

134 FERC ¶ 61,041
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Service Company of New Hampshire

Docket No. QM10-4-004

ORDER DENYING REHEARING

(Issued January 20, 2011)

1. Northeast Utilities Service Company, on behalf of Public Service Company of New Hampshire (jointly PSNH), filed a request for rehearing of the Commission's April 15, 2010 order in this proceeding.¹ In the April 15 Order, the Commission granted PSNH's request to terminate its mandatory purchase obligation pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)² on a service territory-wide basis for qualifying facilities (QF) with a net capacity in excess of 20 MW effective January 7, 2010, with one exception. In doing so, the Commission stated that any contract or legally enforceable obligation that may result from the action of the New Hampshire Public Utilities Commission (New Hampshire commission) on, as relevant here, a petition filed by Clean Power Development, LLC (Clean Power) with the New Hampshire commission before PSNH sought termination of its mandatory purchase obligation would be grandfathered.³ On rehearing, PSNH argues that the Commission found that Clean Power's PURPA rights were, in fact, grandfathered and that this finding was in error.

2. As discussed below, we find that PSNH's arguments rest on a misinterpretation of the April 15 Order; we will deny PSNH's request for rehearing.

¹ *Public Service Company of New Hampshire*, 131 FERC ¶ 61,027 (2010) (April 15 Order).

² 16 U.S.C. § 824a-3(m) (2006).

³ April 15 Order, 131 FERC ¶ 61,027 at P 24.

Background

3. On October 20, 2006, the Commission issued Order No. 688,⁴ revising its regulations governing utilities' obligations to purchase electric energy produced by QFs. Order No. 688 implements PURPA section 210(m),⁵ 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. The Commission found in Order No. 688 that the markets administered by ISO New England, Inc. (ISO-NE), as applicable here, were among the markets that satisfy the criteria of PURPA section 210(m)(1)(A).⁶ Accordingly, section 292.309(e) of the Commission's regulations⁷ established a rebuttable presumption for ISO-NE and other markets that provides large QFs (over 20 MW net capacity) interconnected with member electric utilities with nondiscriminatory access to markets described in section 210(m)(1)(A). The Commission also established a second rebuttable presumption contained in section 292.309(d)(1) of the regulations, which provides that a QF with a net capacity at or below 20 MW does not have nondiscriminatory access to markets.⁸

4. On January 7, 2010, as amended on January 12, 2010, January 15, 2010, and January 22, 2010, PSNH filed an application pursuant to section 210(m) of PURPA and section 292.310 of the Commission's regulations.⁹ PSNH sought termination of the obligation to enter into new power purchase obligations or contracts to purchase electric energy and capacity from QFs with net capacity in excess of 20 MW on a service territory-wide basis for its interconnected system under the control of ISO-NE. In addition, PSNH also sought to terminate the mandatory purchase obligation for all QFs with a net capacity of 5 MW through 20 MW.

⁴ *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).

⁵ Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005. *See* Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-69 (2005) (EPAAct 2005).

⁶ 16 U.S.C. § 824a-3(m)(1)(A) (2006); *see* 18 C.F.R. § 292.309(a)(1) (2010).

⁷ 18 C.F.R. § 292.309(e) (2010).

⁸ *Id.* § 292.309(d)(1).

⁹ 18 C.F.R. § 292.310 (2010).

5. In the April 15 Order, the Commission granted PSNH's application with respect to QFs with a net capacity in excess of 20 MW, but found that PSNH had failed to rebut the presumption that a QF with a net capacity of 5 MW through 20 MW does not have nondiscriminatory access to markets.¹⁰ In addition, in response to Clean Power's intervention and protest, where Clean Power stated both that PSNH had refused to enter into a contract¹¹ for the purchase of capacity and energy from its 29 MW small power production facility and that prior to the date of PSNH's filing Clean Power had filed a complaint with the New Hampshire commission seeking enforcement of its right to sell to PSNH, the Commission stated:

The Commission's regulations provide, in certain circumstances, for the grandfathering of rights. The Commission has determined 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. Clean Power initiated its proceeding with the New Hampshire [c]ommission before PSNH filed its petition to terminate its purchase obligation. Thus, any contract or legally enforceable obligation that results from the New Hampshire [c]ommission's action on Clean Power's petition will be grandfathered and not subject to this termination order.^{12]}

