

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Western Farmers Electric Cooperative

Docket No. EL06-6-000

ORDER GRANTING PETITION FOR PARTIAL WAIVER

(Issued June 15, 2006)

1. On October 19, 2005, as supplemented on April 19, 2006, Western Farmers Electric Cooperative (WFEC), on behalf of itself and certain of its electric distribution cooperative member-owners (Members)¹ filed a petition for partial waiver of certain of the Commission's regulations implementing section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA),² pursuant to section 292.402 of the Commission's regulations.³ As discussed below, we will grant WFEC's petition.

Background

2. WFEC states that it is an Oklahoma electric generation and transmission cooperative headquartered in Anadarko, Oklahoma. It states that it owns, operates, and maintains more than 3,400 miles of transmission lines located principally in Oklahoma, and comprises nineteen distribution cooperatives and Altus Air Force Base, serving over 500,000 customers (approximately 250,000 meters) in Oklahoma, Texas, Kansas and

¹ WFEC's member-owners joining in this Petition are Alfalfa Electric Cooperative, Caddo Electric Cooperative, Canadian Valley Electric Cooperative, Choctaw Electric Cooperative, Cimarron Electric Cooperative, Cotton Electric Cooperative, East Central Oklahoma Electric Cooperative, Harmon Electric Association, Kay Electric Cooperative, Kiamichi Electric Cooperative, Kiwash Electric Cooperative, Northfork Electric Cooperative, Northwestern Electric Cooperative, Oklahoma Electric Cooperative, Red River Valley Rural Electric Association, Rural Electric Cooperative, Southeastern Electric Cooperative, and Southwest Rural Electric Association.

² 16 U.S.C. § 824a-3 (2000).

³ 18 C.F.R. § 292.402 (2005)

Arkansas. WFEC explains that its transmission facilities are subject to administration by the Southwest Power Pool, Inc. (SPP) under SPP's Open Access Transmission Tariff (OATT) on file with the Commission. It adds that it owns natural gas pipelines connected to the intrastate pipeline grid to deliver fuel to its Mooreland and Anadarko generating facilities, as well as fourteen miles of railway facilities (through its wholly-owned subsidiary WFEC Railroad Company) to deliver coal to its Hugo Plant.

3. WFEC states that the Members are electric distribution cooperatives serving retail customers in their service territories. It states that their service territories are located primarily in rural Oklahoma, but some of the Members also serve customers in neighboring parts of Texas, Kansas and Arkansas. WFEC notes that none of the Members have generation resources of their own and they are obligated to purchase all of their power and energy requirements from WFEC pursuant to long-term wholesale power contracts. It further notes that the wholesale power contracts serve as security for loans and loan guarantees made by the Rural Utilities Service ("RUS") and its predecessor, the Rural Electrification Administration ("REA"), to WFEC so that the Members collectively can provide for their power supply needs through WFEC. WFEC adds that most of WFEC's Members also have received financing from the RUS. WFEC states that by virtue of the RUS financing, WFEC and these Members are not "public utilities" under Part II of the Federal Power Act and also are non-regulated electric utilities within the meaning of section 3(9) of PURPA. It further states that some of WFEC's Members have pre-paid their RUS debt, but each sells less than 4 million MWh per year and therefore they also are exempt from regulation as "public utilities" under Part II of the Federal Power Act. WFEC states that it and its members are nonregulated electric utilities within the meaning of section 3(9) of PURPA.

Petition

4. WFEC seeks waiver of its obligation under section 292.303(b) of the Commission's regulations⁴ to make retail sales to qualifying facilities (QFs) and the Members seek a waiver of their obligation under section 292.303(a) of the Commission's regulations⁵ to make purchases from QFs.⁶ WFEC states that QFs interconnecting with

⁴ 18 C.F.R. § 292.303(b) (2005).

⁵ 18 C.F.R. § 292.303(a) (2005).

⁶ 18 C.F.R. § 292.303(a) (2005).

itself or the Members will continue to have a market for the capacity and energy they make available for sale, and will continue to be assured of a source of retail power for their operations through WFEC's Joint PURPA Implementation Plan (Plan).

