

107 FERC ¶ 61,016
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

American Ref-Fuel Company,
Covanta Energy Group,
Montenay Power Corporation, and
Wheelabrator Technologies, Inc.

Docket No. EL03-133-001

ORDER DENYING REHEARING

(Issued April 15, 2004)

1. In this order, we deny rehearing of the Commission's October 1, 2003 Order in this proceeding, American Ref-Fuel Company, et al., 105 FERC ¶ 61,004 (2003) (October 1 Order). In the October 1 Order, the Commission interpreted the Commission's regulations implementing section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (2000), see 18 C.F.R. Part 292 (2003), by declaring that contracts for the sale of qualifying facility (QF) capacity and energy entered into pursuant to PURPA do not convey renewable energy credits or similar tradeable certificates (RECs) to the purchasing utility (absent express provision in a contract to the contrary). The Commission further declared that while a State may decide that a sale of power at wholesale automatically transfers ownership of the State-created RECs, that requirement must find its authority in State law, not PURPA.

Background

2. RECs were created in recent years by State programs typically designed to promote increased reliance on renewable energy resources. These State programs typically are premised on promoting policy goals such as improved air and water quality, reduction of greenhouse gas emissions, broader fuel diversity, enhanced energy security, and hedging against the price volatility of fossil fuels.

3. According to the petition, such programs had been adopted in 13 states as of the date of the petition. The programs require retail sellers of electricity to include in their resource portfolios a certain amount of electricity from renewable energy resources. This

obligation can be satisfied by owning renewable energy facilities, by purchasing power from such facilities, or by purchasing tradeable certificates, such as RECs, that correspond to a certain amount of renewable energy generated by a third party. Two States have implemented REC trading programs. Some Independent System Operators and Regional Transmission Organizations are also developing markets for REC trading.

4. The development of these programs and trading markets for RECs has given rise to disputes between QFs and their purchasing utilities. These disputes have focused on the underlying PURPA purchase obligation; that is, whether the existence of a long-term contract entered into pursuant to a PURPA purchase obligation determines ownership of the RECs, though the long-term contract may be silent.

October 1 Order

5. On June 13, 2003, American Ref-Fuel Company, Covanta Energy Group, Montenay Power Corporation, and Wheelabrator Technologies Inc. (Petitioners) filed a petition for declaratory order seeking an interpretation of the Commission's avoided costs rules under PURPA. Specifically, Petitioners sought an order declaring that avoided cost contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any RECs. They argued that the power purchase price that the utility pays under such a contract compensates a QF only for the energy and capacity produced by that facility and not for any environmental attributes associated with the facility.

6. In the October 1 Order the Commission granted the petition for declaratory order:

to the extent that the petition asks that the Commission declare that the Commission's avoided cost regulations did not contemplate the existence of RECs and that the avoided cost rates for capacity and energy sold under contracts entered into pursuant to PURPA do not convey the RECs, in the absence of an express contractual provision.^[1]

¹ October 1 Order at P 18, 24; accord id. at P 3. Our reference to an "express contractual provision" here and elsewhere in the October 1 Order seems to have been misunderstood. We did not mean to suggest that the parties to a PURPA contract, by contract, could undo the requirements of State law in this regard. All we intended by this language was to indicate that a PURPA contract did not inherently convey any RECs, and correspondingly that, assuming State law did not provide to the contrary, the QF by contract could separately convey the RECs.

The Commission continued that, while a State may decide that a sale of power at wholesale automatically transfers ownership of the State-created RECs, that requirement must find its authority in State law.²

Requests for Rehearing

7. Timely requests for rehearing were filed by the Maine Public Utilities Commission (Maine Commission); the Edison Electric Institute; Southern California Edison Company and Pacific Gas and Electric Company, jointly; Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (collectively, the FirstEnergy Companies); Public Service Electric and Gas Company (PSE&G); Northeast Utilities Service Company on behalf of Connecticut Light and Power Company, Western Massachusetts Electric Company, and Public Service Company of New Hampshire (collectively the NU Operating Companies) and United Illuminating Company; and Xcel Energy Services, Inc. All urge that the Commission should have either dismissed the petition for declaratory order, or, if it did not dismiss the petition, the Commission should have ruled that PURPA contracts are bundled total output contracts that include the renewable attributes and thus RECs convey with the electricity sold under the contracts.

8. Petitioners filed an answer to the requests for rehearing.

Discussion

9. Rule 713(d) of the Commission's Rules of Practice and Procedure provides that the Commission will not permit answer to requests for rehearing. 18 C.F.R. § 385.713 (d) (2003). We will accordingly reject Petitioners' answer to the requests for rehearing.

10. Nothing raised on rehearing warrants changing our decision in the October 1 Order and, accordingly, we will deny rehearing.

11. The entities seeking rehearing, other than the Maine Commission, are (or represent) utilities that purchase electricity from QFs. They argue the Commission should have dismissed the petition and left the issue of whether a contract conveys RECs to the appropriate State court.³ Alternatively, just as they argued in response to the

² Id. at P 24.

³ While those seeking rehearing argue that, once the Commission acknowledged that RECs are creatures of the States and exist outside the confines of PURPA, see id. at P 23-24, dismissal of the petition was the only action the Commission could take in this case, we do not agree. In this regard we note that those seeking rehearing also argue on
(continued...)

original petition, all seek a ruling that avoided cost rates paid under PURPA pay not just for capacity and energy from a QF, but also any associated RECs. All oppose having this Commission rule that contracts for the sale of QF capacity and energy entered into pursuant to PURPA convey only the capacity and energy, and do not convey RECs, to the purchasing utility (absent express provision in the contracts to the contrary).

