

146 FERC ¶ 61,107
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Allco Renewable Energy Limited

Docket No. EL12-12-000

v.

Massachusetts Electric Company

ORDER DISMISSING COMPLAINT

(Issued February 20, 2014)

1. On November 30, 2011, Allco Renewable Energy Limited (Allco) filed a complaint (Complaint) pursuant to section 306 of the Federal Power Act (FPA),¹ against Massachusetts Electric Company d/b/a National Grid (National Grid). Allco alleges that National Grid failed to comply with section 292.301 of the Commission's regulations² and the Public Utility Regulatory Policies Act of 1978³ (PURPA) with respect to the determination of the avoided cost rate for purchases by National Grid. We dismiss the Complaint as premature, as discussed below.

I. Complaint

2. Allco is a Delaware corporation, with its principal place of business in New York City, New York, engaged in the business of financing, developing, owning, operating, and maintaining commercial renewable energy projects. The Complaint concerns an offer to sell to National Grid the generation output from eleven solar qualifying facilities (QF) located in Massachusetts.⁴ Allco explains that, on March 28, 2011, it sought to

¹ 16 U.S.C. § 825e (2012).

² 18 C.F.R. § 292.301 (2013).

³ 16 U.S.C. § 824a-3 (2012).

⁴ Complaint, Exhibit A at 5. The eleven QFs, self-certified on March 28, 2011, are: Brimfield-Wales Solar Project in Docket No. QF11-193-000; Haverhill Solar Project

(continued...)

enter into a contract with National Grid to sell the production, capacity, and Massachusetts Class I Renewable Energy Credits (RECs) from its QFs pursuant to a long-term contract at a price equal to what Allco claims is National Grid's full avoided cost.⁵ Allco claims that National Grid's full avoided cost rate should be based on the rate methodology used by the Massachusetts Department of Public Utilities (Massachusetts DPU) in its *Cape Wind*⁶ proceeding to find that certain contracts were consistent with a state program.

3. Allco states that it made offers to National Grid in an attempt to reach mutual agreement on an avoided cost rate and that, when it was unable to reach an agreement with National Grid, it filed a complaint with the Massachusetts DPU (Massachusetts DPU Complaint) seeking an order that finds that: (1) a legally enforceable obligation exists between Allco and National Grid for each of Allco's eleven QFs located in Massachusetts; (2) the energy purchase rate for a purchase from those QFs by National Grid will be based on National Grid's avoided costs over the specified term calculated at the time the obligation was incurred; and (3) National Grid's avoided costs for that time period equal the contract rate in *Cape Wind*. The Massachusetts DPU Complaint is still pending before the Massachusetts DPU.

4. Allco's Complaint requests the Commission to issue an order: (1) directing that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure and hold the hearing in abeyance, (2) granting the complaint, (3) finding that National Grid has failed to comply with its obligation to implement the Commission's regulations under PURPA, and (4) setting the complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA.⁷

in Docket No. QF11-194-000; Spencer2 Solar Project in Docket No. QF11-195-000; Swansea Solar Project in Docket No. QF11-196-000; Southbridge Solar Project in Docket No. QF11-197-000; Ware Solar Project in Docket No. QF11-198-000; Shirley Solar Project in Docket No. QF11-199-000; Warren Solar Project in Docket No. QF11-200-000; Warwick Solar Project in Docket No. QF11-201-000; Charlton Solar Project in Docket No. QF11-202-000; and Brookfield Solar Project in Docket No. QF11-203-000.

⁵ *Id.*, Exhibit A at 1.

⁶ *Petition of Massachusetts Electric Company and Nantucket Electric Company each d/b/a National Grid for Approval of Proposed Long-Term Contracts for Renewable Energy with Cape Wind Associates, LLC Pursuant to St. 2008, c. 169, § 83, Docket 10-54, Order (Nov. 22, 2010) (Cape Wind).*

⁷ Allco Complaint at 1.

II. Notice of Filing and Responsive Pleadings

5. Notice of the Complaint was published in the *Federal Register*, 76 Fed. Reg. 76,153 (2011), with protests and interventions due on or before December 21, 2011.

6. On December 21, 2011, National Grid filed an answer contending that the Complaint should be dismissed because the facts presented by Allco do not support the corresponding claims.⁸ National Grid states that it considered Allco's March 28, 2011 offer to sell generation, capacity, and RECs under a negotiated agreement. National Grid states that, on April 18, 2011, National Grid countered Allco's offer with an offer to purchase energy, but not RECs, using the standard power purchase agreement and corresponding avoided cost terms contained in a tariff established by the Massachusetts DPU in its implementation of PURPA and the Commission's PURPA regulations.⁹ National Grid states that Allco did not respond to this counteroffer, but instead initiated a rulemaking and a complaint proceeding before the Massachusetts DPU.¹⁰ National Grid argues that Allco, when faced with a disagreement with National Grid on the proper avoided cost rate, followed the correct procedures under PURPA when it filed its complaint with the Massachusetts DPU.¹¹ Thus, National Grid argues, this Complaint challenging proposed avoided cost rates still pending before the Massachusetts DPU is premature.¹²