5. WFEC states that the Plan provides that: (1) any QF may interconnect with WFEC's transmission system or the transmission or distribution system of any of the Members; (2) WFEC will purchase capacity and energy from QFs at a rate equal to WFEC's full avoided costs; (3) the Members will sell supplementary, back-up and maintenance power to QFs, upon request, on either a firm or interruptible basis, at rates that are nondiscriminatory, just and reasonable, and in the public interest; and (4) no QF will be subject to duplicative charges for interconnection or wheeling as a result of selling to WFEC and buying from a Member.

6. WFEC argues that the Commission should waive the Members' purchase obligation because the Members' purchases are not necessary to encourage cogeneration or small power production. It argues that the Plan provides full encouragement to QFs by ensuring that they receive a rate for their power that is equal to WFEC's full avoided costs. WFEC believes this rate will equal the full avoided costs of its Members.

7. WFEC argues that a waiver will enable WFEC to effectively perform its primary function – the coordination of power supply decisions on behalf of all of the Members - in a centralized, efficient manner. It states that it was formed to meet the power supply needs of the Members and that to carry out this function, it must predict the power supply needs of the Members, prepare system-wide load forecasts, coordinate and plan the resources it will use to meet these needs, and perform a series of related functions. WFEC states that the Members rely on WFEC to perform these functions and do not plan independently for meeting or controlling their power supply needs. WFEC argues, however, that it cannot perform this function effectively without first-hand and immediate knowledge of the resources available from QFs.

8. In addition, WFEC argues that purchases of QF capacity and energy by WFEC are more likely to encourage large QFs than would purchases by the individual Members. It states that under the Commission's regulations, a Member would not be required to purchase and pay for energy or capacity from a QF that exceeds the Member's load. In contrast, it states that if the requested waiver is granted, a QF interconnecting with a Member but dealing with WFEC could sell all of its energy and capacity to WFEC at WFEC's full avoided cost rate.

9. Also, WFEC states that QFs wishing to sell to WFEC may interconnect with any Member. It will buy the power supplied by the QF at the point of interconnection. WFEC states that to the extent additional metering equipment or other interconnection

costs are incurred as a result of WFEC, rather than an individual Member, being the purchaser, these costs will be borne by WFEC to the extent the costs would exceed those that would be incurred had the QF interconnected with and sold to a Member.

10. WFEC also argues that the Commission should waive WFEC's sale obligation because retail sales by WFEC are not necessary to encourage cogeneration and small power production as such service: (1) would be requested by few, if any, QFs; (2) would cause WFEC to incur significant administrative costs which would then be recoverable solely from QFs, and (3) would duplicate service already available from the Members at rates that are nondiscriminatory, just and reasonable, and in the public interest.

11. On April 4, 2006, a data request was issued to WFEC requesting additional information concerning WFEC's and the Members' avoided costs, net metering, and the Plan's insurance requirements for QFs. On April 19, 2006, WFEC filed its response.

Notice and Pleadings

12. Notice of WFEC's petition was published in the *Federal Register*, 70 Fed. Reg. 66,377 (2005), with interventions and protests due on or before November 2, 2005. Timely protests were filed by Gregory Swecker, the American Corn Growers Foundation (ACGF), Weldon L. Coldiron, Michael Bergey and Larry D. Barr. WFEC filed an answer to the protests. Mr. Swecker filed an answer to the answer.

13. Notice of WFEC's response to the data request was published in the *Federal Register*, 71 Fed. Reg. 29,142 (2006), with interventions and protests due on or before April 25, 2006. National Rural Electric Cooperative Association (NRECA) filed a timely motion to intervene and comments. Gregory Swecker and Weldon L. Coldiron filed timely comments.

14. Protesters argue that the Commission should deny WFEC's partial waiver request. Mr. Swecker and ACGF assert that WFEC's petition is flawed because WFEC and the Members have not submitted any documentation to verify that the Members' avoided costs are the same as WFEC's. All the protesters claim that the waivers sought in the Petition would circumvent the rights of QFs by denying the QFs net metering arrangements. Mr. Swecker and ACGF assert that the absence of net metering denies the QF its right to determine when power is available for sale. Mr. Barr urges the Commission to promote renewable energy by taking any action necessary to ease the burdens of net metering participation. Mr. Bergey notes that a small QF developer on WFEC Member Harmon Electric Association's system was unable to develop his project in part because of the lack of availability of net metering.

