

154 FERC ¶ 61,203
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Heartland Consumers Power District

Docket No. EL16-1-000

ORDER GRANTING IN PART, AND DENYING IN PART, PETITION FOR WAIVER

(Issued March 17, 2016)

1. On October 5, 2015, Heartland Consumers Power District (Heartland) filed a petition requesting a waiver under section 292.402 of the Commission’s regulations.¹ Specifically, Heartland seeks waiver of its customers’ purchase obligations under section 292.303(a) of the Commission’s regulations to purchase energy and capacity from qualifying facilities (QF), and of Heartland’s own obligation under section 292.303(b) of the Commission’s regulations to sell energy and capacity requested by QFs.² In this order, we grant Heartland’s petition for waiver in part, and deny in part.

I. Background

2. Heartland states that it is a consumer-owned, nonregulated electric utility serving utility customers in the states of Minnesota, Iowa, South Dakota, North Dakota, and

¹ 18 C.F.R. § 292.402 (2015) (allowing nonregulated electric utilities to apply to the Commission for waiver of arrangements between electric utilities and qualifying facilities (QF) under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), as listed in Part 292, subpart C of Commission’s regulations (18 C.F.R. §§ 292.301-.314(2015), with exception of 18 C.F.R. § 292.302 (2015)).

² 18 C.F.R. § 292.303(a) (“[e]ach electric utility shall purchase, in accordance with § 292.304, ... any energy and capacity which is made available from a qualifying facility”); *id.* § 292.303(b) (“[e]ach electric utility shall sell to any qualifying facility, in accordance with § 292.305... energy and capacity requested by the qualifying facility”) *id.*

Kansas.³ Heartland explains that under individual agreements with its customers in Minnesota, Iowa, and South Dakota, Heartland either supplies all of its customers' requirements for electric power and energy, or supplements the fixed amounts that customers purchase from the Department of Energy's Western Area Power Administration (WAPA).⁴

3. On January 14, 1992, as amended on July 6, 2015, the Board of Directors of Heartland adopted a policy titled "Interconnection of Co-Generation and Small Power Production Facilities to Heartland Consumers Power District Electric System" (Policy).⁵ The Policy, as relevant here, explains that Heartland will purchase electric energy and capacity made available from QFs interconnected to Heartland's utility customers, and that Heartland's utility customers will sell energy and capacity to QFs.

II. Heartland Petition

4. Heartland has filed, on behalf of itself and its customers, a petition seeking waiver of its customers' obligations to purchase power directly from QFs as required by 292.303(a) of the Commission's regulations.⁶ Heartland states that, if such waiver is granted, Heartland will commit to purchase and pay for capacity from QFs interconnecting with its customers and will not subject a QF to any duplicate interconnection charge or charges for wheeling power to Heartland.⁷ According to

³ Heartland states that it serves thirty-six municipal members and state institutions and that a list of these customers is attached as Exhibit A of its petition. Petition at 1, n.1. However, Exhibit A includes the names and addresses of only twenty of Heartland's Customers. Petition at Exhibit A. Heartland also states that it "provides electric power and energy to twenty-seven municipalities [in the states of Minnesota, Iowa, and South Dakota] and similar service to six State institutions in South Dakota" for a total of thirty-three customers. Petition at 2.

⁴ *Id.* at 2-3.

⁵ *Id.* at Exhibit B.

⁶ Heartland explains that it notified its customers of its desire to adopt the Policy as it relates to the purchase and sale of energy and capacity from QFs interconnecting to its utility customers, and that it intends to review related policies its customers presently have in place, and suggest changes where the policies have language contradictory to Heartland's Policy, and will not suggest changes where its customers' policies are substantially similar to Heartland's. Petition at 4, n.2.

⁷ *Id.* at 4-5.

Heartland, waiver of the purchase obligation is appropriate under Commission precedent because it will not frustrate Congress' intent to encourage QFs under PURPA, as no QF will be deprived of a market for its power and Heartland will pay its full avoided cost to QFs.⁸

5. Heartland states that since it acquires the bulk power resources required to meet its customers' loads, Heartland is in a better position than its customers to purchase energy offered from QFs.⁹ Heartland commits to making all appropriate purchases from QFs on behalf of its customers and plans to purchase energy and capacity from QFs at negotiated rates, or if none is negotiated, at Heartland's full avoided cost.¹⁰

6. Additionally, Heartland states that, since its customers provide retail electric services, they are in a better position to provide the interconnection and retail service required by QFs.¹¹ Consequently, Heartland also requests waiver of its own obligation to sell energy and capacity directly to QFs pursuant to section 292.303(b) of the Commission's regulations. Heartland states that its customers offer QFs supplemental, backup, maintenance, and interruptible power at rates determined between the customer and the QF.¹² Heartland claims that such rates will be nondiscriminatory, just and reasonable, and in the public interest.¹³ Therefore, according to Heartland, a separate sales requirement for Heartland is not necessary to sufficiently further the establishment and development of QFs.¹⁴

III. Notices and Responsive Pleadings

7. Notice of Heartland's Petition was published in the *Federal Register*, 80 Fed. Reg. 61,803 (2015), with interventions and protests due on or before October 26, 2015.

