

156 FERC ¶ 61,043
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Nebraska Public Power District

Docket No. QM16-1-000

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

(Issued July 21, 2016)

1. On February 12, 2016, as amended,¹ Nebraska Public Power District (NPPD) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)² and section 292.310 of the Commission's regulations³ (Application). NPPD seeks, pursuant to section 292.303(a) of the Commission's regulations,⁴ to terminate the requirement to enter into new power purchase obligations or contracts to purchase electric energy and capacity from qualifying cogeneration or small power production facilities (QF) with a net capacity in excess of 20 MW that are located within the Southwest Power Pool, Inc. (SPP).

2. In this order, with the exception of the PURPA purchase request pending before the NPPD Board of Directors for NextEra Energy Resources, LLC's (NextEra) Cottonwood Wind Project, LLC (Cottonwood QF), we find that NPPD has met the statutory standard. Accordingly, we grant NPPD's Application, in part, to terminate the requirement that it enter into new obligations or contracts with QFs with net capacity in

¹ NPPD amended its Application on February 22, 2016, February 26, 2016, April 26, 2016, and May 3, 2016, to include potentially-affected QFs, and in response to an April 19, 2016 deficiency letter issued by Commission staff.

² 16 U.S.C. § 824a-3(m) (2012).

³ 18 C.F.R. § 292.310 (2015).

⁴ 18 C.F.R. § 292.303(a) (2015).

excess of 20 MW, effective February 12, 2016, the date NPPD filed its Application, and deny NPPD's Application, in part, with respect to NextEra's Cottonwood QF.

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 QFs. Order No. 688 implements PURPA section 210(m), 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 a market described in section 210(m) of PURPA.

II. Application

4. NPPD states that it is a public corporation and political subdivision of the state of Nebraska that is not subject to the Commission's authority under the Federal Power Act (FPA), and that it is also a SPP member.⁶ NPPD asserts that it satisfies the requirements of PURPA section 210(m) and sections 292.309 and 292.310 of the Commission's regulations. NPPD states that it relies on section 292.309(a) of the Commission's regulations,⁷ i.e., that the QFs in SPP have nondiscriminatory access to a market that satisfies the requirements of section 210(m) of PURPA as a market that warrants termination of an electric utility's purchase obligation.

III. Notices of Filings and Responsive Pleadings

5. Notices of NPPD's filings were published in the *Federal Register*, 81 Fed. Reg. 8955 (2016), 81 Fed. Reg. 11,788 (2016), 81 Fed. Reg. 26,539 (2016), and 81 Fed. Reg. 29,260 (2016). Interventions and protests were due on or before May 31, 2016. The Commission served notices of the Application on the potentially-affected QFs identified by NPPD by letters dated February 16, 2016, February 29, 2016, April 28, 2016, and May 5, 2016.

6. Motions to intervene were filed by Golden Spread Electric Cooperative, Inc.; Municipal Energy Agency of Nebraska; Broken Bow Wind II, LLC; and Elkhorn Ridge

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 February 12, 2016 Application at 2-3.

⁷ 18 C.F.R. § 292.309(a)(2) (2015).

Wind, LLC, Laredo Ridge Wind LLC, Crofton Bluffs Wind, LLC, and Broken Bow Wind LLC (collectively NRG Wind Companies). NextEra filed a motion to intervene, a protest, and an answer. NPPD filed an answer to NextEra's protest, and an answer to NextEra's answer.