15. In addition, Mr. Swecker and ACGF take issue with WFEC's assertion that it is ready and able to "stand in the shoes" of the Members to purchase QF electrical output that is made available for sale by the QF. They state that if a QF had more power available for sale than a Member could purchase, then the QF could sell to WFEC, but that they are not aware of any such scenario having arisen (i.e., where the QF's output exceeds the distribution utility's needs) and that the waiver request should be denied because it is not equal to or better than PURPA.

16. Also, several of the protesters challenge the \$1,000,000 insurance requirement for QFs set forth in WFEC's and the Members' Joint Plan. For example, Mr. Swecker states that the insurance requirement is a "major deterrent" for QFs and duplicates the insurance that WFEC and the Members are "required to provide . . . under the Federal Power Act."⁷ Mr. Coldiron claims that the insurance requirement constitutes a restraint of federal trade. Mr. Swecker, the ACGF and Mr. Coldiron all assert that WFEC and the Members are "public utilities" under the Federal Power Act. Mr. Coldiron also asserts that the insurance requirement is not necessary because the electrical grid poses more danger to small QFs than do small QFs to the grid.

17. Further, ACGF argues that WFEC's waiver request runs directly opposite to the public and rural stakeholder opinions as confirmed by public opinion surveys and polls regarding renewable energy development and policy and the expansion of wind farms.

18. Mr. Bergey complains that WFEC and the Members should not be permitted to establish interconnection policies such as requiring upgraded inverters when WFEC deems it appropriate.

19. Mr. Coldiron argues that the rural areas are divided into wholesale markets that are controlled by the NRECA and that the retail customer has little or no choice of another electrical power provider if they are dissatisfied with the service or policies of the rural cooperatives.

20. In its answer, WFEC argues at the outset that it is not clear what interest the protesters have in the waivers sought by WFEC and the Members. WFEC states that none of the protesters has approached WFEC or any of the Members about developing a QF on WFEC's or a Member's system. WFEC notes that only one of them is even a resident in WFEC's service territory in Oklahoma (Mr. Bergey, whose business address is in Norman, Oklahoma), and none of them is a resident of the neighboring portions of Kansas, Arkansas and Texas served by WFEC and the Members.

⁷ Swecker Protest at 5.

21. In any event, WFEC argues that the issues raised by protesters are not dispositive of the only issue presented by the petition: whether QFs should deal with WFEC (a wholesale electricity supplier) when they have power to sell and with the Members (retail electricity providers) when they need retail electricity service. WFEC also points out that the small QF developer noted by Mr. Bergey ultimately was able to have his wind project interconnected with Harmon's system. Further, WFEC informs the Commission that it did not receive a response to its public notice of the proposed Joint Plan.

Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), NRECA's timely, unopposed motion to intervene serves to make it a party 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) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept WFEC's answer because it has provided information that assisted us in our decision-making process.

B. Partial Waiver

24. Section 292.402(b) of the Commission's regulations provides that upon application by a State regulatory authority or nonregulated electric utility, the Commission may grant waiver from the applications of any of the requirements of section 292, Subpart C (other than section 292.302), if the applicant demonstrates that compliance is not necessary to encourage cogeneration and small power production. WFEC and its members have applied for waiver as nonregulated electric utilities.

25. The Commission has addressed requests for waiver submitted by generation and transmission cooperatives (G&Ts) seeking waiver of the G&T's sale obligations and waiver of the member distribution cooperatives' purchase obligations on numerous occasions where the member distribution cooperatives have assumed the G&T's sale obligation while the G&T has assumed the member distribution cooperatives' purchase

obligation.⁸ The Commission has granted every such request, except one,⁹ finding that a G&T's sale obligation, and its members' purchase obligation are not necessary to encourage cogeneration and small power production where the G&T's sale obligation is transferred to its members and the members' purchase obligation is transferred to the G&T.