⁸ *Id.* at 5 (citing *Soyland Power Coop.*, 50 FERC ¶ 62,072 (1990); *Oglethorpe Power Coop.*, 32 FERC ¶ 61,103 (1985), *aff'd on reh'g*, 35 FERC ¶ 61,069 (1986) (*Oglethorpe*); *Seminole Elect. Power Coop.*, 39 FERC ¶ 61,354 (1987) (*Seminole*)).

⁹ *Id.*

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² *Id.* at 6.

¹³ *Id.*

¹⁴ *Id.*

8. Truman Public Utilities Commission of Truman, Minnesota (Truman)¹⁵ and South Dakota Soybean Processors, LLC (Soybean Processors)¹⁶ filed timely motions to intervene and protests. Heartland filed an answer on November 10, 2015. Soybean Processors filed a response on November 23, 2015.

9. On December 11, 2015, the Commission issued a deficiency letter notifying Heartland that its petition was deficient and that additional information was required. On December 29, 2015, Heartland filed its response to the deficiency letter. Notice of Heartland's response to the deficiency letter was published in the *Federal Register*, 81 Fed. Reg. 933 (2016), with interventions and protests due on or before January 19, 2016. None was filed.

A. Truman's Protest

10. Truman argues that Heartland cannot request waiver on Truman's behalf, and has no authority to require Truman to adopt the Policy or any other policy. Furthermore, Truman states that there are no current or potential QFs within its system, and therefore Truman is not a co-filer with Heartland's petition.¹⁷ Truman contends that, in the event that a QF interconnects to its system, Truman is already contractually obligated by a December 30, 2005, Participation Power Sale and Interchange Agreement to provide Heartland "prompt written notice of any future potential electric generation resource within or capable of physical interconnection with [Truman's] local distribution or transmission facilities..."¹⁸ Truman states that it does not oppose Heartland's petition insofar as it applies only to Heartland customers that want to adopt, or have adopted the Policy.¹⁹

¹⁵ Truman is a Heartland utility customer that owns and operates an electric system that supplies power and energy within the Midcontinent Independent System Operator, Inc. footprint.

¹⁶ Soybean Processors owns and operates a soybean processing plant and a soybean oil refinery in Volga, South Dakota; the City of Volga is a Heartland utility customer.

¹⁷ Truman Protest at 4.

¹⁸ *Id.* at 4-5.

¹⁹ *Id.* at 5-6.

B. Soybean Processors' Protest

11. Soybean Processors argues that Heartland is violating section 210 of PURPA, by not providing the standby power rates²⁰ required under sections 292.303(b) and 292.305(b) of the Commission's regulations.²¹ Soybean Processors states it discussed its "desire to explore cogeneration options" with Heartland and the City of Volga in August 2011, and that it sent a formal request to the Mayor of the City of Volga requesting standby power provisions.²² Soybean Processors states that neither the City of Volga nor Heartland have supplied standby power provisions, and that the City of Volga indicated it could not provide standby power rates without Heartland's involvement.²³

12. Soybean Processors claims that Heartland is the generation supplier to its utility customers and has the responsibility to fulfill obligations promulgated under section 292.303(b) of the Commission's regulations. Soybean Processors states that installation of a QF will impact the City of Volga's cost of providing generation service to Soybean Processors, which the City of Volga largely procures from Heartland; therefore, Heartland is the entity best suited to provide standby power provisions.²⁴

13. Soybean Processors argues that Heartland's Policy needs to clarify how Heartland can fulfill its PURPA obligation to purchase energy and capacity from QFs 20 MW and smaller through a purchase rate limited to payments for energy and capacity which Heartland can use to meet its total system load, given that Heartland indicates it is purchasing more energy or capacity from QFs than required to meet system load. Soybean Processors claims Heartland's Policy is also contrary to Heartland's assertion that no QF will be deprived of a market for its power, and recommends that the Commission require Heartland's Policy be made consistent with PURPA.²⁵

²⁰ Soybean Processors explains that the PURPA sales obligation in section 292.303(b) refers to section 292.305(b) of the Commission's regulations, 18 C.F.R. § 292.305(b) (2015), which requires utilities to provide supplementary, back-up, maintenance, and interruptible power services to requesting QFs. Soybean Processors Protest at 3.