12. We disagree. As we stated in the October 1 Order, “States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.”⁴ However, PURPA does determine the rate which electric utilities must offer to purchase electric energy from QFs.

13. As we explained in the October 1 Order,⁵ section 210(a) of PURPA requires the Commission to prescribe rules imposing on electric utilities the obligation to offer to purchase electric energy from QFs.⁶ The Commission implemented the purchase obligation in PURPA in section 292.303 of its regulations, 18 C.F.R. § 292.303 (2003), which provides:

Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility

Section 292.304, in turn, requires that rates for purchases shall: (1) be just and reasonable to the electric customer of the electric utility and in the public interest; and (2) not discriminate against qualifying cogeneration and small power production facilities. 18 C.F.R. § 292.304(a)(1) (2003). The regulation further provides that nothing

rehearing, as they did in response to the petition, that RECs automatically convey under PURPA avoided cost contracts to the power-purchasing utilities. They ask that the Commission affirmatively rule that, under PURPA, RECs are conveyed to the purchasing utilities. They, in essence, argue that the Commission may properly address the substance of the petition, as long as the Commission rules in their favor. They implicitly acknowledge that the Commission can properly rule on the substance of the petition, rather than dismiss it. Their quarrel is thus with how the Commission ruled on the substance of the petition.

⁴ *Id.* at P 23. Indeed, insofar as RECs are State-created, different States can treat RECs differently.

⁵ *Id.* at P 19-21.

⁶ In PURPA the QFs are referred to as qualifying small power production facilities and as qualifying cogeneration facilities.

in the regulation requires any electric utility to pay more than the avoided costs for purchases. 18 C.F.R. § 292.304(a)(2) (2003). “Avoided costs” is defined as “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.” 18 C.F.R. § 292.101(b)(6) (2003).

14. Section 292.304 sets forth what factors are to be considered in determining avoided costs. See 18 C.F.R. § 292.304(e) (2003). The factors to be considered include:

- (1) the utility’s system cost data;
- (2) the availability of capacity or energy from a QF during the system daily and season peak periods;
- (3) the relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and
- (4) the costs or saving resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.

15. As the Commission stated in its October 1 Order,⁷ the factor that is not mentioned in the Commission’s regulations is the environmental attributes of the QF selling to the utility. This is because, under PURPA and our implementing regulations, avoided costs were intended to put the utility in the same position when purchasing QF capacity and energy as if the utility either had generated the energy itself or purchased the energy from another source. In this regard, the avoided cost that a utility pays a QF does not depend on the type of QF, i.e., whether it is a fossil-fuel-fired cogeneration facility or a renewable-energy-fired small power production facility. As those seeking rehearing recognize, only renewable energy small power production facilities have renewable attributes, yet the energy from a cogeneration facility is priced the same as the energy from a small power production facility. Both are priced based on a purchasing utility’s avoided costs. The Commission thus reasonably concluded that avoided cost rates are not intended to compensate the QF for more than capacity and energy.⁸

⁷ Id. at P 22.

⁸ Id.

16. If avoided cost rates are not intended to compensate a QF for more than capacity and energy, it follows that other attributes associated with the facilities are separate from, and may be sold separately from, the capacity and energy.⁹ Indeed, states in creating RECs that are unbundled and tradeable have recognized this. The very fact that RECs may be unbundled and may be traded under State law indicates that the environmental attributes do not inherently convey pursuant to an avoided cost contract to the purchasing utility.

17. In sum, therefore, we will deny rehearing of our October 1 Order.

The Commission orders:

The requests for rehearing are hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁹ In this regard, we note that cogeneration facilities, to receive QF status, are required to produce both electricity and useful thermal output. See 16 U.S.C. §§ 796 (18)(A)(i)-(ii), (B) (2000); 18 C.F.R. §§ 292.202(c), 292.205 (2003). The thermal output that is a pre-requisite to a cogeneration facility's achieving QF status is saleable separately from the capacity and energy of the cogeneration facility. See, e.g., *Liquid Carbonics Industries Corp. v. FERC*, 29 F.3d 697, 700 (D.C. Cir. 1994) (purchase of thermal output by unaffiliated thermal host establishes arm's-length market for thermal output); see also *Brazos Electric Power Cooperative, Inc. v. FERC*, 205 F.3d 235, 237-38 (5th Cir. 2000); *Kamine/Besicorp Allegany L.P.*, 63 FERC ¶ 61,320 at 63,157-59 (1993); *Arroyo Energy Limited Partnership*, 62 FERC ¶ 61,257 at 62,722-23, reh'g denied, 63 FERC ¶ 61,198 at 62,545-46 (1993); *Electrodyne Corp.*, 32 FERC ¶ 61,102 at 61,277-79 (1985).

If the thermal output of a cogeneration QF is separately saleable, the renewable attributes of a small power production QF are similarly separate.

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Nora Mead BROWNELL, Commissioner *dissenting*:

1. As I stated in my prior dissent, I believe that once the Commission acknowledged that RECs are creations of the States, the only logical course was to dismiss the petition and leave the issue of ownership of RECs to be resolved in the appropriate state fora. Therefore, I would have granted rehearing.

Nora Mead Brownell