

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Renewable Energy Projects, LLC

Docket No. EL06-9-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued July 7, 2006)

1. On October 20, 2005, Midwest Renewable Energy Projects LLC (Midwest Renewable)¹ filed a petition for declaratory order requesting the Commission find that section 210(m) of the Public Utility Regulatory Policies Act of 1978, as amended (PURPA),² preserves the rights and remedies of Midwest Renewable with respect to the obligation of Wisconsin Power & Light Company (Wisconsin Power) and Interstate Power & Light Company (Interstate Power) to purchase electric energy and capacity from five qualifying facilities (QFs) currently being developed by subsidiaries of Midwest Renewable. For the reasons discussed below, we will grant Midwest Renewable's request for a declaratory order.

I. The Petition for Declaratory Order

2. Pursuant to section 210(m) of PURPA, which was enacted on August 8, 2005 as part of the Energy Policy Act of 2005 (EPAct 2005),³ an electric utility's obligation to purchase electric energy from a QF, as mandated PURPA § 210(a) and the Commission's enabling regulations, shall be terminated if the Commission determines that the QF has nondiscriminatory access to a market described in section 210(m)(1)(A), (B) or (C) of PURPA. However, section 210(m) or PURPA also contains a savings clause, which provides:

nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the

¹ Midwest Renewable is a corporation formed on July 10, 2000 to develop, own and operate a series of wind farms throughout the Midwest.

² 16 U.S.C. § 824a-3 (2000).

³ Pub. L. No. 109-58, § 1253, 119 Stat. 594 (2005).

appropriate State regulatory authority or non-regulated electric utility on the date of enactment of this subsection, to purchase electric energy or capacity from ... a qualifying ... small power production facility ...”⁴

3. Midwest Renewable argues that the savings clause preserves the rights and remedies of its QFs because, on the date of enactment, there were proceedings pending before the appropriate state regulatory commissions respecting the obligation of both Wisconsin Power and Interstate Power to purchase power from the five Midwest Renewable QFs.⁵ It explains that on April 1, 2005, Midwest Renewable commenced a proceeding before the Wisconsin Public Service Commission (Wisconsin PSC) seeking a determination of the specific rates to be paid by Wisconsin Power in fulfilling its obligation to purchase power from the Columbia Wind Farm. In its petition, Midwest Renewable recites that its Wisconsin QF has been negotiating a power purchase agreement with Wisconsin Power but that the utility and the QF have not been able to agree on the contract rates for the purchase of energy and/or capacity from the QF or the renewable resource credits (RECs) associated with the energy and/or capacity. A principle bone of contention appears to be that the QF wants to receive an additional payment for the RECs while the utility wants to receive them without an additional charge above the avoided cost payment for the energy and/or capacity. The petition asks the Wisconsin Commission to set an inclusive rate for the mandatory purchase by Wisconsin Power of energy and/or capacity from the QF and the purchase of associated RECs at no less than the “all-in” purchase rate established by the most recent power purchase agreement between Wisconsin Power and a performing wind power project in Wisconsin adjusted to reflect the difference in size. The petition for declaratory order recites that the Wisconsin petition was filed pursuant to Wisconsin procedures which permit the Wisconsin Commission to determine that a legally enforceable obligation has been created.

4. Similarly, Midwest Renewable states that it has commenced proceedings before the Iowa Utilities Board (IUB) to determine rates to be paid by Interstate Power for the mandatory purchase of power from Midwest Renewable’s four Iowa QFs. The Iowa QFs each filed petitions with the Iowa Commission to determine specific rates to be paid by Interstate Power for mandatory purchases of energy and/or capacity from the QF, and to order Interstate Power to purchase such energy and capacity from the applicable QF

⁴ Section 210(m)(6) of PURPA, 16 U.S.C. § 824a-3(m)(6).

⁵ Midwest renewable attached copies of the petition it filed with the Public Service Commission of Wisconsin (Wisconsin Commission) and the four petitions it filed with the Iowa Utilities Board (Iowa Commission) to its petition for declaratory order filed with this Commission.

pursuant to a long-term agreement that does not convey to Interstate Power any emission credits, “Green Tags,” alternate energy credits, renewable energy certificates, or similar tradable certificates unless Midwest Renewable agrees to their conveyance.