6. On rehearing, PSNH argues: (1) that Clean Power did not argue before the Commission that it had initiated a proceeding before the New Hampshire commission that could result in a legally enforceable obligation; (2) that the Commission should have applied New Hampshire law in determining whether Clean Power had initiated a state PURPA proceeding; (3) that Clean Power had not initiated a state PURPA proceeding; (4) that it is the New Hampshire commission and not this Commission that should determine whether a state PURPA proceeding was initiated by the Clean Power filing with the state commission; (5) that the Commission should not have ruled that any contract or legally enforceable obligation that results from the New Hampshire proceeding would be grandfathered because such a finding was premature before a New

¹⁰ April 15 Order, 131 FERC ¶ 61,027 at P 18-22.

¹¹ Clean Power also alleged that PSNH had denied that it must enter into a legally enforceable obligation to purchase capacity and energy from the Clean Power QF.

¹² April 15 Order, 131 FERC ¶ 61,027 at P 24 (footnotes omitted).

Hampshire commission ruling on Clean Power's petition; and (6) that the Commission should not have rejected PSNH's answer to Clean Power's protest.¹³

Discussion

7. We will deny PSNH's request for rehearing.

8. PSNH objects to the Commission's statement in the April 15 Order that "any contract or legally enforceable obligation that results from the New Hampshire commission's action on Clean Power's petition will be grandfathered and not subject to this termination order."¹⁴ While PSNH argues that Clean Power did not raise the grandfathering issue in its protest, Clean Power's recital of its negotiations with PSNH and its description of the petition it filed with the New Hampshire commission was sufficient to raise the issue, and the Commission appropriately addressed the issue.

9. PSNH reads too much into the Commission's finding on the issue. In applying section 292.314 of the Commission's regulations,¹⁵ the Commission did not find that Clean Power's petition was, in fact, a petition that satisfied New Hampshire commission rules on how a QF must seek a PURPA contract. Instead, the Commission simply stated that "any contract or legally enforceable obligation that results from the New Hampshire [c]ommission's action on Clean Power's petition will be grandfathered and not subject to this termination order."¹⁶ In other words, the Commission did not find that as a result of Clean Power's petition before the New Hampshire commission there was a contract or legally enforceable obligation, which was grandfathered, but rather found that, if as a result of Clean Power's petition before the New Hampshire commission there was a contract or legally enforceable obligation, then it would be grandfathered.

10. Under the Commission's regulations, "[w]hether the state regulatory authority's process for creating a legally enforceable obligation has begun, and thus there is a

¹³ On October 12, 2010, PSNH moved to supplement its request for rehearing. As PSNH's supplement was filed beyond the 30 days allowed by our regulations for seeking rehearing, *see* 18 C.F.R. § 385.713(b) (2010), we will reject the supplement. Likewise, with respect to Clean Power's answer to PSNH's request for rehearing, as our regulations do not permit answers to requests for rehearing, *see* 18 C.F.R. § 385.713(d) (2010), we will reject the answer.

¹⁴ *Id.*

¹⁵ 18 C.F.R. § 292.314 (2010).

¹⁶ *Id.*

contract or obligation pending, depends on state law.”¹⁷ Here Clean Power has filed a petition with the New Hampshire commission, and PSNH states that it has argued before the New Hampshire commission that Clean Power has not properly initiated a PURPA proceeding before the state commission. In these circumstances, we believe that the New Hampshire commission is in the best position to decide whether Clean Power has properly initiated a PURPA proceeding. If the New Hampshire commission decides that Clean Power has indeed followed proper state procedures, and that a contract or legally enforceable obligation results from the Clean Power petition,¹⁸ then and only then will that contract or legally enforceable obligation be grandfathered and not subject to our April 15 termination order.

11. We will, further, deny PSNH’s request that the Commission accept its answer to the Clean Power protest. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or an answer to an answer, and the Commission in this proceeding followed its regulations in rejecting PSNH’s answer. While the Commission may exercise its discretion and choose to allow such an answer, we were not persuaded to do so then, nor are we now persuaded that we should have accepted PSNH’s answer.

The Commission orders:

PSNH’s request for rehearing is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁷ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 140.

¹⁸ That petition, we also note, predated PSNH’s filing to terminate its mandatory purchase obligation.