that their facilities may be larger than

20 MW net capacity, and thus could become directly affected by the termination of the mandatory purchase obligation. Hence, it is important that all QFs, including those QFs 20 MW and smaller, be provided sufficient notice – not just the larger QFs.

The Commission therefore finds that all QFs, whether they are larger than 20 MW, or 20 MW and smaller, are potentially affected by a section 210(m) application. Utilities thus should provide the information required by our regulations in section 292.310(c) for all potentially affected QFs, whether they be larger than 20 MW, or 20 MW and smaller (and whether they are already self-certified or Commission-certified as QFs, or not). We note that the Commission has indicated that “[i]n the unlikely event a potentially affected QF is intentionally or unintentionally omitted by the electric utility and is not served notice of an application, the Commission will take remedial steps as appropriate.” One such appropriate remedial step that may be considered is any potentially affected QF that a utility fails to identify in its application will not be subject to any termination ordered by the Commission in a section 210(m) proceeding. Thus, it is in the applicant’s own interest to be more inclusive rather than less. Applying utilities should err on the side of broader identification and inclusion in, rather than exclusion from, the list of potentially affected QFs. [13]

PNM responded that, “the Estancia Facility under development by WWPP is the ‘only potentially affected qualifying facility’ as that term is used in 18 C.F.R. § 292.310(c).”¹⁴ In PNM’s Third Amendment, however, PNM supplemented its response in PNM’s Second Amendment to include two QFs under 1 MW in size located within PNM’s Balancing Authority Area that it states are interconnected with PNM’s distribution – not transmission – system and that are not selling their output to PNM.

20. While WWPP identified QFs that it stated were potentially affected, PNM argues that the facilities on WWPP’s list of potentially-affected QFs do not constitute potentially affected QFs as defined by the Commission’s regulations. PNM argues the facilities identified by WWPP do not qualify as potentially affected QFs because none of those facilities: (1) have sought or secured QF status, (2) have power purchase contracts with PNM, (3) have pending state avoided cost applications, or (4) entered into power purchase discussions with PNM.

¹³ *ComEd*, 135 FERC ¶ 61,005 at PP 41-43 (footnotes omitted).

¹⁴ PNM’s Second Amendment at 4.

21. PNM's interpretation of a "potentially affected QF" is incorrect. PNM's response to WWPP's list of potentially affected QFs relies on a standard for identifying potentially affected QFs that is inconsistent with the Commission's precedent in *ComEd*. We explained in *ComEd* that even though a utility may only be seeking termination of the mandatory purchase obligation for QFs larger than 20 MW, but not for QFs 20 MW and smaller, and QFs 1 MW or less are no longer required to file self-certifications with the Commission,¹⁵ our regulations regarding notice do not draw size-based distinctions as to which QFs should be considered potentially affected QFs and which should not. Most relevant to this proceeding, we also explained there that our regulations do not draw distinctions based on whether they are self-certified as QFs, Commission-certified as QFs, or not yet certified as QFs, or whether the utility is seeking termination of the mandatory purchase obligation from the particular QFs.¹⁶ In *ComEd*, we stated that, if anything, applying utilities should err on the side of broader identification and inclusion in, rather than exclusion from, the list of potentially affected QFs.

22. PNM is required to identify, with names and addresses, potentially affected QFs in its application to the Commission. Since additional potentially affected QFs were identified by WWPP, and PNM's response to WWPP indicates that its search for potentially affected QFs was not consistent with our precedent in *ComEd*, the Commission cannot conclude that PNM has listed all potentially affected QFs as required by our regulations.¹⁷ PNM's failure to provide the names of all potentially affected QFs

¹⁵ 18 C.F.R. § 292.309(d)(1) (2011); see *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, Order No. 732, FERC Stats. & Regs. ¶ 61,306, at PP 15, 35-40 (2010).

¹⁶ *ComEd*, 135 FERC ¶ 61,005 at PP 41-42.

¹⁷ As noted above, while QFs 1 MW or smaller are no longer required to file self-certifications with the Commission, we explained in *ComEd* that our regulations regarding notice do not draw size-based distinctions as to which QFs should be considered potentially-affected QFs and which should not, and do not draw distinctions based on whether they are self-certified as QFs, Commission-certified as QFs, or not yet certified QFs. However, in *Consumers Energy Company*, 139 FERC ¶ 61,069, at P 19 (2012), we noted that the only QFs that Consumers Energy did not identify were those that were smaller than 1 MW and that participated in a net metering program and for which Consumers Energy did not have the required information. Under those circumstances, the Commission found Consumer Energy's listing of the potentially-affected QFs sufficient and did not require Consumers Energy to do more. *Id.*

therefore renders the application incomplete.¹⁸ Notwithstanding that the directive in the Deficiency Letter provided PNM with an explicit reference and citation to the *ComEd* order and directed PNM to provide the required names and addresses of potentially affected QFs as that term was used in *ComEd*, PNM did not do so. The Commission will accordingly reject the application as incomplete without prejudice to PNM filing a new complete application.

The Commission orders:

PNM's application to be relieved of its PURPA's mandatory purchase obligation for the Estancia Facility is hereby rejected, without prejudice to PNM submitting a new application with the information required by the Commission's regulations and precedent, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁸ We note that a simple search of our own records in e-Library confirmed that there are other potentially affected QFs not identified by either PNM or WWPP.

We used the Search Option "General Search" (<http://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) highlighting "Filed Date" and "All" under the Date Range heading, inserted "QF" under the Docket Number heading and used simple search terms such as: "New Mexico," "Albuquerque," or "PNM" under the Text Search heading.

Two examples of QFs which are potentially affected QFs revealed in this eLibrary search, and not previously identified by PNM are: City of Albuquerque in Docket No. QF88-127-001 (6.9 MW natural gas cogeneration facility); and Lightning Dock Geothermal HI-01, LLC in Docket No. QF08-363-000 (15 MW geothermal small power production facility).