5. Midwest Renewable further argues that a narrow reading of section 210(m)(6) of PURPA which would protect the rights of only those QFs that already have entered into a power purchase agreement, would render superfluous the words “pending approval” in the savings clause, because the existence of a power purchase agreement, by definition, means that the obligation under PURPA to offer to purchase the QF’s power has already been satisfied.

II. Interventions, Protests and Answers

6. Notice of Midwest Renewable’s petition was published in the *Federal Register*, 70 Fed. Reg. 67,158 (2005), with interventions and protests due on or before November 10, 2005. Timely interventions and protests were filed by Alliant Energy Corporate Services, Inc. (Alliant), the Edison Electric Institute (EEI) and Southern California Edison Company (SoCal Edison). Midwest Renewable filed an answer and a request for expedited action.

7. Intervenors argue that the savings clause applies only to specific existing contracts and obligations, and that Interstate Power and Wisconsin Power do not have written or oral contracts or obligations to purchase power from the Midwest Renewable QFs.⁶ They argue that the terms “contract” and “obligation” are used to describe an arrangement that defines the rights and responsibilities of specific parties. Parties argue that the legislative history demonstrates that Congress viewed the terms “contract” and “obligation” as essentially synonymous when used in the PURPA section 210(m)(6) savings clause.⁷ They contend that the proposal to terminate the mandatory purchase obligation was under consideration for several years, and in virtually every legislative formulation, the termination of the mandatory purchase obligation was coupled with legislative language to preserve existing contracts. They argue that at a minimum, an “obligation” within the meaning of the savings clause must mean a requirement already existing on the date of enactment for an electric utility to enter into a specific agreement at specific terms, rates and conditions with a QF seller of electricity.

8. Parties argue that section 210(m)(1) expressly terminates the obligation to purchase electricity from a QF if the QF has access to markets described in the statute in which to sell its power. They argue that an existing obligation that is preserved under the savings clause cannot mean the obligation all utilities had to purchase power from QFs

⁶ Alliant Protest at 6-7.

⁷ EEI Protest at 6.

under PURPA before it was amended. They argue that such an interpretation would render the amendment to PURPA section 210(m)(1) terminating the mandatory purchase requirement meaningless.

9. Parties argue that the mere pendency of a state proceeding to establish the avoided cost rate does not create an “obligation ... pending approval before the appropriate state regulatory authority” on the date of enactment. They argue that what is pending in the state proceeding referenced in Midwest Renewable’s petition is a determination of avoided cost rates, rather than a contract or other similar obligation that defines all the rights and responsibilities of both parties. They argue that a better reading is that the “pending approval” language refers to state commission approval of arrangements between buyers and sellers of QF-generated power that have already resolved all the matters necessary for power sales to take place.

10. Alliant adds that Interstate Power and Wisconsin Power did not commit themselves to obligations under PURPA through statements made to Midwest Renewable prior to the enactment of EPAct 2005. Alliant argues that Interstate Power and Wisconsin Power’s acknowledgement of an obligation to buy the output of QFs, made several months before the enactment of PURPA § 210(m), should not be deemed to bind Interstate Power or Wisconsin Power to a future obligation to purchase the output of the Midwest Renewable QFs when or if those projects are finally constructed and placed in service. It argues that Interstate Power and Wisconsin Power’s statements merely acknowledged an obligation under the then-existing rules. It argues that in the absence of any agreement on price, terms, and conditions for power purchase arrangements, however, those statements did not form a binding commitment or obligation by Interstate Power and Wisconsin Power to purchase the Midwest Renewable projects’ output.

11. In its answer, Midwest Renewable argues that reading the statute to protect only existing contracts violates the rules of statutory construction. Midwest Renewable further argues that legislative history cannot be used to alter the plain meaning of the statute.

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answer of Midwest Renewable because it has provided information that assisted us in our decision-making process.

B. Commission Determination

13. Section 210(m)(6) of PURPA, as amended by EAct 2005, reads as follows:

Nothing in this subsection affects the rights and remedies of any party under any contract or obligation, *in effect or pending approval before the appropriate State regulatory authority* or non-regulated electric utility on the date of enactment of this subsection, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility under the Act (including the right to recover costs of purchasing electric energy or capacity).⁸

EAct 2005 was signed into law on August 8, 2005; therefore the statute indicates that any contract or obligation “in effect or pending approval” by the appropriate State regulatory authority prior to that date would fall within the scope of the savings clause. According to Midwest Renewable, proceedings to determine specific rates to be paid for purchasing power by Wisconsin Power or Interstate Power to the various Midwest Renewable QFs were initiated between Jan. 12, 2005 and July 26, 2005.⁹ Thus, at the time of enactment of section 210(m) there were pending before the appropriate state regulatory authorities requests by each of the Midwest Renewable QFs for state commission approval in connection with the utilities’ obligation to purchase the QF’s electrical output.