26. WFEC's request for waiver is identical to those we have granted in the past. The G&T will assume the members' purchase obligation while the members will assume the G&T's sale obligation. There is no history of refusal to purchase QF power by the members or the G&T. Under these circumstances we find that the petitioners have made the showing required by section 292.402 of our regulations to justify a waiver.¹⁰ Accordingly, we shall grant both waivers.

27. The arguments of protesters opposing the waiver are essentially irrelevant to our decision. First, while protesters argue that members have not submitted any documentation to verify that the members' avoided costs are the same as WFEC's, no such documentation is necessary. The Commission has consistently held that the avoided costs of an all-requirements customer to be those of its all-requirements supplier.¹¹

⁸ See *Oglethorpe Power Corp.*, 32 FERC ¶ 61,103 (1985), *reh'g granted in part and denied in part*, 35 FERC ¶ 61,069 (1986), *aff'd sub nom. Greensboro Lumber Co. v. FERC*, 825 F.2d 518 (D.C. Cir. 1987); *Seminole Electric Cooperative, Inc.*, 39 FERC ¶ 61,354 (1987); *Missouri Basin Municipal Power Agency*, 69 FERC ¶ 62,250 (1994); *Corn Belt Cooperative*, 68 FERC ¶ 62,249 (1994); *Southern Illinois Power Cooperative*, 66 FERC ¶ 62,010 (1994); *Northwest Iowa Power Cooperative*, 57 FERC ¶ 62,079 (1991); *Soyland Power Cooperative, Inc.*, 50 FERC ¶ 62,072 (1990).

⁹ The one exception was *Central Iowa Power Cooperative*, 105 FERC ¶ 61,239 (2003), *reh'g denied*, 108 FERC ¶ 61,282 (2004), where the Commission stated that it could not find that regulations governing arrangements between electric utilities and QF's were not necessary to encourage cogeneration and small power production in the G&T's service area where one of its members had used every means at its disposal to avoid making a purchase from a QF.

¹⁰ Our decision to grant WFEC's petition does not constitute approval of any of the provisions in WFEC's proposed Plan.

¹¹ The Commission first made this determination in Order No. 69 which implemented section 210 of PURPA. *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory*

28. The net metering and insurance arguments and the polls raised by protesters, are also unpersuasive. These issues have no bearing on whether the Commission can grant WFEC's requested partial waiver. The relevant issue in this case is whether cogeneration and small power production will be encouraged if WFEC stands in the shoes of the members to purchase QF power and the members stand in the shoes of WFEC to supply retail service to QFs. In any event, PURPA does not require net metering; PURPA only requires that state regulatory authorities or nonregulated utilities consider adopting net metering.¹² Any insurance requirement is not relevant to whether a waiver should be granted; there is no change in the insurance requirement whether the waiver is granted or not.¹³ Similarly, we find that any interconnection standards WFEC may adopt have no bearing on the central issue in this proceeding.

Policies Act of 1978, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,871, *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶30,160 (1980), *aff'd in par nad vacated in part*, *American Electric Power Service Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part*, *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983). The Commission has consistently followed this determination in case law. *See, e.g., Carolina Power & Light Co.*, 48 FERC ¶ 61,101 at 61,390 (1989) (citing *City of Longmont*, 39 FERC ¶ 61,301 (1987)) (in the case of a QF selling to a full requirements customer instead of selling to that customer's supplying utility, the Commission will measure "the avoided cost of the full requirements customer as the avoided cost of the full requirements supplier since it is the supplier that avoids generation when the full requirements customer purchases from a QF"). To the extent protesters argue that the avoided cost should be the purchase price, they have not offered any compelling reason to change our policy. *See North Little Rock Cogeneration, L.P. and Power Systems, Ltd. v. Entergy Services, Inc. and Arkansas Power & Light Company, Entergy Services, Inc.*, 72 FERC ¶ 61,263 at 62,172 (1995).

¹² *Gregory Swecker*, 114 FERC ¶ 61,205, *reconsideration denied*, 115 FERC ¶ 61,084 (2006).

¹³ We note that it is possible for an electric utility to impose an insurance requirement on a QF that would be so financially burdensome as to be a refusal to purchase from the QF.

The Commission orders:

WFEC's petition is hereby granted.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.