A. NextEra's Protest

7. NextEra states that it owns three subsidiaries, Steele Flats Wind, LLC (Steele Flats),⁸ Sholes Wind, LLC (Sholes QF), and Cottonwood QF that have self-certified as QFs within NPPD's service territory.⁹ NextEra does not challenge NPPD's assertion that SPP's markets satisfy section 210(m) of PURPA, but protests that NPPD has failed to acknowledge two letters seeking to have NPPD purchase the output from two of its QFs: a November 6, 2015-dated letter formally requesting that NPPD purchase the output of the Cottonwood QF¹⁰ and a February 12, 2016-dated letter formally requesting that NPPD purchase the output of the Sholes QF.¹¹ NextEra states that these two purchase letters were submitted prior to, or as of, February 12, 2016, the date NPPD filed its application with the Commission, and therefore the termination NPPD requests should not apply to the Cottonwood QF and the Sholes QF.¹²

8. NextEra claims that, in accordance with Order No. 688-A, a legally enforceable obligation was established for both the Cottonwood QF and the Sholes QF. NextEra

⁸ NextEra states that NPPD acknowledges that projects such as Steele Flats with existing power purchase agreements are not affected by this Application. NextEra Protest at 3, n.6.

⁹ NextEra Protest at 2 (stating the 79.5 MW Cottonwood QF was self-certified in Docket No. QF15-1026-000 and the 79.5 MW Sholes QF was self-certified in Docket No. QF16-432-000).

¹⁰ NextEra's Protest includes the Cottonwood QF's November 6, 2015 letter as an attachment in which the Cottonwood QF writes to NPPD "to invoke its rights pursuant to section 210 of [PURPA] to require NPPD to purchase energy generated from Cottonwood's wind energy generating facility. . . which is a Qualifying Facility under PURPA....Cottonwood exercises its right under the FERC regulations implementing PURPA to provide energy to NPPD 'pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term....'" *Id.*

¹¹ *Id.* at 2-3.

¹² *Id.* at 4-5. NextEra states that certain QFs should be "grandfathered" and the termination of the mandatory purchase obligation should not apply to those QFs.

asserts that Order No. 688-A provides that “a QF that has initiated a state PURPA proceeding that may result in a legally enforceable contract or obligation 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.”¹³

B. NPPD’s Answer

9. NPPD contends that the Cottonwood QF’s purchase request should not be grandfathered as NextEra requests because SPP’s April 5, 2016 notice of termination of the Cottonwood QF’s Generator Interconnection Agreement (GIA) makes the Cottonwood QF no longer viable and effectively moots any legally enforceable obligation.¹⁴ Also, NPPD argues that it has not entered into a contract with the Cottonwood QF and, therefore, does not have a legally enforceable obligation to purchase the output.

10. Furthermore, NPPD states that, in response to the Cottonwood QF’s power purchase agreement request at published avoided cost rates, NPPD informed the Cottonwood QF that NPPD was not in a position to acquire additional wind resources as NPPD “had excess energy and the need for additional resources was unclear in light of uncertainties over the implementation of the Clean Power Plan.”¹⁵ NPPD also states that it simultaneously received, and subsequently rejected, another Cottonwood QF offer with different pricing.¹⁶ NPPD argues that this demonstrates there is no agreement governing NPPD’s purchase of the Cottonwood QF’s output.¹⁷

11. NPPD recognizes a legally enforceable contract may arise short of an actual agreement as to contract terms, but states that the Commission has not determined that a letter demanding a PURPA power purchase agreement or QF self-certification filing is sufficient to establish a legally enforceable obligation.¹⁸ NPPD states that, in Order

¹³ NextEra Protest at 3 (citing Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 137).

¹⁴ NPPD Answer at 2.

¹⁵ *Id.* at Attachment A.

¹⁶ *Id.*

¹⁷ *Id.* at 11.

¹⁸ *Id.* at 12 (citing *Northern States Power Co.*, 136 FERC ¶ 61,093, at P 24 (2011)).