14. Parties opposed to Midwest Renewable’s petition for declaratory order argue that the proceedings that Midwest Renewable filed with the Wisconsin and Iowa Commissions will not result in an “obligation” under the new language of PURPA 210(m)(6). They argue that the savings clause should only preserve specific existing contracts and obligations. They argue that the “obligations” pending approval were at most the potential for rights under PURPA as it then existed that had not ripened into a legally enforceable obligation. While there appears to be some ambiguity surrounding the term “obligation” in 210(m)(6), we find that the reading favored by protestors would eliminate the term “or pending approval” from the statutory language, and would be contrary to the well-established rule of statutory construction that every clause and word of a statute be given effect and that no clause or word be interpreted so as to render it superfluous, redundant, void or insignificant. To the contrary, we find the phrase “or pending approval” to be quite significant, as it ensures that contracts or obligations that

⁸ 16 U.S.C. § 824a-3(m)(3) (emphasis added).

⁹ Midwest Renewable Petition at 6.

had not yet been entered into but were being pursued in the context of the state commission proceedings that were pending on the date of enactment of EAct 2005 will fall within savings clause.¹⁰

15. Further, we reject the notion that the terms “contract” and “obligation” are synonymous, and that the savings clause should therefore apply only to existing contracts. This reading is inconsistent with our reading of the term “obligation.” If the two words were synonymous and referred only to existing contracts, it would render the term “obligation” superfluous because it would only refer to contracts.

16. In addition, we disagree with the argument that the avoided cost proceedings commenced before the relevant state regulatory authorities do not qualify for the protection of the savings clause. State commission approval requirements applicable to QF purchase contracts or obligations generally include proceedings to approve the recovery of the purchased power costs by the purchasing utility and the avoided cost rates under which the sales of power by the QF will be made. While the language of PURPA section 210(m)(6) is ambiguous, we find that a better interpretation is the statute protects avoided cost proceedings if they result in a legally enforceable obligation. This interpretation protects the interests of QFs that had already initiated proceedings but had not yet finalized contracts on the date that EAct 2005 was written into law. Moreover, this interpretation is also consistent with Order No. 69,¹¹ which states that the term “legally enforceable obligation” was used in the Commission’s regulations implementing PURPA to prevent a utility from circumventing requirements under PURPA merely by refusing to enter into a contract. That Congress used the term “contract or obligation” in drafting section 210(m)(6) suggests that Congress intended that the Commission continue to protect both contracts and obligations that had not yet ripened into contracts but were “in effect or pending approval.”

17. We find that the proceedings pending before the Wisconsin and Iowa Commissions are proceedings that result in a legally enforceable obligation. In the Iowa petitions, Midwest Renewable specifically asked the Iowa Commission to order Interstate Power to purchase energy and capacity from the Midwest Renewable QFs pursuant to long-term agreements. In the Wisconsin proceeding, the Wisconsin Commission has the

¹⁰ EEI and SoCal Edison argue Midwest Renewable’s petition is not yet ripe for a Commission determination. However, we see no reason to postpone our decision.

¹¹ See *Final Rule, 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 (1980), *order on reh’g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff’d in par nad vacated in part*, *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983).

authority to determine whether a legally enforceable obligation has been created.¹² We conclude that each state proceeding at issue here involves a “contract or obligation, in effect or pending approval before the appropriate State regulatory authority” within the meaning of section 210(m)(6) of PURPA. Accordingly, for the reasons discussed above, we grant Midwest Renewable’s petition for a declaration that section 210(m)(6) of PURPA preserves the rights and remedies of Midwest Renewable with respect to the obligations of Wisconsin Power and Interstate Power to purchase electric energy and capacity from the five QFs that currently are being developed by subsidiaries of Midwest Renewable.

The Commission orders:

The petition for declaratory order is granted to the extent described in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹² See *Investigation on the Commission’s Own Motion Into Barriers to Contracts Between Electric Utilities and Nonutility Cogenerators and Certain Related Policy Issues*, Findings of Fact, Conclusions of Law and Order, Wisconsin Public Utility Commission, Docket 05-EI-112 (December 28, 1993) at p.10.