²¹ 18 C.F.R. § 292.303(b) (2015).

²² Soybean Processors Protest at 5.

²³ *Id.*

²⁴ *Id.* at 8.

²⁵ *Id.* at 9.

14. Soybean Processors also argues that Heartland has not provided the specifics of Heartland's avoided costs and rates for purchasing power from QFs larger than 100 kW, and Heartland needs to demonstrate that its full avoided cost will be sufficient to stimulate efficient QF generation.²⁶

C. Heartland's Answer

15. In response to the Truman protest, Heartland states that it "in no way can require its Customers to enact a policy," and Heartland acknowledges and agrees with Truman's assertion that Heartland cannot require Truman "to pass any particular legislation or adopt any particular policy or vote any particular way."²⁷

16. Heartland explains that, under South Dakota law, it does not have the ability to sell electricity at retail, and that the purpose of its waiver request is to clearly define the responsibilities for purchases from QFs, and sales to QFs, in accordance with statutory and contractual obligations.²⁸

17. Heartland contends that Soybean Processors did not request standby power rate provisions. Rather, Heartland claims that, on September 30, 2015, Soybean Processors inquired about the Policy and whether Heartland provided the City of Volga with information essential to determining standby rates, and Heartland responded on October 5, 2015.²⁹ Heartland claims that Soybean Processors' project was not technically developed enough to provide assistance to the City of Volga in setting standby rates, and that a wholesale rate analysis for Heartland was tentatively scheduled for completion by October 14, 2015.³⁰ Heartland also argues that Heartland's avoided cost is essentially Heartland's customer's avoided cost as presented in its filing with the South Dakota Public Utilities Commission.³¹

18. Heartland argues that its Policy is consistent with federal regulations and that Heartland has informed Soybean Processors that, in the event Soybean Processors

²⁶ *Id.*

²⁷ Heartland Answer at 2, 8, n.9.

²⁸ *Id.* at 7.

²⁹ Soybean Processors' inquiry is included as Exhibit A, and Heartland's response as Exhibit B, in Heartland's Answer.

³⁰ *Id.* at 4-5, Exhibit B.

³¹ *Id.* at 5, Exhibit C.

constructs a cogeneration plant, Heartland intends to negotiate a rate for the purchase of excess energy and capacity from the facility not to exceed its avoided cost.³² Heartland adds that it does not believe Soybean Processors has begun cogeneration plant construction, nor taken steps to become a QF. Heartland claims that Soybean Processors has not been rebuffed by the City of Volga or Heartland on any sales of excess energy, and Heartland is not at fault for any delay in Soybean Processors' QF development.³³

19. Heartland argues that its Policy satisfies existing federal regulations in regards to purchases from QFs, citing Order No. 69:

A qualifying facility may seek to have a utility purchase more energy and capacity than the utility requires to meet its total system load. In such a case, while the utility is legally obligated to purchase any energy or capacity provided by a qualifying facility, the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load.³⁴

D. Soybean Processors' Response

20. Soybean Processors answers Heartland by contending that utilities typically have a standby service tariff that has wide applicability, and detailed information regarding a cogeneration system's expected operation is not required to develop a standby rate.³⁵ Soybean Processors claims that the City of Volga's all-requirements contract with Heartland, such that Heartland's fixed and variable generation charges pass directly to Soybean Processors, indicates that Heartland is responsible for developing standby power provisions for the City of Volga's customers.³⁶ Soybean Processors claims that

³² *Id.* at 5.

³³ *Id.* at 6.

³⁴ *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 38,871, *order on reh'g sub nom.* Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated in part*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

³⁵ Soybean Processors Answer at 3.

³⁶ *Id.*

Heartland only provided rates for purchases for facilities 100 kW or smaller, which would not apply to Soybean Processors' potential 4.2 MW QF.³⁷ Soybean Processors states that its QF development is stalled because an economic feasibility analysis cannot be completed without knowledge of the standby rate services provisions and charges.³⁸

IV. Heartland's Deficiency Letter Response

21. In its response to the deficiency letter, Heartland clarifies that it seeks waivers on behalf of twenty-eight customers.³⁹ Heartland states that, after direct communication with its customers, all but six of the twenty-eight customers⁴⁰ at issue in Heartland's Petition have adopted, or agreed to adopt, a policy transferring PURPA purchase and sales obligations between Heartland and its customers as requested in Heartland's petition.⁴¹

V. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), Truman's and Soybean Processors' timely, unopposed motions to intervene serve to make them parties to this proceeding.

23. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the parties' answers because they have provided information that assisted us in our decision-making process.

B. Determination

24. We will grant Heartland's request for waivers in part, and deny it in part.

³⁷ *Id.* at 4.

³⁸ *Id.* at 5.