No. 688-A, the Commission relies on state regulatory authorities and non-regulated utilities as to the existence of legally enforceable obligations, such that “a legally enforceable obligation arises under state law and may be grandfathered if the relevant state regulatory authority or non-jurisdictional utility [such as NPPD] determines a legally enforceable obligation exists under its policies implementing PURPA.”¹⁹ NPPD claims that, under Nebraska state law, its Board of Directors must authorize all contracts, including power purchase agreements, in order for them to be enforceable against NPPD.²⁰ NPPD states that the Board of Directors did not authorize a PURPA purchase obligation with the Cottonwood QF, and argues that a finding that this statutory requirement can be superseded by a QF’s letter would represent encroachment both on state law and on the autonomy of publicly-owned utilities.²¹

12. NPPD further claims that it received the Sholes QF’s purchase request after NPPD filed its Application.²² NPPD states that, upon filing its Application, it no longer has the obligation to enter into new contracts or obligations with QFs, unless the Commission finds that reinstatement of that obligation is appropriate and establishes a different effective date for the application.²³ NPPD also states that, in Order No. 688-A, the Commission was concerned about QFs opportunistically seeking contracts and thus temporarily suspending an electric utility’s right to termination of the electric utility’s obligation to enter into new contracts and obligations upon the filing of the PURPA termination application.²⁴ NPPD argues that is the case here.

C. NextEra and NPPD Additional Answers

13. In response, NextEra again claims that the Cottonwood QF’s and the Sholes QF’s purchase requests were sent to NPPD on November 6, 2015 and February 12, 2016 respectively, on or before the date NPPD filed its request for termination on February 12, 2016.²⁵ NextEra argues that in the state of Nebraska there is no state regulatory

¹⁹ *Id.* at 9-10.

²⁰ *Id.* at 12.

²¹ *Id.*

²² *Id.* at 14.

²³ *Id.* at 15.

²⁴ *Id.* (citing Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 227).

²⁵ NextEra Answer at 2.

commission authorized to determine whether a contract would be formed, and that the Nebraska Power Review Board does not have authority to set NPPD's rates or to regulate its purchases pursuant to PURPA.²⁶ NextEra further argues that allowing NPPD to determine whether legally enforceable obligations exist for either the Cottonwood QF or the Sholes QF is inconsistent with PURPA.²⁷

14. NextEra also claims that an interconnection dispute with SPP, resulting in SPP's notice of termination of the Cottonwood QF's GIA in Docket No. ER16-135-000 is not relevant to whether a legally enforceable obligation exists.²⁸

15. In response, NPPD argues that the Commission should not waive the prohibition on answers to a protest or an answer²⁹ for NextEra's answer because there was no new information justifying such a waiver. NPPD states that, if the Commission does accept NextEra's answer, then the Commission should also accept NPPD's answer to NextEra's answer.

IV. Discussion

A. Procedural Matters

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

17. 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 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

18. NPPD is a member of SPP and relies upon the fact that QFs in SPP have nondiscriminatory access to a market that satisfies the requirements of section 210(m) of PURPA. As such, we find, based on the unrebutted statements in NPPD's Application, that QFs over 20 MW have nondiscriminatory access to wholesale markets for the sale of

²⁶ *Id.* at 5.

²⁷ *Id.* at 6.

²⁸ NextEra Protest at 5.

²⁹ 18 C.F.R. § 385.213(a)(2) (2015).

capacity and energy warranting termination of NPPD's mandatory purchase obligation. Accordingly, we grant NPPD's request to terminate the mandatory purchase obligation pursuant to section 210(m) of PURPA to enter into new contracts or obligations to purchase electric energy or capacity from QFs larger than 20 MW net capacity that are located within NPPD's service territory, with the exception of the Cottonwood QF.³⁰

19. PURPA and the Commission's regulations provide that a QF that has initiated a proceeding before the appropriate state regulatory authority or non-regulated electric utility that may result in a legally enforceable contract or obligation prior to an electric utility filing its petition for relief pursuant to section 292.310 of the Commission regulations will be entitled to have any contract or obligation that may be established by state law grandfathered.³¹ Therefore, until a utility applies for termination of the PURPA mandatory purchase obligation, a QF has the statutory right to pursue a contract or other legally enforceable obligation with that utility, and the Commission will grandfather any such legally enforceable obligation that exists prior to that date.³²