7. On December 21, 2011, the Massachusetts DPU filed a letter informing the Commission that Allco then had two petitions pending before the Massachusetts DPU. The first petition was a request by Allco for the Massachusetts DPU to initiate a rulemaking to amend existing regulations regarding renewable energy QFs, filed on August 1, 2011, in Docket No. D.P.U. 11-57. The second petition, filed on August 4, 2011, in Docket No. D.P.U. 11-59, was the complaint (described above) seeking an investigation of the actions taken by National Grid concerning the offer by Allco to sell the output from its eleven QFs. On January 5, 2012, Massachusetts DPU filed a letter further informing the Commission that it had declined to initiate a rulemaking proceeding and had closed out Docket No. D.P.U. 11-57.

⁸ National Grid Answer at 2.

⁹ *Id.* at 9-10.

¹⁰ *Id.* at 10.

¹¹ *Id.* at 5-6, 12, 15.

¹² *Id.* at 16.

III. Commission Determination

A. Procedural Matters

8. Pursuant to Rule 102(c)(2) of the Commission's Rules of Practice and Procedure, the respondent is a party to this proceeding.¹³

B. Substantive Matters

9. PURPA directs the Commission to prescribe "such rules as it determines necessary to encourage cogeneration and small power production."¹⁴ PURPA, in turn, directs the states and non-regulated utilities to "implement" the Commission's rules.¹⁵ As a result, a state may take action under PURPA only to the extent that that action is in accordance with the Commission's rules. If a QF is dissatisfied with a state commission's or non-regulated utility's decision implementing PURPA and the Commission's PURPA regulations, it may seek judicial review of such decision or enforcement of PURPA and the Commission's PURPA regulations pursuant to

¹³ 18 C.F.R. § 385.102(c)(2) (2013).

¹⁴ 16 U.S.C. § 824a-3(a) (2012).

¹⁵ 16 U.S.C. § 824a-3(f) (2012); *accord FERC v. Mississippi*, 456 U.S. 742, 751 (1982); *Independent Energy Producers Association v. California Public Utilities Commission*, 36 F.3d 848, 856 (9th Cir. 1994); *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,864 (1980), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part*, *American Electric Power Service Corporation v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part*, *American Paper Institute, Inc. v. American Electric Power Service Corporation*, 461 U.S. 402 (1983); *Cogeneration Coalition of America, Inc.*, 61 FERC ¶ 61,252, at 61,925-26 (1992).

A state commission or non-regulated utility may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking other actions reasonably designed to give effect to the Commission's rules. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982); *see also Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,643 (1983) (1983 Policy Statement).

section 210 of PURPA.¹⁶ PURPA provides for judicial review and enforcement authority in sections 210(g)¹⁷ and 210(h),¹⁸ respectively.

10. As described above, prior to filing its Complaint with the Commission, Allco submitted two petitions with the Massachusetts DPU that are related to this proceeding. First, on August 1, 2011, Allco filed a petition requesting the Massachusetts DPU to amend its regulations governing the sale of energy by a renewable energy QF. Second, on August 4, 2011, Allco filed a complaint requesting an investigation of National Grid's response to the March 28, 2011 offer by Allco to sell the generation output from certain of its QFs to National Grid.

11. Although the Massachusetts DPU ruled, on December 23, 2011,¹⁹ that it declined to initiate a rulemaking proceeding in response to Allco's August 1, 2011 petition, the August 4, 2011 complaint is still pending. Accordingly, the Commission does not have before it a state regulatory authority decision addressing Allco's proposed avoided-cost methodology or a corresponding state regulatory authority justification for such methodology in light of the avoided-cost implementation factors set forth in the Commission's regulations.²⁰ While we recognize that this order has been delayed, it remains the state's responsibility in the first instance to determine an avoided cost rate consistent with the Commission's regulations.²¹ Thus, only after the Massachusetts DPU acts upon Allco's complaint would Allco then be positioned to seek review before this Commission. For this reason, we procedurally dismiss the Complaint before us.

¹⁶ 1983 Policy Statement, 23 FERC ¶ 61,304 at 61,645.

¹⁷ 16 U.S.C. § 824a-3(g) (2012).

¹⁸ 16 U.S.C. § 824a-3(h) (2012).

¹⁹ See Massachusetts DPU Jan. 5, 2012 Letter.

²⁰ 18 C.F.R. § 292.304(e) (2013).

²¹ *Council of the City of New Orleans, Louisiana*, 145 FERC ¶ 61,057, at P 30 (2013). After a state regulatory authority has determined an avoided cost rate, an electric utility, qualifying cogeneration facility or qualifying small power production facility may file a petition with this Commission pursuant to section 210(h)(2)(B) of PURPA, alleging that the state regulatory authority's decision is inconsistent with PURPA or the Commission's regulations and asking the Commission to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA. See 16 U.S.C. § 824a-3(h)(2) (2012).

The Commission orders:

Alco's Complaint is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.