

119 FERC ¶ 61,320
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Applicability of Federal Power Act Section 215
To Qualifying Small Power Production and
Cogeneration Facilities

Docket No. RM07-11-000

ORDER DENYING STAY

(Issued June 25, 2007)

1. In this order, the Commission denies the motion for stay filed by the City of Tampa, Florida (Tampa), the Solid Waste Authority of Palm Beach (SWA), Florida, and Mosaic Fertilizer, each a member of Florida Renewable Energy Producing QFs (Florida Renewable QFs). These Florida Renewable QFs seek, as to themselves, a stay of Order No. 696,¹ which eliminated the generic exemption of qualifying small power production and cogeneration facilities (QFs) from the requirements of section 215 of the Federal Power Act (FPA),² and thus required that all QFs that meet the criteria of Order No. 696 register as resources and that such registered QFs be subject to the mandatory and enforceable Reliability Standards. As discussed below, the Commission denies the motion for stay.

¹ Applicability of Federal Power Act Section 215 to Qualifying Small Power Production Cogeneration Facilities, Order No. 696, 72 Fed. Reg. 29,056 (May 24, 2007), FERC Stats. & Regs. ¶ 31,248 (2007).

² 16 U.S.C.A. § 824o (West Supp. 2006).

Background

Regulatory Background

2. On August 8, 2005, the Electricity Modernization Act of 2005, which is Title XII, Subtitle A, of the Energy Policy Act of 2005 (EPAct 2005), was enacted into law.³ It added a new section 215 to the FPA, requiring a Commission-certified Electric Reliability Organization (ERO) to develop Reliability Standards which are subject to Commission review and approval. Once approved, the Reliability Standards become mandatory and may be enforced by the ERO, subject to Commission oversight.

3. In July 2006, the Commission issued an order certifying the North American Electric Reliability Corporation (NERC) as the ERO.⁴ In an April 2007 order, the Commission approved delegation agreements between NERC and eight Regional Entities, including a delegation agreement between NERC and Florida Reliability Coordinating Council (FRCC).⁵ Pursuant to that delegation agreement, NERC delegated to FRCC the authority to enforce mandatory Reliability Standards within the FRCC region. Pursuant to Order No. 693, the Commission approved 83 Reliability Standards, which became effective on June 18, 2007.⁶ Further, in Order No. 693, the Commission approved NERC's compliance registry process, including NERC's Statement of Compliance Registry Criteria (NERC Registry Criteria), which describes how NERC and the Regional Entities will identify organizations that may be registered for compliance with mandatory Reliability Standards.⁷ However, NERC's Rules of Procedure provide that an entity registered by a Regional Entity may seek NERC review of the registration decision and, ultimately, may appeal the registration decision to the Commission.

³ Energy Policy Act of 2005, Pub. L. No 109-58, Title XII, Subtitle A, 119 Stat. 594, 941 (2005).

⁴ North American Electric Reliability Corp., 116 FERC ¶ 61,062 (2006).

⁵ North American Electric Reliability Corp., 119 FERC ¶ 61,060 (2007).

⁶ *Mandatory Reliability Standards for the Bulk Power System*, Order No. 693, 72 Fed. Reg. 16,416 (April 4, 2007), FERC Stats. & Regs. ¶ 31,242 (2007).

⁷ *Id.* at P 92-95.

4. In Order No. 696, the Commission revised its regulations governing QFs to eliminate the generic exemption of QFs from the requirements of FPA section 215.⁸ In Order No. 696, the Commission explained that Congress used broad language to ensure that all entities that could affect the reliability of the Bulk-Power System, including QFs, would be subject to mandatory Reliability Standards. The Commission also determined that, for reliability purposes, there is no meaningful distinction between QF and non-QF generators that would warrant generic exemption of QFs from mandatory Reliability Standards.

Motion for Stay of Order No. 696

5. On June 12, 2007, the Florida Renewable QFs filed a joint motion for stay of Order No. 696. They state that FRCC, the relevant Regional Entity under FPA section 215, registered them as responsible for compliance with mandatory Reliability Standards. They claim that their inclusion in the registry is unsupported and there is a substantial probability that either NERC or the Commission will reverse FRCC's determination. According to the Florida Renewable QFs, they are currently seeking NERC review of FRCC's decision and will appeal to the Commission if unsuccessful before NERC. The Florida Renewable QFs ask that the Commission grant a stay of FRCC's determination pending the appeal process before NERC and the Commission. In addition, they ask the Commission to clarify that Order No. 696 does not apply to them while their appeal of the FRCC decision is pending.

6. The Florida Renewable QFs argue that they will likely succeed on the merits of their appeal, either before NERC or before the Commission, based on the NERC Registry Criteria. They maintain that they were wrongly registered – based either on their small size, the low voltage level of their interconnection, or the radial nature of the lines connecting their plants to the grid. In this regard, they describe the specific operations of each QF and explain why each QF does not meet the NERC Registry Criteria. The Florida Renewable QFs claim that “[i]n these circumstances, the public interest requires a stay to avoid placing a substantial, and ultimately likely to be unnecessary and costly burden on the affected QFs.”⁹

⁸ Applicability of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities, Order No. 696, 72 Fed. Reg. 29,056 (May 24, 2007), FERC Stats. & Regs. ¶ 31,248 (2007).

⁹ Florida Renewable QFs' motion at 3.

Discussion

7. We do not find that Tampa, SWA or Mosaic Fertilizer have met the standard for granting a request for a stay.

8. The Commission may stay its action when “justice so requires.”¹⁰ In addressing motions for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without the stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.¹¹ The key element in the inquiry is irreparable injury to the moving party.¹² If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.¹³

9. In their motion for a stay, the Florida Renewable QFs do not claim, much less substantiate, irreparable harm. Moreover, while the NERC Registry Criteria set forth general criteria for inclusion in the registry, the document also makes clear that any generator, regardless of size, may be registered if needed for Bulk-Power System reliability. Thus, the explanation by Florida Renewable QFs that they do not satisfy the NERC Registry Criteria is not, in and of itself, persuasive. Similarly, they do not claim, much less substantiate, irreparable harm if required to abide by the Reliability Standards while their appeals are pending, and so we will not excuse their compliance with the Reliability Standards while their appeals are pending. Under these circumstances, we will deny the requested stay and we clarify that the movants are required to comply with Order No. 696 unless they successfully appeal the registration.

10. Nevertheless, we urge FRCC and NERC to expeditiously resolve this issue so that the Florida Renewable QFs, if unsatisfied by the NERC review process, can quickly bring their anticipated appeal to the Commission.

¹⁰ 5 U.S.C. § 705 (2000).

¹¹ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,142 (2005); *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,630-31 (1991), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993).

¹² *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,631.

¹³ *Id.*

The Commission orders:

Florida Renewable QFs' request for a stay is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.