20. The Commission stated in Order No. 688-A that:

[I]n the division of responsibilities of administering PURPA between this Commission and state regulatory authorities (and non-regulated utilities), it is the state regulatory authorities (or non-regulated utilities) that determine whether and when a legally enforceable obligation is created, and the procedures for obtaining approval of such an obligation. QFs that believe that some other sort of state proceeding has created a legally enforceable obligation under state law may argue their claim before the Commission, and we will make such determinations on a case-by-case basis based on state law.³³

Here, Nebraska does not have a state regulatory commission to apply to and, according to state law, NPPD's Board of Directors authorizes QF purchases. The Cottonwood QF submitted its purchase request to NPPD by letter dated November 6, 2015, i.e., prior to February 12, 2016, the date NPPD filed its Application with the Commission.

³⁰ To the extent that a potentially affected QF's net capacity is 20 MW or smaller, this order also does not terminate the mandatory purchase obligation for that QF.

³¹ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 213; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 137-138.

³² *Fitchburg Gas and Electric Light Co.*, 146 FERC ¶ 61,186, at P 34 (2014).

³³ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 139.

Accordingly, we find on this record that the Cottonwood QF by virtue of its letter to NPPD requesting an NPPD purchase, has initiated a proceeding to establish a contract or legally enforceable obligation and the Cottonwood QF's application is pending approval before the applicable non-regulated electric utility; that application is thus grandfathered.

21. Contrary to NPPD's arguments, moreover, the determination to grant or deny relief from the mandatory purchase requirement with respect to a particular QF is not predicated upon the existence of a currently effective GIA. In Order No. 688-A, the Commission "rejected requests to allow a QF to litigate open access implementation issues in the context of these 90-day applications, concluding that complaint proceedings are the appropriate forum for such disputes."³⁴ The status of the Cottonwood QF's GIA is such an open access implementation issue, and is not relevant to this proceeding.

22. The Sholes QF's purchase request letter, by contrast, was dated February 12, 2016, the same date NPPD filed its Application with the Commission to terminate its mandatory purchase requirement. Order No. 688 states that an electric utility will not be obligated to enter into new contracts or obligations with QFs as of the date its PURPA petition is filed, and if the Commission grants the application, the mandatory purchase requirement for that electric utility ends as of the date of the PURPA petition.³⁵ Because the Sholes QF's purchase request letter was dated the same date that NPPD's Application to terminate its obligation to enter into new obligations or contracts was filed, the letter was not filed prior to that date, and thus did not grandfather the Sholes QF's efforts to sell to NPPD.

23. Furthermore, we find that the Sholes QF's argument that self-certifying, in and of itself, creates a legally enforceable obligation is without merit. A notice of self-certification is a certification by the applicant itself that the facility meets the relevant requirements for QF status. Depending on state law, or the procedures established by the non-regulated utility, a self-certification may indeed initiate a proceeding to establish a legally enforceable obligation. Here, however, there is no evidence in the record that Nebraska state law, or NPPD, as the relevant non-regulated electric utility, provides that submitting a notice of self-certification to the Commission is sufficient to create a legally enforceable obligation, or to initiate a proceeding to establish such an obligation.

24. Accordingly, while denying NPPD's Application with respect to NextEra's Cottonwood QF, we will otherwise grant NPPD's Application to terminate its mandatory

³⁴ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 53.

³⁵ See Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 228; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 144.

purchase obligation on a service territory-wide basis to enter into new contracts or obligations to purchase electric energy or capacity from QFs larger than 20 MW net capacity.

The Commission orders:

The Commission grants NPPD's Application, in part, to terminate the requirement under section 292.303(a) of the Commission's regulations that NPPD enter into new power purchase obligations or contracts to purchase electric energy and capacity from qualifying cogeneration or small power production QFs, located within SPP, with a net capacity in excess of 20 MW, effective February 12, 2016. The Commission denies NPPD's Application, in part, with respect to NextEra's Cottonwood QF.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.