³⁹ Heartland Response to Deficiency Letter at 1.

⁴⁰ The following six customers have not adopted the Policy or a similar policy: City of Howard; City of Aurora; City of Sioux Falls; City of McLaughlin; City of Tyndall; and Truman.

⁴¹ Heartland Response to Deficiency Letter at 3-4.

25. Under section 292.403 of the Commission's regulations, the Commission will grant waivers of sections 292.303(a) and (b) if compliance is not necessary to encourage cogeneration and small power production and is not otherwise required by section 210 of PURPA. In *Oglethorpe*, the Commission explained that it has authority to waive the PURPA purchase and sales obligations set forth in sections 292.303(a) and (b) of the Commission's regulations.⁴²

26. The Commission has previously granted waivers of sections 292.303(a) and (b) of the Commission's regulations where the generation and transmission utility agreed to purchase QF power at its avoided cost on behalf of its customer utilities, and the customer utilities agreed to offer supplementary, interruptible, backup, and maintenance power to QFs at rates that are nondiscriminatory, just and reasonable.⁴³

27. In *Seminole*, the Commission granted Seminole Electric Power Cooperative's (Seminole) request for waiver of its members' purchase obligation under section 292.303(a), and its sales obligation under section 292.303(b), where Seminole would act as the purchasing agent on behalf of its members, and its members would offer supplementary, backup, maintenance and interruptible power to QFs at rates that were nondiscriminatory, just and reasonable, and in the public interest. The Commission determined in that instance that a separate sales requirement applicable to Seminole is unnecessary for the encouragement of QFs.⁴⁴

28. Heartland has represented -- without contradiction -- that twenty-two of twenty-eight customers have adopted or agreed to adopt the same or a similar policy as Heartland's Policy. As discussed below, we grant Heartland's petition for those twenty-two customers who agreed to transfer their PURPA purchase obligation, and accepted Heartland's sales obligation, as requested in the petition.⁴⁵ We deny Heartland's petition with respect to those six customers that currently do not agree to adopt Heartland's Policy.

29. For those utility customers that agree to allow Heartland, as their requirements supplier, to purchase power from QFs interconnected to their systems, and agree to sell backup power to QFs, waiver of sections 292.303(a) and (b) of the Commission

⁴² *Oglethorpe*, 32 FERC at 61,283-84.

⁴³ *Seminole* 39 FERC at 62,112.

⁴⁴ *Id.*

⁴⁵ See Appendix for a list of the twenty-two customers for which the waiver is granted.

regulations is appropriate because QFs will retain the same ability to sell power and receive backup power as is currently the case. QFs will continue to receive both Heartland's avoided cost for the QF energy and capacity sold, and backup power from their interconnected utility that reflects Heartland's rates for sales of such power. Thus, strict adherence to sections 292.303(a) and (b) of the Commission's regulations, under these circumstances, is not necessary to encourage QFs and waiver is appropriate under section 292.403 of the Commission's regulations. For those six utilities that do not currently support Heartland's waiver we deny Heartland's request with respect to those customers because sections 292.303(a) and (b) remain necessary to encourage QFs and cogeneration facilities interconnected to those six customers.

30. Finally, as required by section 292.305(b) of the Commission's regulations, the City of Volga must provide supplementary power, back-up power, maintenance power, and interruptible power for Soybean Processors' cogeneration facility if and when it should ever become operational. As stated by Heartland in its response to the Commission's deficiency letter, the City of Volga has adopted, or agreed to adopt, the pertinent section of Heartland's Policy in which utility customers like the City of Volga assume Heartland's PURPA sales obligation in section 292.303(b) of the Commission's regulations. Therefore, by this order, Heartland's sales obligation with respect to Soybean Processors' proposed cogeneration facility is waived, and the City of Volga instead must sell energy and capacity requested by Soybean Processors' QF, in accordance with section 292.305 of the Commission's regulations. If the City of Volga does not fulfill its obligations under section 292.305(b) of the Commission's regulations, Soybean Processors may file a complaint under section 210(h) of PURPA.

The Commission orders:

Heartland's waiver petition is hereby granted in part, and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Heartland Consumers Power District
Customers for which Waivers are Granted

South Dakota:

City of Arlington

City of Bryant

City of Colman

City of Estelline

City of Groton

City of Hecla

City of Langford

City of Madison

City of Miller

City of Parker

City of Plankinton

City of Volga

City of Wessington Springs

City of White

State of South Dakota: University of South Dakota, South Dakota State University, Northern State University, Human Services Center, Mike Durfee State Prison, and SD Development Center

Iowa:

City of Akron

City of Auburn

City of Stanhope

Minnesota:

City of Grove City

City of Lake Crystal

Madelia Municipal Light & Power

City of Tyler